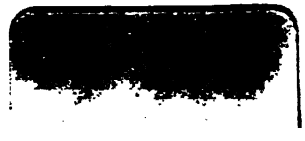

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REPORTS OF ALL CASES

DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE YEAR 1897

(WITH TABLE OF CASES AND DIGEST).

REPORTED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, ADVOCATE OF THE SUPREME COURT, AND ASSISTANT LAW ADVISER TO THE CROWN.

VOL. VII.

CAPE TOWN:

PRINTED AND PUBLISHED AT THE "CAPE TIMES" OFFICE, ST. GEORGE'S STREET.

1898

JUDGES OF THE SUPREME COURT DURING THE YEAR 1897.

THE RIGHT HONOURABLE SIR J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice).
HON. MR. JUSTICE BUCHANAN (Acting Chief Justice from 1st June to 31st Oct.).
HON. MR. JUSTICE MAASDORP.
HON. MR. JUSTICE SOLOMON (Sat during the August Term).

Attorney-General.

HON. SIR THOMAS UPINGTON, Q.C., K.C.M.G.

*TABLE OF CASES.

* I am much indebted to Mr. HOWEL JONES of the Supreme Court Bar, who has reported the majority of the cases since the beginning of the August Term.—J.D.S.

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

REGINA V. VAN BOVEN. { 1897. Jan. 12th.

Liquor Licence—Act 28 of 1883, sections 76 and 85—Penalty—Forfeiture.

The Chief Justice said: Amongst the cases which came before me as judge of the week was that of the Queen v. Van Boven. It was tried before the Assistant Resident Magistrate of Malmesbury, at a Court holden at Hopefield, for contravention of the 76th section of Act 28 of 1883. The evidence is clear as to the guilt, but the Magistrate, in passing sentence, ordered the accused to pay £5 or undergo two months' imprisonment, and the licence was declared forfeited. The 76th section only authorises the Magistrate to declare the licence forfeited. I sent the case to the Magistrate, with an inquiry as to what section he had in view when he sentenced the man to pay a fine. He referred me to the 85th section, which provides that a fine may be inflicted for the contravention of any of the provisions of the Act for which no penalty is specially provided. The answer is that a penalty is specially provided in section 76, namely a forfeiture of the licence. This section 76 is clearly not one of the sections which would fall under the 85th section. We are of opinion, therefore, that the sentence of fine should be quashed, though, of course, the licence will be declared forfeited.

REGINA V. LODEWYK SOLOMONS, ALIAS ARNADUS PLAATJES. { 1897. Jan. 12th.

Mr. Justice Buchanan said that in this case which came before him as judge of the week, a preparatory examination was held by the Resident Magistrate of Knysna, on a charge of store-breaking with intent to steal and theft. The papers were sent to the Attorney-General, and the Attorney-General remitted the case to the Magistrate for trial on the charge of theft only. The Magistrate, however, charged the prisoner with store-breaking and theft, overlooking the reservation. He passed a sentence of twelve months' imprisonment on the two charges, but said that if he had only convicted on a charge of theft the sentence would have been only six months. The sentence will therefore be reduced to one of six months' imprisonment with hard labour.

PROVISIONAL ROLL.

COLONIAL ORPHAN CHAMBER V. HUNTER.

Mr. Tredgold applied for provisional sentence for the sum of £126, interest from July 1, 1895, to December 31, 1896, at 6 per cent. on a mortgage bond for £1,400.

Granted.

JOUBERT V. TRENGOVE.

Mr. McGregor applied for final adjudication of the defendant's estate.

Granted.

LAMBERTZ V. BRAUER.

Mr. Buchanan applied for provisional sentence on a bill of exchange.

Granted.

HEYDENRYCH V. J. S. DU PREEZ.

Interest—Limitation to amount of principal.

Mr. McGregor applied for provisional sentence on a mortgage bond for £50, with interest at the rate of 8 per cent. from December 20, 1882, and asked that the property specially hypothecated be declared executable.

Order granted, limiting the amount of interest, however, to the amount of the capital.

VIVIERS V. GRESSE.

Mr. Maskew applied for provisional sentence for £95, with interest from March 14, 1896.

Provisional sentence granted.

DRAMAT V. GAMAAB.

Mr. Graham applied for final adjudication of the defendant's estate.

Granted.

S.A. ASSOCIATION V. AUGUSTYN.

Mr. Maskew applied for provisional sentence for £54, being twelve months' interest on a bond for £900.

Provisional sentence granted.

ILLIQUID ROLL.

WELLS V. LIPPIATT.

Mr. Buchanan asked for judgment under Rule 329D for £56 for goods sold.

Granted.

COLONIAL GOVERNMENT V. NOLTZYKOP GOLD-MINING COMPANY.

Mr. Sheil (Acting Attorney-General) applied for judgment under Rule 329D for £364, licence money due in respect of mining claims at Knysna, with interest *a tempore morae* and costs.

Granted.

WANKLYN V. LEGREW.

Mr. Buchanan applied for judgment under Rule 329D for £198 16s. 3d., goods supplied, less £64, together with interest *a tempore morae.*

SCANLEN AND SYFRET V. DE VILLIERS.

Mr. Close applied for judgment under Rule 329D for £64 10s., with interest *a tempore morae* and costs of suit, the debt being owing on balance of account for professional services.

Granted.

ADMISSIONS.

The following admissions were made: Daniel de Waal, advocate; William James Wynne, conveyancer; Gertrude Flather, translator; Carolina Sophia van Pelt, translator; Pieter Adriaan van Zyl, translator; Hendrik Adriaan Meintjes, attorney and notary.

REHABILITATIONS.

The Court granted the following rehabilitations: Johan George Fourie, jun., John William Orren, Maria Elizabeth Hauman, Charl Jacobus Krugel, Johannes Frederick Pienaar, Andrew Develing, Marthinus Petrus Loubser, and Johannes Hermanus van der Westhuizen.

GENERAL MOTIONS.

THE PETITION OF HENRIETTA A. GOOSEN.

Mr, Jones applied for leave to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion, and for an order giving her the custody of the two minor children of the marriage.

Order granted; personal service if possible, failing which, publication in the Johannesburg "Star" and Pretoria "Volksstem," with leave to serve the intendit and notice of trial with the citation. Return day, February 18.

THE PETITION OF THE RONDEBOSCH MUNICIPALITY.

Mr. Graham applied to make absolute the rule *nisi* for the attachment and sale in execution under the Titles Registration and Derelict Lands Act of 1881, for payment of the rates due thereon of certain piece of freehold land, marked No. 235, on the Camp Ground at Rondebosch, registered in the name of George F. Parker, but abandoned and left derelict for many years.

Granted.

COLONIAL GOVERNMENT V. COOK BROS. { 1896. Jan. 12th.

Appeal—Privy Council—Recognisance.

An application to estreat a recognisance for the due prosecution of an appeal to the Privy Council cannot be heard without notice to the sureties. As a general rule an application to discharge leave given by the Supreme Court to appeal should be made to the Privy Council.

This was an application on notice to the respondents, for an order estreating the recognisance entered into by them and discharging the order of the 19th March, 1895, granting them leave to appeal from the judgment given in the action brought by them against the Colonial Government or for other relief as set forth in the petition. The respondents were further called upon to show cause why the application should not be granted with costs.

The petition of the applicant, Sir Gordon Sprigg, K.C.M.G., Prime Minister and Treasurer-General of the Colony, set forth:

That on the 11th March, 1895, judgment was given in the Supreme Court in favour of the

Colonial Government in an action instituted by the present respondents, for a declaration of rights and damages.*

That on the 19th March, 1895, the plaintiffs applied for and obtained leave to appeal to Her Majesty in Her Privy Council from the said judgment.

That within three months thereafter, the plaintiffs entered into a recognisance under Rule 38, for the due prosecution of the appeal, but that since then no steps whatever had been taken by them to prosecute their appeal.

After referring to Rules 2 and 5 of the Privy Council, the petition went on to allege that in accordance with the well-established practice prevailing in the office of the Registrar of the Supreme Court, it was the duty of the appellants personally or through their attorneys, to give notice to the Registrar of their intention of proceeding with the appeal, and to request that the records be prepared, whereupon the Registrar prepares the record, and the prescribed fees are paid by the appellants.

That the appellants in this case had failed to give the required notice, and had neither paid, nor offered to pay, the fees payable in connection with the preparation and transmission of the records, and had thereby failed duly to prosecute their appeal.

That by reason of the aforesaid failure of the appellants, the Colonial Government had been debarred from obtaining the benefits of the rules of the Privy Council.

That the delay of the appellants in duly prosecuting their appeal was vexatious and unreasonable, and the Colonial Government was embarrassed by having the appeal held over indefinitely.

The prayer was for an order (1) either estreating the recognisance entered into by the appellants and discharging the order granting leave to appeal, or (2) fixing a time within which the appellants must duly prosecute their appeal.

The respondents filed an affidavit, in reply in which they detailed various circumstances (none of them very weighty) which had contributed to the delay, and alleged that they had never abandoned their intention of prosecuting the appeal.

Mr. Sheil, Acting Attorney-General (with him Mr. Schreiner, Q.C.), for the applicant: The object of Rule 38 in requiring that the party appellant and his two sureties should enter into the recognisance provided for by the rule is two-fold:

1st. That the appeal should be duly prosecuted and:

2nd. That the costs of the party respondent should be secured.

No mention is made in our rules or in the rules of the Privy Council as to the time within which an appeal must be prosecuted after leave to appeal has been given. But an indication is afforded in Rule 2 of the Privy Council that the appeal should be prosecuted as soon as possible after leave has been given to appeal.

It could never be contended that the Privy Council in framing that rule intended to interfere in any way with the practice of the Colonial Court from which the appeal was brought as to the payment of office fees in connection with the preparation of the record:

In fact the concluding part of Rule 2 shows that it was contemplated that all fees and expenses should have been paid before the despatch of the record, otherwise it would be impossible for the Registrar to give the certificate required by the rule.

Consequently until the fees have been paid and the Registrar instructed to prepare the record there can be no prosecution of the appeal.

In the present case leave was given to appeal nearly two years ago, during which time no steps whatever have been taken to prosecute the appeal.

There has therefore been a breach of one of the conditions of the bond, viz., that the appeal would be duly prosecuted, and the Government is now entitled after the length of time that has elapsed to come to the Court and ask that the bond should be estreated.

De Villiers, C.J.: How can the Court estreat the bond if the sureties are not before us? They have not been made parties to this application.

Mr. Sheil: The sureties can be in no way prejudiced. They were not made parties to this application because no costs had been incurred by the Government in respect of which they could have been held liable. But the main condition of the bond, viz., due prosecution of the appeal, has been broken and it is in consequence of that breach that we ask that the bond should be estreated.

De Villiers, C.J.: But has the Court jurisdiction? Should you not go the Privy Council?

Mr. Sheil: It is submitted that this Court has jurisdiction. The bond was entered into in this Court, and the order of the 19th March, 1895, was made conditionally on the bond being entered into and its covenants complied with.

In 1831 when appeals were brought from this Colony direct to the King in Council, this Court

* Vide *Cook Bros.* v. *Colonial Government* (5 Sheil 197).

held that notwithstanding that the appeal was pending it had jurisdiction to dismiss an appeal which had not been duly prosecuted. See *Morrison* v. *Anderson and Stenhouse* (1 Mens., 527).

In the present case also the appeal has not been duly prosecuted and the party respondent, the Government, is clearly entitled to come to the Court and ask that the order of the 19th March, 1895, should now be cancelled.

De Villiers, C.J.: How can the Court cancel a final order?

Mr. Sheil: The order it is submitted was not final, it was interlocutory in its nature, inasmuch as a condition was attached to it that the conditions of the recognisance, required by the 38th Rule of Court, should be complied with, and this the appellants have failed to do.

Mr. Innes, Q.C. (with him Mr. Graham), for the respondents: Section 50 of the Charter of Justice settles all conditions on which an appeal is allowed to the Privy Council. For a period up to three months the grant of leave is provisional or interlocutory, after that if security has been provided it becomes final. As in *De Montmort* v. *Board of Executors* (4 Juta, 61), leave to appeal can be withdrawn if that condition fails. The Privy Council must make its own rules as to appeal. Take a precisely analogous case, our Resident Magistrate's Court Act (No. 20 of 1856) does not provide for "due prosecution of appeal," but this Court, the upper Court of Appeal, has, even in cases where the record was still in the Court below, over and over again said it would decide what was a fit and proper time within which to bring on a case on appeal. *Rymer* v. *Solomon* (4 Sheil, 223). See also *McPherson's* ("Practice of the Judicial Committee, Privy Council" (page 94). In this case undoubtedly there has been considerable delay, but look at the inconvenience of the present course, even if the Court has jurisdiction, but we contend the Court is *functus officio*. With regard to *Stenhouse's case* it does not appear to have been argued on this point, viz., of the time to appeal. The only condition in section 50 of the Charter of Justice is that the recognisance be entered into in the three months. This case is probably a *casus omissus*.

Mr. Sheil in reply.

De Villiers, C.J.: The object of this application is two-fold: to estreat the recognisance entered into by the present respondents for the due prosecution of their appeal to the Privy Council, and to discharge the order of this Court granting them leave to appeal. As to the recognisance, it is obvious that the Court cannot order it to be estreated without due notice to the sureties. They are interested in such an order, even although the immediate effect of the order might not be to render them liable for the payment of any sum of money As to the discharge of the leave to appeal, I am not prepared to say that this Court has no jurisdiction to withdraw its leave on sufficient cause shown, but the cause shown in the present case is insufficient. The circumstances of the case of *Morrison* v. *Anderson* (1 Mens. 527), which is relied on by the applicant, were wholly different from those of the present case. There had been a delay of ten years, there was clearly no intention to proceed with the appeal, and the only question argued seems to have been whether the obligation of the recognisance could be enforced by motion instead of by action. As a general rule, in my opinion, applications to discharge leave to appeal should be made to the Privy Council. In the present case there has been considerable delay, but not of such length as to justify this Court in concluding that the intention to prosecute the appeal has been abandoned. The application must be refused, but there will be no order as to costs.

[Government Attorneys, J. & H. Reid & Nephew; Respondent's Attorney, C. C. Silberbauer.]

THE PETITION OF WILLIAM MACINTOSH.

Mr. McGregor applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act, 1881, for transfer to petitioner of certain land, portion of the Rufane Vale Estate, Port Elizabeth, reserved according to diagram for roads which were never made, petitioner being owner of the whole of the land sub-divided, and he and his predecessors in title having occupied the said reserved spaces for about thirty-seven years.

Granted.

In re CONSISTORY OF THE DUTCH REFORMED CHURCH, CAPE TOWN. } 1896. Jan. 12th.

Burial ground—Alienation—Grant—Condition—*Fidei-commissum*—Trust.

Certain land having been granted by the Government to the applicants to be used as a burial ground for the inhabitants of Cape Town, the applicants allotted and transferred different plots for the purpose of erecting vaults thereon, but the transfers were not registered in the Deeds Office.

Under section 64 of Act 4 of 1883 the Governor has directed that burials on the land shall be discontinued,

The applicants, having sold a portion of the land for the purpose of erecting thereon a Huguenot Memorial, applied to the Court for its sanction to such sale and transfer.

Held that *such sanction could not be granted without the consent of the Government and of the heirs of the allottees whose vaults had been erected within the portion so proposed to be transferred.*

This was an application to make absolute the rule *nisi* for authority to petitioners to transfer to the Huguenot Memorial Committee a certain portion of the land in Cape Town granted to the said church in the years 1755 and 1801 for burial purposes, such land being no longer used as a graveyard.

Mr. Innes, Q.C. (with him Mr. Graham), appeared for the applicants.

Mr. Sheil, Acting Attorney-General (with him Mr. Bisset), appeared for the Colonial Government.

Mr. Schreiner, Q.C. (with him with Mr. Roos), appeared for certain parties who had filed affidavits to oppose.

The rule *nisi* was granted on the petition of the Reverend Abraham Isaac Steytler, V.D.M., and Pieter Marais, members of the Consistory (Kerkeraad) of the Dutch Reformed Church, Cape Town, acting for and on behalf of the said consistory.

The petition set forth:

1. That your first-named petitioner is one of the ministers of the said Church and a member of the said consistory. Your second-named petitioner is an elder of the said church and is also a member of the said consistory.

2. That your petitioners have been jointly authorised to approach your Honourable Court on the matters hereinafter set forth, and beg to annex hereto, marked A, a copy of the resolution of the said consistory granting such authority.

3. That on the 2nd day of July, 1755, a grant of a certain piece of land, in extent 429 square roods and 140 square feet, was made by the then Governor of this colony to the deaconry thereinmentioned and hereinafter referred to, to serve as a burial place or churchyard for the inhabitants of this city, a certified translation of which grant is hereunto annexed marked B.

4. That the said grant was made at the request of the Consistory of the Dutch Reformed Church as appears from the minute books of the said consistory, inasmuch as at the date of the application therefor and issue thereof the existing burial ground of the said church could not be utilised for further burials owing to a severe epidemic of small-pox then prevalent in this city. The burial ground for which the said grant was substituted was situate adjacent to the present Dutch Reformed Building and constitutes the land upon part of which the University and other buildings are now erected, the other has been converted into what is now Bureau-street.

5. The deaconry mentioned in the said grant was an administration of deacons of the said Dutch Reformed Church (which was at that date the only ecclesiastical body in this city), appointed and controlled by and acting in every respect under the directions of the said consistory, and the said deaconry was charged with the care and execution of the charitable works inaugurated by the said consistory.

6. From the date of the issue of the said grant up to the present time the said consistory exercised sole and entire control over the land forming the subject of the said grant, and the said land was in every way administered and possessed in ownership by the said consistory.

7. That on the 8th April, 1801, the Governor issued a further grant to the said consistory on their application for the enlargement of the aforementioned churchyard, in extent 236 square roods and 44 square feet; a certified translation of the said grant is hereunto annexed marked C.

8. That on the 9th February, 1802, a further grant of land, in extent 327 square roods and 112 square feet, was made by the Governor to the said consistory on their application, in addition to the aforementioned grant for a burial ground, but the said grant is not affected by the matters referred to in this petition.

9. That on the 26th day of February, 1830, the trustees of the property then lately administered by the Burgher Senate, transferred to the said Dutch Reformed Church an extent of land measuring 4 morgen 98 square roods 23½ square feet to be appropriated as a new burial place. The whole of this land was, with the consent of the Colonial Government, sold to various purchasers for building purposes, and duly transferred in the office of the Registrar of Deeds of this colony. Your petitioners annex hereto, marked D, a copy of the letter addressed to the said consistory by the Assistant-Commissioner of Crown Lands dated 12th April, 1978, authorising such sale.

10. That the land comprised in the grants referred to in paragraphs 3 to 7 of this petition and generally known as the Somerset-road Cemetery, was from the dates of the said grants up to the enforcement of the provisions of this Act No. 4 of 1883, entitled the "Public Health

Act, 1883," used by the said consistory for the interment of deceased members of the said church and for the purpose of other burials.

11. That under and by virtue of the provisions of the said Act, the said cemeteries were on or about the 15th day of January, 1886, duly closed, since which date no interments have taken place there.

12. That since that time, burials under the rites of the said church have taken place at the cemeteries, allotted to the said church separately, and used by its adherents jointly with other denominations at Maitland, and purchased by the said church at Mowbray, to which cemeteries the remains of many persons have been removed from the aforementioned disused burial ground, and in the course of time interest in the said Somerset-road Cemetery has, consequent upon its disuse and for other reasons, ceased. The descendants of families originally having vaults or allotments therein have abstained from keeping them in repair, and graves and tombstones are not the subject of attention on their part.

13. That from time to time, the said consistory has been obliged to expend considerable sums of money upon repairs to vaults, tombstones and graves, and such expenditure has affected the funds of the said church and hampered the said consistory in the administration of trusts committed to its charge, and the promotion of church works and objects.

14. That your petitioners respectfully submit on behalf of the said consistory, that the maintenance and repairs connected with the said disused cemetery will, in course of time, continue to be a further tax upon the resources of the said church, and an impediment to its work.

15. That the said consistory have received and favourably entertained an application from the Huguenot Memorial Committee of the Synod of the Dutch Reformed Church in South Africa, for the purchase of a certain portion of the said disused cemetery, and on the 15th day of September last past, caused a letter to be addressed to the Honourable the Secretary of Agriculture, requesting his consent to the proposed alienation. In so doing the said consistory followed the practice of obtaining the consent of Government as had appertained in connection with the alienation of the land, referred to in paragraph 9 of this petition. Your petitioners beg to refer your lordships to a copy of the said letter marked E, and to the ultimate reply received from the Secretary, hereunto annexed marked F.

16. That the said consistory are still prepared to abide by the terms of their said letter marked E.

17. That a survey has been made of the land proposed to be alienated to the said Huguenot Memorial Committee, and your petitioners beg leave to annex hereto, marked G, a diagram framed by Charles Marais, Government surveyor, fully delineating the said disused cemetery. The coloured portion marked A, B, C, D, on the said diagram, representing 234 square roods and 88 square feet of land, is the extent which the said consistory is prepared to transfer to the said Huguenot Memorial Committee for the sum of £1,501 10s. 3d. sterling.

18. That the said consistory intend to and will apply the amount received to work, purposes, and objects of the said Dutch Reformed Church, as administered by the said consistory, and your petitioners beg to submit that it will be to the advantage of the said church to carry the proposed transaction into effect.

19. That your petitioners are aware that the said Huguenot Memorial Committee have for some time past sought to secure an eligible site for the erection of buildings which they contemplate as a memorial, but have not been successful owing to the high prices of landed estate in desirable parts of the city. And your petitioners are cognisant of the fact that the site desired to be obtained from the Consistory is considered eminently suitable for the said purpose and is in every respect regarded as advantageous to the said committee.

20. That your petitioners are advised that the Registrar of Deeds will not be in a position to allow transfer to pass from the said consistory to the said committee unless authorised thereto by this Honourable Court.

The petitioners prayed for an order authorising the Registrar of Deeds to allow transfer and conveyance to pass from the Consistory of the said Dutch Reformed Church of Cape Town to the trustees to be appointed for the time being by the said Huguenot Memorial Committee of the Synod of the Dutch Reformed Church in South Africa, of a portion of the said property, to wit: a certain piece of land measuring 234 square roods and 88 square feet, situate along the Somerset-road in Cape Town, part of the land granted on the 2nd July, 1755 and 8th April, 1801, as aforesaid.

The following opposing affidavit was filed:

We, Pieter Jacobus Boonzaier and Goris Boonzaier, farmers, of Hout Bay Vlei, Hout Bay, make oath and say:

1. That on the twelfth instant a rule *nisi* was granted by this Honourable Court, returnable on the twenty-second instant, calling upon the

Government and all parties concerned to show cause why the prayer of certain petitioners should not be granted, for authority to the Registrar of Deeds to allow transfer by the Consistory of the Dutch Reformed Church, Cape Town, to the Huguenot Memorial Committee of a certain portion of the land granted to the said church, in the years 1755 and 1801 for burial purposes, such land being no longer used for such purpose, and it being desirable that it should be dealt with as proposed, and the purchase price applied for the furtherance of the objects of the said church.

2. That until 1886 the cemetery, of which the said ground forms a portion, was used for burial purposes.

3. That from the commencement of the present century, the said cemetery has been the last resting-place of many men whose memory is still revered throughout South Africa, and of whom we may, without invidious reflection, be permitted to name Sir Andries Truter, Chief Justice of the former Council of Justice, John Pringle, and J. Barnard, Secretary to the Government.

4. That in the said portion of the said cemetery, proposed to be alienated, there is an allotment which was sold by the said church to and purchased by our late mother, Suzanna Rebekka Grundeler, widow of Willem Court Boonzaier, on or about the 10th February, 1858, for the sum of £4 13s. 9d.; the title thereof is attached as Annexure A.

5. That thereby all right to the said allotment became vested in the said Suzanna Rebekka Grundeler, and the Consistory renounced its property therein and its rights thereto.

6. That our father, Willem Court Boonzaier, our mother, Suzanna Rebekka Grundeler and sister, Apollonia Boonzaier, have been buried in the said allotment.

7. That we, as heirs to our mother, are entitled to shares in the said allotment, and neither our mother nor ourselves at any time sold, disposed, or in any other way parted with our rights thereto.

8. That we object to any dealing with the said cemetery, without our consent which would be inconsistent with our rights in the allotment aforesaid, and we respectfully beg that this Honourable Court will protect our rights, and those of all others interested in the said cemetery by refusing to grant any such order as is asked by the said consistory.

[Annexure A referred to in above affidavit contained *inter alia* the following:

The undersigned church master (kerk meester), elder of the congregation of the Dutch Reformed Church in Cape Town, Cape of Good Hope, duly authorised thereto by the reverend consistory of said congregation, doth hereby declare to have sold to Mrs. Suzanna Rebekka Grundeler, widow of Willem Court Boonzaier, for the sum of sixty-two ryksdollars and four schillings (or £4 13s. 9d.), and therefore doth hereby cede and transfer to her in full property a piece of ground situate in the outer cemetery of said congregation, in length twelve feet and in breadth ten feet, Rhynlands measure, in order to erect a vault, and subject to the following conditions, to wit: The vault to be erected shall be marked No. 341, it shall not be higher than six feet, Rhynlands measure, above the surface of the ground of said cemetery.

The proprietor shall erect the vault at his own costs, the repairs and other necessaries shall be done by him, as is customary to be done to vaults. Under the aforegoing conditions the Consistory aforesaid renounces all right and title thereto.]

There were also several affidavits (to the same general effect as Messrs. Boonzaaiers) by Messrs. Höhne, De Smidt, Holm, G. H. Moller, Rev. D. P. Faure and Mrs. Marquard, the several deponents being either blood relations or connections of original lot holders. There was also a petition to the Consistory signed by 275 such blood relations or heirs (of whom, however, a large number subsequently withdrew their objections) protesting against the proposed sale.

To these objections and affidavits the Consistory filed an answering affidavit alleging that Holm had no right to his plot, as he had failed to comply with the condition of title by building a vault and alleging as to the lots claimed by De Smidt, Moller, and others that the vaults had got into a bad state of repair and had been neglected by the deponents; and saying *inter alia*, ...

9. That the Consistory have not recognized the claims of heirs or descendants of an original allottee as having any succession to the plot or vault unless registration of such succession has been effected with the Consistory, and we annex hereto an instance of such registration in connection with a certain lot numbered 185.

10. That we crave leave to direct the attention of this Honourable Court to the fact that the area affected by the petition herein contains over 112 plots, that the rule *nisi* has been duly published as ordered, and only six out of such 112 plots are affected by the affidavits filed in opposition to the said rule, and that in respect of two out of such six plots affidavits have been made in support of the said petition by descendants of the original allottees.

11. That we respectfully refer this Honourable Court to the statement contained in our petition, and especially to paragraph 16 thereof,

wherein we express the willingness of the Consistory to abide by the terms of their letter to the Honourable the Secretary of Agriculture constituting annexure to the said petition, and wherein the Consistory undertake the responsibility of satisfying parties holding plots on the ground, either by burying the bones deeper than they are now or by removing them to Mowbray or Maitland as may be desired.

12. That we annex hereto the correspondence which has passed since the issue of the rule *nisi*, together with a list of the names of original allottees of plots in the area affected by our petition.

From the correspondence put in at the hearing of the petition, it appeared that on the 15th September, 1896, the Consistory wrote the following letter to the Secretary for Agriculture:

The Consistory of the Dutch Reformed Church, Cape Town, have resolved to sell, in lots, their present and unused cemetery situate in Somerset-road.

The title deeds of the said cemetery were obtained from Government as a free grant, for use as burial ground (Begraafplaats) by resolution passed at the Castle on the 21st January, 1755.

The title deeds were respectively dated:

2nd July, 1755, by Governor Tulbagh.

8th April, 1801, by Sir George Yonge.

9th February, 1802, by Gen. Francis Dundas.

The Consistory have already sold a portion to the Huguenot Memorial Committee, appointed by the Synod of the Dutch Reformed Church of South Africa, for the purpose of erecting a Memorial building thereon, for the use of Synodical meetings and other objects.

They, the Consistory, have applied to the Registrar of Deeds for his sanction, to allow them to pass a free Deed of Transfer to the said Huguenot Memorial Committee on behalf of the Synod of the Dutch Reformed Church. He is quite prepared to allow this transfer, and any other of further sales to be passed, provided the said consistory can obtain from the Honourable the Commissioner of Crown Lands, a similar letter to the one addressed to the Consistory on the 12th April, 1878, with the proviso that there shall be no restriction on the use of the proceeds, and which letter is filed with the Registrar of Deeds in connection with a sale of ground, effected by the Dutch Reformed Church, granted to them by Government for similar purposes as the above grant on the 26th February, 1830.

The Consistory do hereby respectfully request of you, that you will give your consent to the transfer by the Registrar of said ground to the Huguenot Memorial Committee, and other transfers of above-mentioned ground to other purchasers. As the Consistory have already provided a new cemetery at Mowbray, and further provisions having been made by Government for a general cemetery at Maitland, they request that the stipulation contained in the above-mentioned letter of 12th April, 1876, be so altered that the funds derived from these sales may be used for church purposes, instead of specially for the purpose of a cemetery.

The Consistory hereby undertake the responsibility of satisfying parties holding plots on the ground, either by burying the bones deeper than they are now or by removing them to Maitland as may be desired. Care will however be taken that all bones shall be buried four feet below the surface before any buildings will be allowed to be erected.

The Consistory wish to bring to your notice that since the closing of the cemetery in Somerset-road in 1886 by Act of Parliament it has ceased to be used as a burial place. Consequently a considerable annual expenditure is necessitated to keep it in order, as with a very few exceptions nothing is done to it by the relatives of those buried there. A few years ago the Consistory expended no less than £300 in putting the cemetery in decent order, and they very much fear that at no distant date they will be obliged to expend a similar amount upon vaults, walls and monuments, which are rapidly falling into decay. We trust you will as soon as it is convenient accede to our request, as the Synodical Committee of the Huguenot Memorial are anxious to have the building completed before the next session of the Synodical Assembly, which has been fixed for October, 1897, and therefore have no time to lose.

To this the Secretary for Agriculture replied on the 31st October, expressing regret that the Government could not grant the consent asked for, "the Governor having no power to alter the terms of the grants under which land is held." The Consistory were, however, advised to petition the Supreme Court for leave to sell; and it was stated that "the Government has no objection to such application being made."

After further correspondence, the Government addressed a letter to the Consistory to the following effect, on the 30th December, 1896:

Mr. Faure, the Secretary for Agriculture, has given careful consideration to the letter in question (from the Consistory, dated 18th December), and he thinks that the feeling of disappointment given expression to, is due not to any change of attitude on his part, but to the fact which was stated in my letter of the 14th instant, that the Consistory had undertaken the responsibility of satisfying parties holding plots of ground in that cemetery, and which he found

the Consistory were unable to do, for he received objections to the proposed alienation from all quarters.

With regard to the deputation which waited upon Mr. Faure, he desires me to say he considers that anybody who has relations buried in any portion of the cemetery is interested in the alienation of any portion of it.

Mr. Faure does not think there is any necessity to disclose the names of the deputation through whom the case of the objection was represented, as it will be seen when the case comes into court, whether the objectors have any interest in the ground or not.

The Consistory replied on the 6th January, pointing out that in the petition to the Supreme Court, the Consistory still adhered to the undertaking contained in their letter of the 13th September, and expressing surprise at the Government joining in the case in opposition to the petition.

Mr. Innes, Q.C., applied to make the rule absolute.

Mr. Sheil, Acting Attorney-General (with him Mr. Bisset), for the Government: Before addressing myself to the legal question involved in this case, I may briefly explain the position which the Government has taken up in this matter. When application was made by the Consistory in thier letter of the 13th September last for leave to sell the land, the Secretary for Agriculture wrote on the 31st October, pointing out to the Consistory that the Governor had no power to alter the terms of the grant and that consequently the required consent could not be given, at the same time suggesting that the Supreme Court might be approached and that the Government would have no objection to such a course.

The Government was not then aware that any opposition would be raised to the proposed alienation, more especially bearing in mind the statement contained in the letter of the 13th September, that the claims of all interested parties would be satisfied. Subsequently, however, on the 10th December an influential deputation waited upon the Minister for Agriculture and offered strong opposition to the proposed sale.

The Minister for Agriculture then wrote, on the 14th December, to the Consistory pointing out that in face of the strong opposition which existed the Government could not consent to the proposed sale. and suggested that Parliament should be approached on the subject, when the views of all parties could be heard and considered.

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Coming to the strictly legal question, the Court will have to consider and decide two points:

1st. Whether the land in question can be alienated, and if that question is answered in the affirmative, then the

2nd. Question arises as to what purposes the money realised by the sale should be devoted.

It is a clear principle that a grant. like a will or testament, will not be lightly interfered with by the Court if the intention of the grantor be clear. In other words, the Court will give effect to the intention of the parties.

If the grants in the present case are looked at it will be found that they are perfectly clear in their terms.

In the first grants dated 2nd July, 1755, the land is granted to the deaconry as a burial place or church yard for the inhabitants of Cape Town, and in the second grant, dated 8th April, 1801, the land is granted to the Venerable College of Churchwardens for the purpose of enlarging the local cemetery, *i.e.*, the cemetery granted in 1755, so that both these grants stand on the same footing. The land was granted for the inhabitants of the Cape, *not for the benefit of any particular denomination*, but generally for the burial of the inhabitants of the Cape.

The *Deaconry* in the one case, and the *College of Churchwardens* in the other, are appointed trustees of the land granted for the public of Cape Town, and without the consent of the public, or at least of the Crown, the land cannot be sold.

The law is clear that the subject matter of grants *from the Crown* can only be devoted to the purposes expressed in the grant. *Blackstone* (Vol. II., p. 464).

Here the terms of the grants are clear, there is no ambiguity, and the attempt which is now being made to devote the subject matter of the grants to other purposes cannot be authorised by the Court.

But even if the land were allowed to be sold, the Consistory has no right to the proceeds of the sale. The land was impressed with a trust for the benefit of the people of Cape Town, and not merely for members of the D. R. Church, and any money derived from the sale of the land, if it could be authorised, must be devoted to public purposes.

The grants were not for charitable purposes; if they had been, and the object of the charity had failed. the Court might possibly apply a doctrine somewhat similar to the *cy-près* doctrine of the English law and devote the proceeds of the sale to similar charities.

But no question of charity arises in this case, the only persons beneficially entitled are the

public of Cape Town, for whose benefit the proceeds of the sale, if it is allowed, must be devoted.

A further point might be taken that the uses for which the land was granted having been exhausted the land reverts to the Crown.

Mr. Schreiner, Q.C., argued for the respondents: The consistory as holding under a trust has interests in the burial ground, but only as under a trust—but the public and the 112 allottees holding sub-titles have also rights. Here we have a large number of titles granted by the Consistory holding good *as between* the Consistory and the *grantees*. No registration it is true has been affected, but the present application is a complete disregard of that right under these sub-titles, for the right has passed out of the Consistory to the allottees, so far as regards the plots granted thereunder. The Consistory denies the rights under these sub-titles, yet especially alleged in its affidavits that it claimed payments from the allottees in 1891 as owners of the allotments. The Consistory has purported to sell the plots, the titles have not been registered, but though this might be good as against third parties who buy without knowledge, it is not required as regards the grantor, *i.e.* the Consistory. A *jus in re* was not passed, but a *jus ad rem* has passed, and we are right in coming to protect such right now. The old doctrine of non-alienability of such property as this has ceased. See *Cape Town Districts Waterworks Co.* v. *Elders* (8 Juta, 9); *Van Leeuwen* (Commentaries, section 13, Book II., Chapter I.); *Grotius* (2, 1, 37); *Van Leeuwen* (Roman-Dutch law 2, 1, 9); *Digest* (11, 7, 39); *Code* (3, 44, 14); *Sande* (Restraints on Alienation, pages 114 and 122, Webber's Translation); *Voet* (11, 7, 6). The rights of the purchasers are not only those of future burial, for of course as the cemetery has been closed, this part of their right has ceased. But they have the right to the due respect and veneration of the bones of their ancestors and to the non-disturbance thereof. Moreover, even if the Consistory could sell, they could not use the proceeds by putting them into the common church funds. It is interesting to note that Bureau-street was constituted out of a Dutch Reformed grave yard, against the will of the then consistory.

Mr. Innes, Q.C., for the Consistory: It is interesting to see that out of the 112 plotholders only five are now before the Court. What were the legal rights of these allottees? Surely the Consistory never parted with *dominium* but only gave a sort of servitude, viz., of building vaults and burying. . . . But of the five plot claimers only one actually bought land, the others represent in the second or third degree previous plot buyers—as to whose disposition of their rights by will, &c., there is no evidence. All that counsel for the objectors contends for, is practically that the holders have a right that the bones of their relations shall not be desecrated. *Elder's case* cited by him shows that such land can be alienated, not desecrated. Is this alienation to the Huguenot Memorial Committee a desecration? The place has been in a disgraceful condition, and there may be desecration by omission as well as commission. Everything at the cemetery was in a miserable state, and two of these very objectors refused to pay 15s. to make things seemly and orderly. If we proceed to desecrate we can be stopped, but the use to which the ground is to be put by the Huguenot Memorial Committee is a decent, seemly and orderly one. The Court has discretion.

The Chief Justice: Suppose one of the plot owners wished to erect a handsome monument as a memorial of an ancestor. Can you stop him, for the Consistory has gone through every stage to give *dominium* except registration? Or could you pull down a handsome vault architecturally beautiful, if any such now exist?

Mr. Innes: No, but the vaults are in a tumble-down condition.

The Chief Justice: Then your action would properly be one for a declaration of forfeiture on the ground of failure to keep the ground in proper condition.

Mr. Innes: Who could be sued: who would have the right? But the real point is the desecration. It is difficult to understand the position of the Government. We applied for their consent, then the Government had no objection. Now they have joined with the objectors.

The rule was discharged with costs.

De Villiers, C.J.: I quite agree with the applicant's counsel that it is a greater desecration of the dead to allow their tombs to go to rack and ruin, than to build over them a memorial such as the one proposed. Some of the tombs in the burial ground have certainly been much neglected by the relatives of those buried there, and it does surprise me that persons who have taken so little interest in the proper maintenance of these sepulchres, should now object to the alienation of the land for the purpose of building thereon the Huguenot Memorial. The question, however, which the Court has to deal with, is one of law and not of sentiment. In the face of the objections raised by purchasers this Court has, in my opinion, no power to authorise the alienation of the land, even for so praiseworthy an object as the erection of a Huguenot Memorial. The forms of

transfer to the different allottees have been put in. In some the power is given to the applicants to declare forfeit the right to the land if the vaults built thereon should be allowed to become ruinous, but I incline to the opinion that this power can only be exercised with the aid of a Court of law. There is no application in the present case for a forfeiture of any of the allotments in this ground, because vaults erected therein have become dilapidated. In the other forms transfer of the land is unconditional, and with the exception of registration in the Deeds Office, everything has been done by the Consistory to vest the ownership in the allottees. It is true that the purpose for which the land is transferred is stated to be the burial of the dead, but that is the purpose stated in the grant to the Consistory itself. In all the transfers put in, it is stated that vaults will be erected for the burial of the dead. These vaults belong to the persons who built them, or their heirs. They have the right to place any monuments there, and of this right they would be deprived if the memorial buildings were were now allowed to be erected on the ground. The Court cannot sanction such an interference with rights solemnly transferred to individuals for valuable consideration. The absence of registration in the Deeds Office does not assist the applicants. If they had transferred the land for value to a third party, who had no notice of the prior sale and allotment to the owners of the vaults, such third party would have had a prior claim over the allottees. But as between the Consistory and the allottees the want of registration makes no difference. There still remains the further difficulty that the Government the original grantor of the land—objects to the proposed alienation. The grant of the land was made for the definite purpose of being used as a burial ground for the inhabitants of Cape Town. Since the date of the grant the Legislature has, by section 64 of Act 4 of 1883, authorised the Governor by public notice to direct that burials shall be discontinued in any cemetery, and to alter or vary such notice. Under that section the burial ground now in question has been closed, but it would be competent for the Governor to order it to be reopened for purposes of burial. It would, at all events, not be inconsistent with the objects of the Act to permit the ashes of cremated persons to be deposited in the vaults. The heirs of the allottees of plots of ground would be entitled to claim that in case, after their death, their bodies should be cremated their ashes shall be deposited in such plots. I refer to this point merely in order to show that the fact of the burial ground having been closed is not conclusive in the applicants' favour. There is no proof of such a complete failure of the condition on which the land was granted as to apply to this case the doctrine that the burden of *fidei-commissum* is extinguished upon failure of the condition on which it was created (*Voet*, 36, 1, 63). The burial ground is closed but it may at any time be reopened by order of the Governor, and even if it should not be so reopened the heirs of the allottees are still entitled to a modified use of the land. It is impossible, therefore, to hold that the applicants can claim the right to alienate the land for other purposes than burial, without the consent of the grantor by whom the condition was imposed that it shall only be used for purposes of burial. On every ground, therefore, the rule granted in this case must be discharged with costs.

Mr. Justice Buchanan concurred. He said: Reduced to its barest form the principle involved is this. This land was vested in the Consistory of the Dutch Reformed Church. They have sold portions of this land and received money for it. They now propose to re-sell some of the property to other people, and take more money for it. But the persons to whom they first sold it come and object, and in view of these objections the Court cannot set the rights of these people aside.

Mr. Justice Maasdorp concurred.

[Applicants' Attorney, C. C. Silberbauer: Attorneys for the Government, Messrs. Reid & Nephew; Respondents' Attorney, V. A. van der Byl.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PIRIE v. PIRIE. } 1897. } Jan. 13th.

Mr. Close moved to make absolute the rule *nisi* admitting applicant to sue *in formâ pauperis* by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

Granted; with leave to sue by edictal citation—intendit (short form) and notice of trial to be served with the citation—returnable May 1. Same service as the rule *nisi*.

IN THE MATTER OF THE MINOR LIZAMORE.

Mr. Tredgold moved for the sanction of the Court to the sub-division of the arable lands of the farm Welgerust, in the district of Oudtshoorn, of portion of which the minor owns a half-share, and for the appointment of Mr. Botha as curator to represent the minor, and to sign all necessary documents in connection with the partition of the pasture lands.

Granted.

BURDACK V. BURDACK.

Mr. Jones moved to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties, by reason of respondent's failure to obey the order requiring him to restore her conjugal rights to his wife, and for an order giving the custody of the minor children to applicant.

Granted.

THE PETITION OF FANNY L. WOLSTONE.

Mr. Tredgold applied for extension of the return day of the edictal citation about to be issued in the suit instituted by petitioner against her husband for restitution of conjugal rights, failing which for divorce, and for further directions as to the service of the process, and for leave to have the trial heard at the next Oudtshoorn Circuit Court.

Extension granted to first day of Oudtshoorn Circuit Court; service to be by publication in the Johannesburg "Star."

THE PETITION OF LILY HARRIS.

Mr. Tredgold applied for leave to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

Order granted; returnable on February 18.

IN THE MATTER OF THE UNION BANK.

Mr. Schreiner, Q.C., appeared to present the eighth report of the official liquidators as follows: The official liquidators beg to submit to this Honourable Court their eighth report. Since presenting their seventh report, the liquidators have been able to collect the remainder of the amounts due in respect of those debtors who had arranged with the sanction of your Honourable Court to liquidate their engagements by periodical payments. Some of these have paid off their liabilities sooner than was expected. There is one compromise now before your Honourable Court, but as its acceptance appears to be in the interests of the bank, no opposition is expected when it comes before the Court for confirmation. The only remaining assets are various life policies, claims against debtors and contributories, sundry gold-mining shares, and miscellaneous securities, of the value of which it is hardly possible to form any reliable estimate. Little good, it is felt, is likely to result from holding the assets mentioned any longer, and under the circumstances, with the ultimate object of finally closing off the affairs of the bank and bringing the liquidation to an end, it is proposed to sell them by public auction at an early date, and an order of your Honourable Court authorising this course is now desired. When these assets have been realised, the liquidators will be able to file a final report and account.—Dated at Cape Town, December 16, 1896.—G. W. Steytler (secretary Colonial Orphan Chamber and Trust Company) and Henry Gibson (secretary South African Association), official liquidators.

The usual order was made.

LOUWRENS AND OTHERS V. POTGIETER AND OTHERS.

For extension of the return day of the edictal citation until February 22 about to be issued in the suit instituted by applicants against respondents for a declaration of rights, and for the recovery of damages in respect of certain water rights on the Buffels River, in the district of Oudtshoorn.

Mr. Schreiner, Q.C., and Mr. Graham appeared for the applicants.

The extension was granted.

IN THE INSOLVENT ESTATE OF TRENGOVE AND JOUBERT.

Mr. Graham applied for the appointment of Messrs. A. W. Spilhaus and P. J. de Villiers as provisional trustees of the said estate, with power to sell the assets and goods, being the commodities of a general dealer, and carry on the business pending the election of a permanent trustee or trustees.

Application granted.

INCORPORATED LAW SOCIETY V. LLOYD. | 1897. Jan. 13th. Feb. 2nd.

Attorney—Professional misconduct—Theft—Suspension.

L., *an attorney, having been convicted of the theft of £4, was, on the application*

of the Law Society, suspended from practice for a period of six months, with leave to him after the expiration of that time to petition the Court to be reinstated, notice of the application to be given to the Law Society.

This was an application for an order striking off the respondent's name from the roll of attorneys of the Supreme Court by reason of his professional misconduct, in that he was, on the 3rd November last, convicted before the Resident Magistrate for Graham's Town on a charge of theft, of £4 by means of embezzlement, and was sentenced to pay a fine of £10, or in default to undergo six weeks' imprisonment.

Mr. Searle, Q.C., moved.

Mr. Joubert, for the respondent, applied for a postponement until the 1st February, on the grounds of the respondent's illness, and put in from the bar an affidavit to that effect.

The Court expressed some doubt as to whether the affidavit should be received, as it had not been filed with the Registrar by the respondent's attorney on the preceding day in accordance with practice.

Eventually the Court admitted the affidavit and granted the postponement.

Postea (February 2nd), after argument,

The Chief Justice said: The explanation is given by Mr. Joubert in regard to the respondent that this attorney, being in a state of poverty and requiring money to pay his landlady, yielded to a temptation to appropriate some of his client's money, and that when afterwards his client asked him for the money he told him that he had only received £4, whereas as a matter of fact he had received £8. He did this in a moment of temptation, and in the state of poverty in which he then was. Of course this is no excuse for any person committing theft, especially an attorney, but at the same time I do not think that the Court ought to visit this man with an exemplary punishment. The Court will suspend him until a further order is made, with leave to him to apply again in six months, and after due notice to the Law Society; the costs to be paid by the respondent.

[Applicants' Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, C. Herold.]

REGINA V. MARAIS. { 1897. Jan. 13th.

Evidence—Suspicion—Conviction.

Where a Magistrate had convicted M. *upon evidence which raised a strong case of suspicion against him but which failed to directly connect him with the offence charged, the Court on appeal quashed the conviction.*

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate, Caledon, in a case in which the accused, D. W. Marais, was charged with malicious destruction of property in destroying a bluegum tree growing at the side of his property in Dempers-street, by barking the tree, which was the property of the Caledon Municipality,

The Resident Magistrate convicted the accused and fined him £5 or fourteen days' imprisonment.

Against this conviction the appeal was now brought.

From the evidence in the case before the Resident Magistrate, it appeared that the accused asked permission to cut down the tree in question, but the Council refused to accede.

The Resident Magistrate in his reasons stated that though the case rested entirely on circumstantial evidence, it was clearly proved that the accused was the guilty party because of the application to be allowed to cut the tree down, and because the bark of the tree was traced to the yard, and that the accused's servant refused to give the bark up to the streetkeeper on the ground that she would get into trouble, and because the bark was burnt by a child, an inmate of the house of accused. Moreover, the prisoner gave his evidence in a very unsatisfactory manner.

The servants referred to were not called, though hearsay evidence of what they were alleged to have said was given.

Mr. Searle, Q.C., appeared for the appellant.

Mr. Sheil, Acting Attorney-General, for the Crown.

The Court allowed the appeal.

The Chief Justice said: The utmost that can be said on behalf of the prosecution is that the evidence raises a case of suspicion against the accused. Mr. Sheil argues now that there are two circumstances which tend to show that the accused was guilty; first, that a piece of bark of a bluegumtree was found in the yard of the accused, and secondly, the unsatisfactory nature of the evidence given by the accused. No attempt was made to fit in the bark, and see whether it belonged to the tree in question. It was said that a girl took it away, which would rather tend to raise suspicion against the girl, and not against the accused. Then as to the unsatisfactory manner in which the accused gave his evidence, we have the evidence

before us, and unless there was something in his demeanour which the Magistrate considered unsatisfactory, the evidence itself seems satisfactory. I am afraid that the Magistrate was mainly influenced by the hearsay evidence. The girl made certain statements to one witness, and without those statements I am satisfied that the Magistrate would not have found the accused guilty. I understand that the girl was subpœnaed but not called. Well, the onus of proving the guilt lay upon the prosecution, and having failed to prove that guilt, the Court must quash the conviction.

Their lordships concurred.

[Appellant's Attorney, Paul de Villiers]

BARTHOLOMEW V. STABLEFORD. } 1897. { Jan. 13th.

Provisional sentence--Consideration—Restraint of trade.

Provisional sentence granted upon a promise contained in an agreement to pay a certain sum, although part of the consideration for such promise was a release by the promisee of the promisor from a previous obligation imposing upon the latter a partial restraint of trade.

This was an application for provisional sentence on a certain agreement or acknowledgment of debt for £100, with interest from 22nd April, 1896.

The document on which provisional sentence was claimed was one signed by plaintiff and defendant, which set forth that defendant owed £78 2s. 9d. on advances made by plaintiff on security of certain furniture; that defendant had undertaken for various considerations not to be concerned directly or indirectly, in any capacity, in selling typewriting machines or accessories in the United Kingdom or South Africa (except with the Yost Company) or to take part in any school of shorthand or typewriting in Cape Town, Durban or Johannesburg, without the consent of plaintiff, under a penalty of £500; that plaintiff releases defendant from the latter restriction.

Further the document stated that defendant was indebted to plaintiff in respect of certain matters arising out of the management by the defendant of the plaintiff's business in respect of which the plaintiff had agreed to release defendant to the extent of claims which had come to plaintiff's knowledge.

The document proceeded: Therefore the said parties do hereby, contract, and agree with each other in manner following:

1. It is agreed that the said Bartholomew shall remain in undisturbed possession of the aforesaid furniture until the 31st day of March next, whether balance due in respect thereof be paid before that date or not, the said Bartholomew paying in advance to the said Stableford the rent for the said period which the said Stableford hereby acknowledges to have received.

2. The said Bartholomew hereby releases the said Stableford from such portion of the said recited agreements as prohibits him from being engaged or occupied, either directly or indirectly, in any capacity whatever in or connected with any person or firm except the "Yost Typewriter Company (Limited)" dealing in or selling typewriting machines or any like contrivance within Great Britain and Ireland or South Africa, or taking part in any school of typewriting in Cape Town, Durban or Johannesburg, without first obtaining the written permission of the said Bartholomew.

It is further understood and agreed that the release hereby given shall not be taken to cancel or affect any other portion of the said recited agreements otherwise than to the extent of releasing the said Stableford in respect of certain of the restrictions in the third condition of the said agreement of the 1st day of May, 1895.

3. In consideration of the premises the said Stableford hereby undertakes and promises to pay to the said Bartholomew the sum of £100, in security whereof the said Bartholomew agrees to accept a certain promissory note for £100 dated the 22nd of April, 1895, signed by one Alfred Cadman to and in favour of the said William Stableford, or order, and falling due on the 22nd April, 1896.

4. On payment of the said sum of £100 the said Bartholomew agrees to credit £50 thereof to the said Stableford on account of his indebtedness in respect of the said sum of £78 2s. 9d., and the balance of £5) to the credit of the sum of £100 to be paid as aforesaid.

5. The said Stableford agrees to execute and deliver to the said Bartholomew in payment of the balance of the said sum of £100 two promissory notes in his favour, each for the sum of £25, falling due at nine months and twelve months respectively from the date hereof.

6. The said Benjamin Bartholomew hereby discharges the said Stableford in respect of all other transactions between them in so far as the same have been disclosed by the said Stableford,

it being understood and agreed further that this settlement does not affect or prejudice any claim of the said Bartholomew, in respect of such matters as have not been disclosed to him or brought to his notice by the said Stableford.

7. The balance remaining due on the debt for which the said furniture is pledged, namely, £78 2s. 9d., the said Stableford agrees to pay on the 31st day of March, 1896.

8. Should the said Stableford make defaults in payments of any of the promissory notes, or debts as hereinbefore set forth, or should he and the said Alfred Cadman both fail to meet the said bill for £100 within fourteen days after maturity, the said Bartholomew shall be entitled to put into force the conditions of the said agreement of the 23rd February, 1895.

9. The acceptance of the said Bartholomew of the said draft for £100, shall not be taken to be a novation of this claim against the said Stableford, or prejudice him or postpone his rights otherwise, than is in this agreement expressly set forth.

10. The costs of the said Bartholomew, in and about this agreement and of the aforesaid supplementary agreement, shall be paid by the said parties in equal shares.

(Sgd.) B. BARTHOLOMEW.
" W. STABLEFORD.

This document was dated 19th October, 1895.

In opposing the application for provisional sentence on the above document the defendant filed the following affidavit:—

1. That I have perused the summons and annexures served upon my agent in the above matter.

2. That I deny that there is due by me to the plaintiff the sum of £100, as stated in his summons dated 21st November, 1896.

3. That at the time I entered into the service of the plaintiff I was a minor of the age of 16 years, which fact was well known to the plaintiff.

4. That the sum of £100, claimed under the agreement of the 19th October, 1895, was obtained from me by the plaintiff under pressure and threats of a criminal prosecution if I did not agree to the payment of the sum of £100.

5. That the several agreements entered into between plaintiff and myself and referred to by him in the summons and annexure are void and of no effect, as the same were cancelled by my having left his employ in consequence of my discovering that the plaintiff was systematically defrauding Her Majesty's Customs in his business transactions, and to which I would not be a party, of which fact I duly apprised the plaintiff at the time.

6. That I do not owe any money to the plaintiff on any furniture account, I having paid through my agent the balance due thereon and amounting to £36 11s. 9d. during the month of November, 1896.

7. That I am quite prepared to defend any action the plaintiff may bring in connection with the amount now claimed, and have to ask that this Honourable Court may refuse provisional sentence with costs, leaving the plaintiff to bring his action in the usual way, so that I may be prepared to bring evidence in support of the allegations herein contained.

Mr. Tredgold moved.

Mr. McGregor for the defendant: The document now sued on is not a liquid document, it was not drawn in a form on which provisional sentence should be given. The application goes far beyond anything hitherto decided. But even if this is not held to be so by the Court yet the consideration is also defective.

There must be, in a document on which provisional sentence is claimed an unqualified admission of liability. But it is clear from the document that only if those promissory notes are not paid does the present document sued on become payable: there is a specific mode of payment of the original liability provided for, viz., by the handing over of the notes. Have they been handed over: have they been paid?

The Chief Justice: But there is a clause providing that the giving of those notes shall be no novation of the claim based on this document. That leaves the claim unconditional.

Mr. McGregor. See *Green* v. *Beveridge* (8 Juta, 45), which shows that *Wessels & Waal* (3 Juta, 123) would not govern a case like this. In any case the consideration is illegal, consisting as it does in the releasefrom an agreement operating as a restraint of trade. For even if the time is short the prohibition, if unreasonable in point of area, will remain illegal: and the limit of area here is unreasonable. See *Maxim Nordenfeldt Gun Company* v. *Nordenfeldt* (L.R., Ch.D., 1893, page 630). Besides, the defendant swears there was duress: or at least that plaintiff by his own story hushed up the prosecution for the sake of this document.

Mr. Tredgold for the plaintiff (the Court intimated that it would not hear him as to liquidity, being satisfied that the document was liquid): The Maxim case was one of a general indefinite prohibition. But see *Leather Cloth Company* v. *Lorsont* (9 Eq. Cases, 345); *Rousillon* v. *Rousillon* (14 Ch. D., 351). In the present case the restraint of trade is a very mild and reasonable one. The adequacy of a consideration will

not be too nicely scrutinised. The idea of a criminal prosecution was abandoned six months before the document was signed.

De Villiers, C. J. The first objection is that this is not a case for provisional sentence, inasmuch as there is no unconditional promise to pay. The agreement says: "In consideration of the premises the said Stableford (the defendant) undertakes and promises to pay the said Bartholomew the sum of £100." The premises refer to a good many transactions covering several years and ending in what was virtually a compromise between the parties. The promise to pay the £100 is unconditional and the first objection falls to the ground. Another objection is that part of the consideration for the promise is the release of the promisor from an obligation not to carry on a particular business for a certain time and within a certain area. Such an obligation, it is urged, is invalid as being in restraint of trade, and therefore a release from such an obligation does not constitute a consideration at all. Without inquiring whether the English cases cited as to restraint of trade are applicable to this colony at all, I am satisfied that even in England such a limited restraint as was imposed in the present case would not be regarded as invalid. The release from the restraint was a perfectly valid consideration, and provisional sentence must therefore be granted, with a stay of execution for one month.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

SYTNER v. COHEN.—*Re* COHEN v. SYTNER. { 1897. Jan. 22nd.

Minor—Emancipation—Public Trade—Writ of arrest—Discharge—Fraud—Material allegation—Failure to answer—Rule 135—Summons.

S., a minor, carried on business for six weeks in 1895, on his own account, and thereafter returned to his father's custody.

On the 18th December, 1896, S. signed a promissory note for £50 in favour of C., to mature on April 18th, 1897. In Jan., 1897, however, C. procured the arrest of S. (when about to leave for Bulawayo) upon an affidavit to which was annexed the above-mentioned note, together with another document (also dated 18th December, 1896), purporting to be an agreement by S. to pay the debt in instalments of £3 a week, the whole amount to fall due on default in payment of any one instalment. C. alleged such default in payment. S., however, alleged on affidavit that though he had signed two documents, the later one was signed on January 15th, on C.'s representation that the promissory note was lost, and that this document contained no condition as to the amount falling due on default in payment of an instalment. These statements were not denied by C. in his replying affidavits.

On application by S., the Court discharged the writ of arrest as in consequence of C.'s failure to answer the material allegations, the Court was not satisfied that the debt was due as alleged: but (on C.'s application) authorised that the writ should stand as a summons.

This was an application (anticipating the return day) by Albert Sytner, under Rule 135, for the setting aside of a writ of arrest returnable on February 1. The defendant was present in custody.

The writ was granted on the following affidavit by plaintiff, dated 16th January, 1897:

1. On the 18th day of December, 1896, Sytner signed a promissory note in my favour for the sum of fifty pounds sterling, payable on the 18th day of April, 1897: hereunto annexed marked A.

2. That on the same day he also signed an agreement hereunto annexed marked B, by which he undertook to pay the said note in instalments of £3 per week, failing which payments the whole amount of the said note should become due and payable at once.

3. Sytner has paid two instalments in accordance with such agreement, the last of such payments being made on the 4th day of January, 1897, since when he has paid nothing.

4. That I have been informed by defendant and also by his father, and I verily believe that he is leaving this colony within the next three or four days for Bulawayo, Rhodesia, where he intends taking up a permanent situation.

5. That as far as I am aware the said Sytner is not possessed of any landed property in this colony.

6. That I have no mortgage, pledge, or other security, for the said amount as aforesaid, or any part thereof, and that such amount of £44 remains therefore wholly unsecured to me.

Annexure A, referred to in the affidavit, was as follows:

Due 18th April, 1897.

£50 0 0

18th December, 1896.

Four months after date, I promise to pay C. Cohen, Esq., or order at the Bank of Africa, Cape Town, the sum of fifty pounds sterling for value received.

(Sgd.) ALBERT SYTNER.

Annexure B was as follows:

I promise to pay Mr. C. Cohen the sum of £3 per week, on account of promissory note for £50, payable on the 18th day of April, 1897, at the Bank of Africa, Cape Town, till full amount is paid, and should one payment be missed the whole amount falls due at once.

(Sgd.) ALBERT SYTNER.

18th December, 1896.

The defendant filed the following answering affidavit:—

2. I admit paragraph 1 of the plaintiff's affidavit, but say, that at the time of signing the promissory note referred to therein, I was a minor, of the age of 20 years, as will more fully appear by the notarial copy of my register of birth, hereunto annexed.

3 That I have no occupation, and reside with my parents, and assist my father in his hotel business, known as the Palmerston Hotel, Plein-street, Cape Town. That my parents supply me with board and lodging and clothing.

4. That with regard to paragraph 2 of plaintiff's affidavit, I say that the agreement entered into with regard to the weekly payments of instalments of three pounds sterling was not signed by me on the 18th day of December, 1896, but I signed a document that was undated, on Friday the 15th day of January, 1897, and that if the said document B referred to in plaintiff's affidavit is now dated, such date must have been affixed after my signature was affixed thereto, and without my knowledge or consent. The copy of the document B, served upon me with the copy of the writ of arrest, has no date affixed thereto, but only the figures 18th.

5. That I have paid the said plaintiff the sum of £9 in three instalments of £3 each per week, upon a previous agreement dated 18th December, 1896, which said agreement did not contain a clause to the effect that upon failure of payment of any instalments, the whole amount should become due and payable at once.

6. That the said plaintiff, on the 15th day of January, 1897, called upon deponent, and stated that he had lost or mislaid the document referred to by me in paragraph 5 of this my affidavit, and requested me to sign another document, which plaintiff has referred to in his affidavit as document B, and which has been wrongly dated as the 18th December, 1896.

7. That with regard to paragraph 3 in plaintiff's affidavit I say, that I paid plaintiff the sum of £3 on Wednesday, 13th January, 1897, making £9 in all that I paid him.

8. That the next instalment of £3 would have become due and payable on Monday, 18th January, 1897; the payment made by me on Wednesday the 13th January, 1897, became due and payable on Monday, 11th January, 1897, which I paid to plaintiff, who accepted the money on 13th January, 1897, as aforesaid.

9. I say again that I am still a minor and have never been emancipated, and at the time I was arrested at the instance of the plaintiff I did not owe the said plaintiff any money or instalments due under the written agreement referred to by me in paragraphs 4 and 6 of this my affidavit.

Plaintiff in a replying affidavit re-asserted that defendant had, as inducement to lend the money, told plaintiff that he had an interest in his father's hotel (the Palmerston), otherwise he would not have lent the money. He admitted defendant was under 21 years of age, but stated that defendant in 1895 carried on business with one Jacobs as advertising agents and brokers.

There was an affidavit by Cohen's manager, corroborating the allegation that Sytner stated that he was interested in the hotel; and one by Louis Sytner, owner of the hotel, denying that defendant, his son, ever was interested therein.

Mr. Searle, Q.C., for the applicant: This is an application under the 135th Rule of Court by Sytner to anticipate the return day of a writ of arrest. It is admitted that the applicant is a minor; and unless his case falls under one of the legal exceptions, he cannot be sued—still less be arrested—without a guardian acting in the case. (*Voet*, 5, 1, 11 and 2, 4, 36.) Among the exceptions recognised are emancipation of

a minor (*e.g.*, by carrying on a public trade or profession)—or his representing himself to be of full age—or emancipated. Apparently plaintiff relies on Sytner's being emancipated. But the only evidence as to this is that in 1895 Sytner carried on business for six weeks away from his father—also that the minor represented that he had an interest in his father's hotel business. The father denies that he had any interest or that Cohen could have thought so.

Mr. Justice Maasdorp: If he was emancipated in 1895, would he lose the legal position so acquired by coming back to his father?

Mr. Searle: He clearly is not carrying on business now on his own account. And if he has come back to his father he cannot be said to be now emancipated. *Cairncross* v. *Vos* (Buchanan, 1876, page 6.) The authorities do indeed show that if he represents himself as of age he is liable; but this is not alleged here.

The Chief Justice: But if he represents himself as having an interest in the business is not the principle the same, viz., the liability for the fraud?

Mr. Searle: No authorities go so far as that. Moreover, did Cohen believe it? He carefully avoids telling the father of the promissory note.

The circumstances as to the signing the last document are suspicious. On the previous documents he could not have been sued; but then he was induced to sign the last document which enabled Cohen to arrest him—which he did at once.

The Chief Justice: There are two material allegations in Sytner's affidavit which are not denied at all in Cohen's affidavit.

Mr. McGregor for the respondent: Cohen is in court and can give evidence on these points. As to Sytner's position—there was clearly emancipation. The carrying on of the advertising business with Jacobs effected the emancipation, and once there was emancipation a new status was acquired and can not be revoked. Of course the mere fact of carrying on such a business is not enough: there must be a reasonable time for the acquisition of such new status—*e.g.*, such a time that business men could make a mental note that the minor was carrying on business. (*Voet* 4, 4, 43.)

The Chief Justice said: The applicant in this case applies now for discharge from arrest under the 135th Rule of Court. The arrest was made upon two documents, one of them being a promissory note, payable four months after date, and made on December 18, 1896, for £50. This promissory note will not become payable until April 18 next, and if, therefore, this were the only document sued upon the plaintiff would have no right to arrest the defendant. It was therefore of great importance for the plaintiff to show that he had some other document under which the defendant would be immediately liable, and accordingly this document was produced: "I promise to pay £3 per week on account of promissory note for £50 payable on the 18th April, 1897, at the Bank of Africa, Cape Town, till the full amount is paid, and should one payment be missed the whole amount falls due at once." This document is dated 18th December, 1896, but the words "18th December, 1896," were apparently written by somebody else and not by the person who wrote the body of the note. It is written with a different ink, and apparently on another day. The defendant himself says that a document was signed by him on January 15, and he was then informed by the plaintiff that the document which had been given him on December 18 was lost, and that in the document he then signed the words "and if one payment be missed the whole amount falls due at once" had been omitted. That affidavit was made on January 19, 1897. On January 22 the plaintiff made an affidavit, and he says not one word about this most important statement made by the defendant in his affidavit. Now counsel proposes, on behalf of the plaintiff, to call him as a witness. I think it is too late. He had ample opportunity to answer this most material statement, and he has omitted to do so. The liberty of the subject is at stake, and it is not the habit of the Court under circumstances like the present to give further facilities to a plaintiff of denying statements made by the defendant. I think on that ground alone the defendant ought to be discharged. There is no proof that there is a rebuttal of the statement that no debt was due. It becomes unnecessary therefore to consider whether there is further proof of emancipation, but the evidence on the point is extremely slight. It is said that for six weeks the defendant had carried on the business of an advertising agent and broker. Well, Mr. McGregor is bound to admit that the mere fact that he has carried on such a business would not be sufficient to emancipate him. Supposing he had been employed for a day that would certainly not be sufficient to emancipate him. Sytner was only employed for six weeks. The Court should be very careful to require full proof of emancipation before it holds that there has been such emancipation, and I am not prepared to say in this case that the proof has been sufficient. But, in the absence of proof that any debt is due, I think that the application for the discharge from arrest ought to be granted with costs, the writ to stand as a summons in any fresh case.

Mr. Justice **Buchanan concurred.** He wished to mention that the Registrar was perfectly justified under the circumstances in issuing the writ.

Mr. Justice **Maasdorp concurred.**

[Plaintiff's Attorney. A. Steer; Defendant's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1897, Feb. 1st.

On the application of Mr. Benjamin, Mr. Arthur Plantagenet Kenealy was admitted as an attorney and notary.

PROVISIONAL ROLL.

WOODHEAD, PLANT AND CO. V. PEDERSEN AND ANOTHER.

Mr. Close applied for provisional sentence for £62 13s. on a promissory note.

Granted.

STANDARD BANK V. FLANDERS.

Mr. Innes, Q.C., applied for provisional sentence on a bill of exchange for £100.

Granted.

ILLIQIUD ROLL.

BEHR V. HARMAN.

Mr. Jones applied for judgment under the 319th Rule of Court, in terms of the declaration, for transfer of certain land in Cape Town.

Granted.

REHABILITATION.

On the application of Mr. Roos, the rehabilitation of Daniel Johannes de Villiers was granted.

GENERAL MOTIONS.

ORR V. SCOWEN.

Application by defendant for leave to sign judgment against plaintiff for not proceeding with his action against defendant within the time prescribed by the rules of Court.

Mr. Buchanan appeared for the applicant.

Order granted.

IN THE MATTER OF THE PETITION OF AMY HUTTON, BORN WILLIAMS.

Deed of Transfer—Amendment Substitution of "in community" for "without community."

The petitioner was married in community of property to, and was assisted as far as need be by, Edward Hutton, her husband.

Mr. Searle, Q.C., applied for authority to the Registrar of Deeds to rectify the deed of transfer passed in favour of petitioner on 18th Nov., 1896 by substituting the word "in" before "community" in lieu of the word "without."

Order granted, subject to production of satisfactory proof from Natal that the parties are married in community of property.

MARNEWICKE V. SOUTH AFRICAN MUTUAL LIFE ASSURANCE SOCIETY OF CAPE TOWN.

Mr. Graham applied for the rule *nisi* to be made absolute to sue *in forma pauperis* in an action for the recovery of the amount of the life policy of applicant's wife, who died on 23rd May last.

Application granted.

Mr. Graham appointed counsel; Mr. P. M. Brink to be the attorney.

GROBBELAAR V. GOUS.

Mr. Buchanan applied for the extension of the return day of citation to May 1.

Granted.

IN THE MATTER OF THE PETITION OF EMILE HENRY VAN NOORDEN.

Mr. Tredgold applied for authority to the Registrar of Deeds to issue to petitioner a certified copy of a mortgage bond in his favour passed on 29th February, 1896, by John Goodison, the original having been lost

Rule *nisi* granted, returnable last day of term.

IN THE MATTER OF BEEDLE AND CO., LIMITED, IN LIQUIDATION.

Mr. Buchanan presented the second and final report of liquidators.

Usual order granted.

IN THE ESTATE OF THE LATE ROELOF JACOBUS DU PLESSIS.

Mr. Graham applied for authority to the executor dative to sell certain one-twelfth share or part of the farm De Doorns, the only remaining asset in the estate, and to apply the proceeds in paying the costs of administration; any balance shown in the account to be framed to be for the benefit of the eleven heirs of the said Du Plessis.

Referred to the Master of the Supreme Court for report.

UNION BANK, IN LIQUIDATION.

Mr. Schreiner, Q.C., appeared to present the eighth report for confirmation, and for the sanction of a certain compromise.

Report confirmed and compromise sanctioned.

IN THE MATTER OF MOSS HARRIS, AN ALLEGED LUNATIC.

Mr. McGregor applied for appointment of a *curator ad litem* in proceedings to be taken to have the said Harris declared of unsound mind and for the appointment of a curator of his person and property.

Granted. Mr. Roos appointed *curator ad litem*.

MASTER V. HAYMAN'S TRUSTEE.

Mr. Sheil (Acting Attorney-General) applied for an order compelling respondent to file certain dividend receipts.

Order granted.

AITCHISON V. AITCHISON.

Mr. Benjamin applied to make absolute the rule *nisi* for divorce.

Personal service had been made on the defendant, William Faure Aitchison. The rule was made absolute, with costs.

REGINA V. SOLDAAT.

Mr. Sheil (Acting Attorney-General) applied for removal of the place of trial to the Circuit Court at Uitenhage.

Order granted.

BROOKS V. BROOKS.

This was an action for restitution of conjugal rights, failing which for divorce.

Mr. Jones appeared for the plaintiff.

Mr. Barry, clerk in the Colonial Office, produced the marriage register of the parties, dated December 5, 1883.

Mrs. Brooks (born Lidcote), the plaintiff, said that she was married to the defendant in the Wesleyan Church, King William's Town, and lived in that town for nine months. Her husband was a clothier. They went to Queen's Town, where his business was, and there they stayed eighteen months very happily. His business was then closed up, and he was out of employment for some time. They wandered about for several years, her husband only giving her very little support, her family practically supporting her. In 1892 on returning from Mount Frere to King William's Town she took a boarding-house, and then in 1893 her husband went to Bechuanaland to seek employment. He refused to return, and wrote admitting misconduct in the early years of marriage. The four children were aged twelve, eleven, nine, and six years respectively, the eldest and youngest being girls.

A decree of restitution of conjugal rights was granted, defendant to return to plaintiff on or before February 28, failing which defendant to be called upon to show cause why a decree of divorce should not be given against him, and the plaintiff be entitled to the custody of the children.

[Plaintiff's Attorneys, Messrs. Findlay & Tait.]

HAWORTH V. HAWORTH.

This was an action for divorce on the ground of adultery, or in the alternative for a decree of judicial separation on the ground of cruelty.

Mr. Innes, Q.C. (with him Mr. Maskew), for the plaintiff.

Mr. Searle, Q.C. (with him Mr. Benjamin), for the defendant.

Mr. Searle, Q.C., said that after consultation with defendant he would withdraw the denial pleaded to the charge of adultery.

Mrs. Olivier, married to Cornelius Olivier, said that her husband was defendant's overseer, and lived on his farm for some time, and she went there in May, 1894, and stayed until June, 1895. They at first lived in a tent and then in a room which was part of Haworth's house. Up to May, 1895, there had been nothing improper between herself and defendant. Then one evening he sent to say that he would come and speak to her about her troubles, she having just lost a baby. Her husband was then away on a three days' journey to fetch some poles. She was writing when he came, about 8.30 p.m., and he behaved violently and improperly to her, after first bolting the door behind him. She gave no consent to his action at all. She said she would call out, and a

man in the next room would hear, and he then said that he would murder her if she did so. She said she would tell her husband, and he offered her £20 not to speak. She told her husband when he returned, and he had an interview with the defendant. She left for a neighbour's farm, and then came back to fetch her furniture. They saw a Justice of the Peace and afterwards an attorney on the subject, but so far no action had been entered against Haworth.

Cross-examined by Mr. Searle, Q.C.: She was still living with her husband. There were several people living in the house when defendant misconducted himself as above. On defendant's birthday, after the misbehaviour had occurred, she sent some verses to defendant. They were put into an envelope, and she wrote on them "Congratulations from K.O."

By the Chief Justice: She and her husband had been invited to the birthday dinner, and they refused to go, so her husband consented to her sending verses. She did not compose the verses herself, she copied them from a book. She was so weak that she could not resist defendant sufficiently to prevent him effecting his purpose. She had not wished to have people about the farm knowing anything of the matter, and had, therefore, said as little about it as possible.

Mary Ann Haworth, the plaintiff, said she was married to the defendant in 1869. She had heard nothing of misconduct between her husband and Mrs. Olivier until after she left Trooilap's Pan. She heard of the matter about eighteen months afterwards from a total stranger. Mrs. Olivier she had always considered a most respectable, well-behaved woman. The children (boys) were thirteen and two years old respectively. She objected to the defendant having custody of the children because of his violent and improper language. Defendant's brother George said that defendant's language on one occasion was nearly enough to make his hair stand on end, and also that he did not know a person on earth who could use such bad language as his brother. She left Trooilap's Pan a few weeks before her second child was born. Defendant had refused to bring her a doctor or let her see one. If she wrote, all letters were to go through him. He took her to Orange River Station, and went to Kimberley. She went to Jagersfontein, and had only £10 given by defendant. Then to Fauresmith where she was confined. Since then she had had to support herself by dressmaking. In 1884 defendant offered her £100 a year if she would leave him; but she refused unless she could take the eldest child. It was untrue that she was guilty of intemperate habits. She never saw liquor at Trooilaps Pan. Her husband had sold the property settled upon her by the ante-nuptial contract. She gave her consent afterwards.

Cross-examined by Mr. Searle, Q.C.: She and her husband had lived a wretched life together, two years in Natal, nine years in Jagersfontein, three years in Bosjes Pan, and then in Trooilap's Pan. She called the latter place "the wilderness," and did not like it very much. She had not told defendant that she wanted nothing from him when she left him. When he gave her £10 as she left him she said: "Is that all I am to get through my sickness with?" He had written to her once from De Aar stating that he had just heard that she was dependent on other people for support, and was willing to take her back or allow her some money. She did not reply to the letter. Her husband had lost a lot of money at Jagersfontein. It was not because of her intemperate habits that her husband had had to close his hotel in Natal. He had never spoken to her about drinking. Considering that George Haworth was always the worse for liquor, he was not a very nice person to say that he had seen her the worse for liquor. Her husband was a very temperate man. Her husband had attempted to murder her. Mrs. Olivier had seen him come out of the room with a knife and a steel in his hand. He had said that if he heard her speak one word about him or his family to Mrs. Olivier he would put a knife through her. Defendant had never used violence to her in anyone else's presence. She had a temper, but not such a one as she was credited with. They frequently wrote letters to each other when in the same house. After he had ill-treated her he always used to sit down and write to her as though she had been the offending party, when, as a fact, he was to blame.

Re-examined by Mr. Innes, Q.C.: Her husband had beaten her repeatedly with a sjambok.

Cornelis Olivier, of Britstown, said that he was formerly overseer for the defendant, and in May, 1895, he went to fetch some poles from a distance. When he came back his wife complained of defendant's misconduct. He told defendant that he was going to see a magistrate, and left the farm, taking his wife with him. He afterwards came back to the farm to clear up matters. He saw a J.P. on June 6, and the J.P. told him to wait till a magistrate came. He saw a magistrate when he came on his quarterly visit to the neighbourhood. He had since seen an attorney in the matter of the misconduct.

Cross-examined: He was now in the police force. Just before he came to Haworth's he had finished a term of three years' imprisonment for robbery at Victoria West. He denied that he had wanted to get money out of Haworth. Haworth had offered him £50 to settle the matter. Once when defendant was coming from Kimberley to Trooilap's Pan, he got his wife to write for him to stop at Britstown to talk over the matter, and had a spy set in the room to hear any confession that might be made. He had written to defendant after that, asking him to make an offer, or he would proceed with an action against him.

This concluded the case for the plaintiff.

For the defence, Jacob Abraham Haworth, the defendant, said that the first cause of a most unhappy married life was drink. Three days after marriage he found his wife under the influence of drink. He had a splendid hotel business in Natal, and gave it up to take her from temptation A very little drink affected her. The things numbered in the ante-nuptial contract settled on his wife had fetched about £320. He was worth about £3,0 0 when he got to Jagersfontein, and had put it into landed property, which depreciated in value very considerably owing to the amalgamation of mines. He then took a farm in the Free State named Bosjes Pan. He had always kept the liquor locked up there. The value for Divisional Council purposes of the farm he now had—Trooilap's Pan—was £6 000. It was mortgaged for £6,200—£5,000 at 4 per cent. and £1,200 at 10 per cent. He had 1,600 sheep, 160 cattle, and 50 horses. He had a partner in the farm who found the capital. He had never beaten his wife with a sjambok. He had never gone further than to pick her up and lock her in her room, when he was tired of listening to her abuse of his dead parent. He was somewhat hasty and gave way to bad language at times, but never very bad. He had always endeavoured to keep the eldest boy from drink. He would like the custody of the eldest boy, though he was willing to let his wife have the second child. He was afraid that the present action would place him on the verge of bankruptcy. It was untrue that he had committed a rape on Mrs. Olivier.

The Chief Justice: But you admitted adultery.

Defendant: I am the victim of one of the most diabolical plots ever enacted in this world.

The Chief Justice: Yes! yes! but you admitted adultery.

Defendant: I still admit it, but I did nothing by force. It was all arranged, and took place at half-past ten at night, when the rest of the people on the farm had long been in bed. Continuing, witness said that his eldest son would never have written to his mother if he had not made him.

Cross-examined by Mr. Innes, Q.C.: He had always kept liquor in the house, but locked up. Knowing his wife's infirmity, he had kept the liquor under lock and key; though his wife found out a means of getting at it. He had never driven his wife into Plessis's farm with a sjambok. The letter which she wrote, stating that his inhuman conduct was killing her, was untrue. He had made provision on the farm for his wife's confinement. In addition to Trooilap's Pan, he had one-sixth portion of two other farms. He thought the value of them was about £500. There was a Government bond on them of £3,000, which was four-fifths of their supposed value. He had had two years drought to face which had robbed him of a large quantity of his stock. He had paid £7,305 for Trooilap's Pan He was willing to try and maintain his child, but not his wife. He and his partner had frequently tried to sell the farm Trooilap's Pan. He could make no offer for the maintenance of his wife. If the costs of the present action were heavy, he saw nothing before him but to surrender his estate.

Re-examined: He brought his wife out from England to marry her. In connection with the two farms in Kenhardt, of which he had one-sixth share, he was now owing £150 to his other partners.

George Henry Haworth, brother of the defendant, said that he knew his brother's financial position. He had no money at all. They had suffered from drought for the last two years.

Cross-examined: His brother paid him £10 per month, and he had every hope that he would get the money. It was owing to him. His brother must be owing him quite £300.

The Chief Justice said: In this case it is quite clear that adultery has been committed, and the plaintiff is entitled to a decree of divorce with costs. There has been a great deal of mutual recrimination as to the conduct both of plaintiff and defendant. But in the view which the Court takes of the case it is not necessary now to go into that. On the whole it is better, we consider, for the interest of the elder child that the father should continue in charge of him. The defendant is somewhat excitable, but independent of one single act of adultery, the father has not shown himself entirely unworthy to have the custody of the child. As to the younger child, it is better that the mother should have the custody of it. Defendant has now to make provision for main-

tenance, and instead of ordering a monthly or annual payment it is far better that a lump sum be paid by defendant, and in estimating that amount the Court must bear in mind the terms of the ante-nuptial contract in which certain cattle and other articles have been settled on plaintiff. They were estimated at a very high value, and there is no doubt they were afterwards sold at very much less than the value which was put on them. If the plaintiff had refused to give her consent to the sale the Court would have given judgment for the full amount, and estimated that amount at the value which the parties themselves put upon the goods at the time that the contract was entered into. The consent having been given the Court must be guided by the amount which these articles actually realised; and we are of opinion that the sum of £320 would be a fair sum to be paid by defendant. A decree of divorce will be granted with costs, including plaintiff's witness's expenses, plaintiff to have the custody of the younger child and defendant the elder, each to have access at all reasonable times and places to each of the children. The Court will further order that the defendant pay to plaintiff the sum of £320.

[Plaintiff's Attorney, P. de Villiers; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

JEWELL AND RUTTER V. HAZELL AND STEER. (1897. Feb. 1st.

Co-owners—Partners - Implied authority—Tacit lien - Pledge of title deeds — Loan on mortgage — Agents' charges.

Where land has been transferred by one and the same deed to two or more persons, one co-owner has no implied or tacit authority to pledge the transfer deed as security for the charges of a commission agent in attempting to raise a loan on mortgage of the land at the request of such owner without the consent of his co-owners. Such a commission agent has no lien on the transfer deed for his charges or for the proposed lender's claim for interest in lieu of notice in respect of a loan which has been negotiated but subsequently cancelled.

This was an application by Samuel Henry Jewell and John Robert Rutter, calling upon the respondents, Thomas Herbert Hazell and Frederick Beecher Steer (lately carrying on business as Messrs. Hazell & Steer) to show cause why they should not be ordered to deliver to the applicants a certain deed of transfer of ground situate at Salt River, the said transfer being illegally detained by them; and to pay the costs of this application.

The applicants' affidavit set forth:

1. That they together with one John Jewell purchased from Alfred Thomas Rutter a certain plot of ground, being Lot 9 in Block E in the estate called "Eberstadt," situate at Maitland near Salt River Railway-station.

2. The selling price was £29, and on the 9th day of April, 1896, transfer of the said lot of ground was passed in the Deeds Office, in Cape Town, to Samuel Henry Jewell, John Jewell, and John Robert Rutter.

3. Each of the partners paid his *pro rata* share in the purchase price of the ground and expenses for passing the transfer.

4. The transfer was prepared in the office of Attorney William E. Moore, and John Jewell was entrusted by deponents with their shares of the transfer expenses to pay for the release of the transfer.

5. In the month of April, 1896, applicants found out that the said John Jewell had obtained the transfer and delivered it to Messrs. Hazell & Steer, for the purpose of raising a loan on all the shares in the transfer.

6. The transfer was demanded from Messrs. Hazell & Steer, who refused to give up the same to deponents on the ground that they had got a loan of £350 sterling from William Marsh on the property, which loan John Jewell had since cancelled. That they retained the transfer as a lien for interest claimed by Marsh on his loan and for their commission for obtaining the loan.

7. The transfer was fraudulently and secretly taken by John Jewell to Messrs. Hazell & Steer without the consent of deponents, and he fraudulently, illegally, and without their knowledge attempted to raise the money on the shares of the persons mentioned in the transfer.

8. Deponents gave no written or verbal authority to the said Hazell & Steer to raise the loan, and have received no satisfactory explanation from Hazell & Steer as to how a loan of £350 sterling was granted by Mr. Marsh on a plot of ground which only cost £20.

9. Deponents lastly say that John Jewell had sold his share in the ground before he took the transfer to the said Hazell & Steer, to one of the deponents, viz. to the said John Robert Rutter.

Deponents therefore jointly and severally pray that as the transfer aforesaid was wrongly, unlawfully, and fraudulently put into the hands

of the said Hazell & Steer, they be ordered to restore the said transfer to deponents with costs.

The following affidavit was filed for the respondents by Frederick Beecher Steer, one of the above-named respondents, and liquidator of the late firm of Hazell & Steer :

2. I know nothing of an arrangement existing between the applicants and one John Jewell referred to in paragraph 4 of applicant's affidavit.

3. I deny having received the deed of transfer in question, prior to April, 1896, as stated in paragraph 5 of applicants' affidavit, but on or a out the 4th day of June, 1896, John Jewell called at the office of Hazell & Steer, and requested me to obtain a loan of £450 upon security of certain two houses to be erected (each containing three rooms and kitchen, &c., and one with a shop in addition) situate at Salt River.

4. That in accordance with these instructions I applied to one William Marsh for such loan, as will more fully appear from the copy of a letter addressed to him by the said firm, on the 5th day of June, 1896, hereunto annexed marked A. This application was refused, but I ultimately succeeded in obtaining a loan of £350.

5. That on the 19th June, John Jewell again called on me and signed a power of attorney to pass a bond for the said amount of £350 (the power of attorney is hereunto annexed) and said that his partners, the above-named applicants, would also call to sign the power, which, however, they did not do.

6. That shortly after this John Jewell again called on me, and expressed his wish to cancel the loan of £350, to which, however, I objected, but subsequently agreed on the distinct understanding that our commission for raising the loan, and three months' interest in lieu of notice be paid; which terms he accepted, it being expressly agreed that the deed of transfer should be retained by said Hazell & Steer as security for such payment.

7. That I was totally unaware that the said John Jewell was not acting perfectly *bona fide* in the matter, and that in the whole transaction I considered him as acting for the firm, and treated him accordingly.

8. I admit having received no written instructions from the above-named applicants to procure the loan, but acted on the verbal instructions of one of the partners in the said firm of Jewell Bros.

9. That I did not know at that time that the said John Jewell had sold his share in the property, and that at the time of this transaction he was still apparently a partner in the said firm.

The applicant Rutter made a replying affidavit saying: So soon as deponent heard that the transfer of the ground was in the hands of Hazell & Steer, he went to their office and asked if the transfer was there. He saw Mr. F. B. Steer, who told deponent that he had the transfer but that he kept it b cause there was a claim for interest and commission due, and that he wanted also five pounds sterling, to transfer John Jewell's share of the ground to this deponent, from which statement this deponent inferred that Steer must have heard from John Jewell that he had sold his share to this deponent.

On the 26th day of September, 1896, deponent caused a demand to be made on Hazell & Steer for delivery of the transfer, and that a reply was received from them on the 29th September, 1896; that no mention was made in the said reply or at any time previously that the said John Jewell had pledged the transfer or given it as security for the claim of interest or commission preferred by Hazell & Steer, and that now for the first time deponent hears of such pledge. John Jewell has left the Colony and is not now in the jurisdiction of the Court.

The respondent Steer in a further affidavit denied having demanded £5, as alleged, to transfer John Jewell's share alleged to be sold to J. R. Rutter; and said that the first intimation he received of such sale to Rutter was when Rutter called on him.

Mr. Buchanan, for the applicants: The applicants' business is clearly not a partnership but a co-ownership. In spite of what the parties call themselves in their affidavit this is clear from the facts, *e.g.* one partner went to get transfer to himself of the part held by another —which a co-owner must, a co-partner need *not*, do. A co-owner could not pledge the shares of the other co-owners. The only pledge was the pledge of the title deed.

There is no tacit lien over the title deeds when the express purpose of the deposit of the deeds is to raise a loan. There is no proof of express agreement of lien, and the mere deposit of the title deeds as a pledge is idle and gives no right. Even a partner cannot bind the co-partners unless there is an express or implied authority. The parties now claiming this transfer deed have always alleged that the deposit was fraudulent and illegal. The deposit was not made in the usual course of business. It was not within the apparent authority of the partner.

Mr. Searle, Q.C., for the respondents: It is clear from the affidavits and from the title deed that the parties looked on themselves as partners in a business; and John Jewell could

bind his co-partners accordingly. (*Van Leeuwen*, Cens. For., Pt. I., Bk. IV., section 10, p. 266, Barber's Translation.)

De Villiers, C. J: If the respondents have the right to retain the title deed against the will of the majority of co-owners of the land, they must have the right either by virtue of a special agreement or by virtue of a tacit lien.

To prove such a special agreement the respondent Steer states in his affidavit that he has been authorised by John Jewell, one of the co-owners, to raise a loan on mortgage of the land, that after the loan had been negotiated, John Jewell expressed a wish to cancel the loan, and that he (Steer) agreed to this on the distinct understanding that he should retain the transfer deed as a security for his commission for raising the loan and for three months' interest due to the proposed lender in lieu of notice Assuming these statements to be correct, the question arises whether John Jewell had any authority from his co-owners, the two applicants, to pledge the title deeds as security. There is no evidence whatever of express authority, but the respondents' contention is that John Jewell, as one of three partners owning the land, had tacit authority to borrow money on security of the land and, therefore, to give the title deeds as security for expenses in raising the cancelled loan. It is not proved, however, that a partnership, in the true sense of the term, existed between the three co-owners. The affidavits refer to them as partners, but apparently no more is meant than that they are co-owners of the land in question. It is unnecessary, therefore, to inquire into the power of one partner to bind his co-partners by raising money on mortgage of land or pledging the title deeds of such land. The nature of the partnership, the usual course of dealing between the partners, and the object of the loan would be important points in such an inquiry, and the affidavits are silent on these points. I am satisfied that as co-owner of the land John Jewell had no tacit mandate from his co-owners to pledge the title deeds, and that the special agreement with him relied upon by the respondents does not justify their retention of the transfer deed. The applicants were at hand, and the respondents, before attempting to raise money on mortgage of the land, ought to have asked for a power of attorney signed by all the co-owners.

The next question is whether the respondents have a tacit lien on the deed. If the deed had been drawn by them, they would have been entitled to retain the deed until their lawful charges for their work and labour had been paid to them. The applicants would not have been entitled to the benefit of the deed, without paying the professional charges for drawing the deed. But that is not the nature of the charges, in respect of which the respondents claim the lien. Their commission for raising the loan and the proposed lender's claim for interest in lieu of notice, constitute no part of the expenses necessary to pass the transfer. Upon this point the case of *Queen's Town Assurance Company* v. *Wood, s Trustee* (5 Juta, 327) may usefully be compared with *Trustees of Tritsch* v. *Berrange* (3 Juta, 217) If the respondents have a valid claim against the applicants, they may bring their action, but they are not entitled to retain the title deeds. The application must be granted with costs.

Their lordships concurred.

[Applicants' Attorney, J. Ayliff: Respondents' Attorney, A. Steer.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), the Hon, Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

MAHUMA V. MAHUMA. } 1897. Feb. 2nd.

This was an action for the restitution of conjugal rights brought by the plaintiff against his wife.

Mr. Close appeared for the plaintiff.

Hendrik Mahuma said he was married to his wife in the Free State at Bethulie in 1884, each of them having been married before. Plaintiff had seven children of his first marriage, and his wife had four by her previous marriage, but there were no children of the present marriage. Witness left the Free State to come into the Colony, and his wife refused to come with him or to leave her children. She had also neglected to answer his letters.

A decree of restitution of conjugal rights was granted; the defendant to return to plaintiff on or before April 15, failing which a rule *nisi* to be issued calling upon the defendant to show cause on May 1 why a decree of divorce should not be granted, and the defendant be declared to have forfeited any benefits accruing to her by reason of having been married in community of property; personal services to be effected, failing which the same publication as before.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

REID V. SURVEYOR-GENERAL. { 1897. Feb. 2nd. Feb. 10th.

Grant—Construction of—Boundary—Diagram—"Contiguous to"—"Extending towards"—Sea.

In the body of a grant the words "contiguous to" were used in defining the boundaries on three sides of the land, but in describing the fourth, i.e. the N.E. side, the boundary is said to be "to the sea," and on the face of the grant there was an indorsement, in Dutch, adjoining the diagram, that on the N.E. side the land extends "towards the sea" "naar de zee." The diagram itself agreed with the extent of land appearing in the grant and with the existing beacons which were away from the sea, whereas if the sea were taken as the boundary the extent would be greatly in excess of the extent granted.

Held *that the owner was not entitled to claim from the Surveyor-General an amended title showing the seashore to be the boundary on the N.E. side.*

This was an application on notice calling upon the Surveyor-General to show cause why he should not be ordered to issue to the applicant an amended title of his property at Simon's Town under the provisions of Act 9 of 1879.

After this notice had been served the Municipality served a notice on the applicant calling upon him to show cause why they should not be allowed to intervene.

The applicant consented to their intervening.

The facts are briefly these: The applicant is the registered owner of three pieces of land adjoining each other, situated at Simon's Town and transferred to him on 13th October, 1892.

The total extent of the land was 4 morgen 190 square roods and 42 square feet.

In November, 1895, the land was re-surveyed, and the surveyor, as the applicant alleged, found that the diagrams did not truly and correctly represent the boundaries of the land, and thereupon an application was made to the Surveyor-General for an amended title under provisions of Act 9 of 1879.

The extent shown on the diagram framed by Mr. Reid's surveyor exceeded the extent shown on the original diagram by 2 morgen 59 square roods and 102 square feet.

The land in question was held under two grants—one made to Cloete in 1806 and the other to T. T. Harrington in 1818. In Cloete's grant the north-east boundary was described as being contiguous to the beach, and in Harrington's grant the north-east boundary was described as "extending towards the sea," ("*strekkende naar de zee*"), the other boundaries being described as *strekkende aan*. The last-mentioned grant contained the following clause:

That Government, if thought proper, shall have the right of erecting batteries along the seashore, and making roads to the mountains.

The applicant claimed the land to high water mark as shown on plan A and alleged that the portion of the estate below the road was fenced in to the sea on both sides, that there was no fence along the northern boundary, but that here was a fence or hedge on the north side of Seafort of which his property formed portion.

The Surveyor-General refused to issue an amended title on the following grounds, *inter alia*:

1. That he had reason to believe that Crown land was encroached upon and included within the boundaries of the land as re-surveyed and claimed by the applicant.

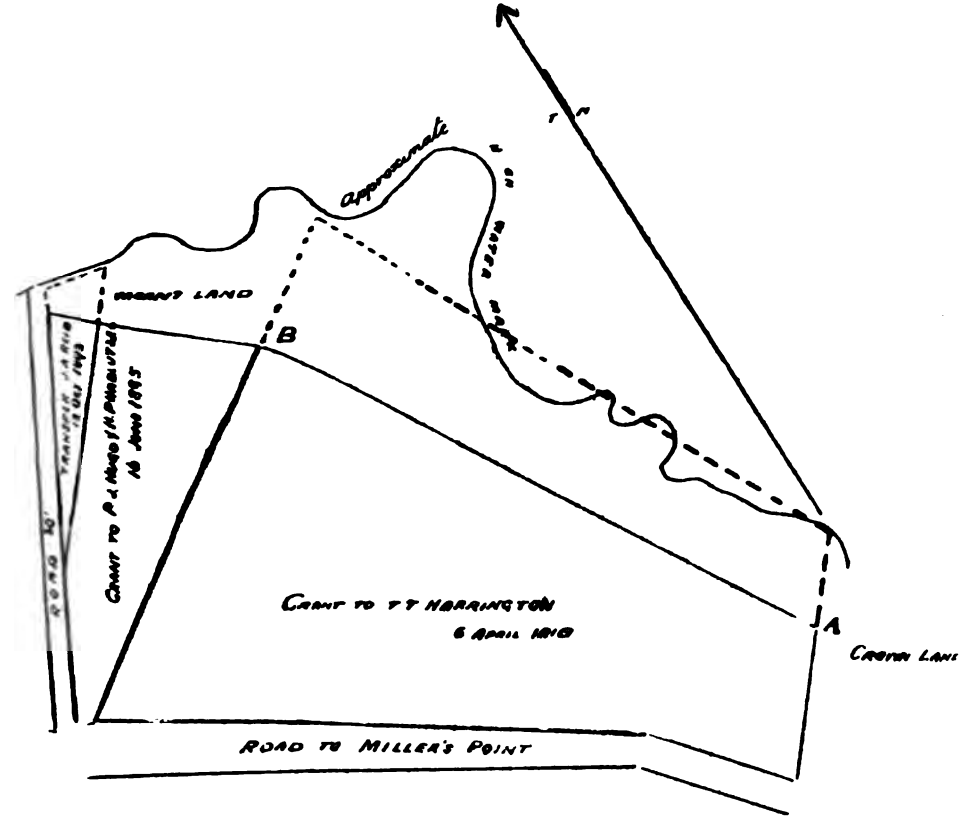
2. That the Act 9 of 1879 was intended to apply to cases where the survey as per existing beacons differs from the diagram by which the owner holds possession of the land, the beacons being undisputed and provided no Crown land is included. That in the present case there was no such difference, as the diagrams attached to the applicant's transfers represent the extent of the land purchased by him, there being no difference between the beacons standing and the beacons as per diagram.

3. That the boundaries of the applicant's land on the beach side are represented, according to the original diagrams, by straight hard lines which agree with the beacons on the ground, and not by a curvilinear boundary as represented by the diagram filed for the purpose of obtaining amended title.

4. That in the title given to T. T. Harrington in 1818 the boundary facing the sea shore is described as extending to (*strekkende naar*) the sea, while on all other sides it is described as extending contiguous to (*strekkende aan*) Cloete's property, public road, and Government land.

5. That the Municipal Commissioners of Simon's Town, in the interest of the public, have

EXPLANATORY PLAN "A"



The above *black lined figure* represents certain land at Simon's Town, in the Cape Division, transferred to J. A. Reid, on 13th October, 1892, now re-surveyed under the Amended Title Act, No. 9 of 1879.

The *dotted lines* denote an additional extent of land to which Mr. Reid lays claim in accordance with the descriptive boundaries of the transfer to him of the 13th October, 1892, and the grant to T. T. Harrington, dated 6th April, 1818.

(Sgd.) T. TENNANT WATSON, G.L.S

13th November, 1895.

raised the strongest opposition to the acquisition of the additional 2 morgen 59 square roods and 102 square feet which would fall within applicant's boundary were his application granted.

6. That in the original diagram of the larger extent of the land in question (Harrington's grant) the sea shore is not even depicted.

A previous owner of the property alleged that he always understood and believed that the boundary of the land did not extend to the sea, but was limited to the beacons which still exist on the ground, and which define the extent of the land.

Mr. Hugo, a son of a former owner of the property, alleged that he could recollect the uninterrupted use of the foreshore and of the ground now applied for by the public for a period of at least 45 years

Mr. Searle, Q.C., for the applicant: The whole case turns on the construction of documents under which Mr. Reid holds. The Surveyor-General reads Act 9 of 1879, section 2, as if "boundaries" meant "beacons." The sale was a private one, and Mr. Reid adheres to his title deed. He did not buy on the general plan. The point at issue is simply—is the land claimed Crown land? No one but the parties to the suit has any claim. The Surveyor-General says that either "extending *to*" or "extending *towards*" is the equivalent of "strekkende *naar*," the words used on the grant. In Barrington's case the words were "contiguous to" the river. It would be an awkward phrase to use in connection with the sea. The Court is bound by the Dutch words used on the grant. Their proper meaning is "stretching to" the sea. Therefore the grant is clear, the land granted extends up to the sea—to high-water mark. If the words on the grant are clear the diagram is immaterial.

The Acting Attorney-General (Mr. Sheil) for the respondents: Apart from the question of prescription in favour of the inhabitants of Simon's Town raised by the Municipality, and which would prevent the Court from deciding the question at issue on motion, even if the Court were of opinion that Mr. Reid had any claim, there is sufficient evidence that the land which Mr. Reid claims is Crown land.

The grants and diagrams both agree as to the extent of land granted to Cloete, in 1806, and to Harrington, in 1818, and it is common cause that the same extent of land has in both instances been conveyed to the applicant under his transfers of the 13th October, 1892.

Mr. Reid now claims nearly half as much again by virtue of the vague expressions used in the grants *strekkende naar* in Harrington's grant and *to the beach* in Cloete's grant.

The primary meaning of *naar* is "towards," and if it had been intended to grant the additional land which the applicant now claims the same language would have been employed in describing the north-east boundary as was used to define the boundaries on the other three sides viz.—*strekkende aan*, *i.e.*, contiguous to or touching.

Barrington's case has very little application to the present, as that case was practically decided on the question of prescription, which the applicant does not raise in the present motion.

As to the right reserved by the Crown of erecting batteries along the sea shore and making roads to the mountains, that means that the Crown shall have the right of entering upon the applicant's land to construct such works.

It is submitted that the Surveyor-General was amply justified in refusing to issue an amended title.

Mr. Searle in reply: It is important to notice that the Government reserve the right to erect batteries on the foreshore. This is clearly an acknowledgment that the land is the grantee's, subject to right to enter on it again to build batteries.

Mr. Justice Buchanan: *Strekkende aan* is used in every other case but this.

Mr. Searle: Yes, because "aan" would be inappropriate here. There is no fixed thing that the land *can* extend to.

The Court, after the case had been argued and judgment reserved, having expressed a desire to have some evidence as to when the beacons which now define the limits of the land, were erected, the applicant filed an affidavit sworn to by Mr. P. K. Maskew, Government land surveyor, who deposed that in the year 1884 he surveyed the estate Seaforth, at Simon's Town, for the late Mr. Hugo, and found no beacons of any description along the lower or sea side of the property with the exception of a cleft in a rock at the corner which Mr. Hugo pointed out to him.

That there were beacons along the road side, and that the beacons now in existence on the sea side were erected by Mr. Hugo on spots fixed by him (Mr. Maskew) as corresponding with the original diagrams of the property.

In answer to these allegations Mr. Rittman deposed that he was the owner and resided on the property adjacent to that of the applicant for the past 35 years, and that during the whole of that time the beacons facing the sea were in existence as at present.

Mr. Bull deposed that he was born in Simon's Town 52 years ago, and that as long as he could

recollect, certainly for the past 40 years, the beacons existed on the same spots as they do at present.

Postea (10th February).

The Court delivered judgment, making no order on the application.

De Villiers, C. J.: This is an application calling upon the respondent to show cause why he shall not be ordered to issue to the applicant an amended title of his land showing the sea shore to be the boundary on the north-east side. The applicant holds the land under three grants of distinct lots, but the grant to which the dispute mainly relates was made in the year 1818. On the face of that grant there is a diagram which corresponds with the extent of land granted and with the beacons now standing on the land. The beacons on the north-east side are some distance from the sea. Next to the diagram there is an indorsement in Dutch that "the adjoining land represents a piece of land enclosing 3 morgen 221 square roods, extending north-west to Cloete's land, south-west to the public road, south-east to Government land, and north-east towards the sea—(*naar de zee*)." In the body of the grant appears the following passage in English: "I hereby grant unto Thomas Harrington 3 morgen and 221 square roods. . . . . on the north-west contiguous to a piece of land belonging to P. L. Cloete, on the south-west contiguous to the public road, on the south-east contiguous to Government land, and on the north-east to the sea. After the arguments had been heard, an affidavit made by Surveyor Maskew was tendered to the effect that when he surveyed the land some years ago, there were no beacons where the existing beacons stand. The affidavit was admitted on condition that the respondent should be allowed to file counter affidavits. Two such affidavits made by old inhabitants have been filed, which state that for upwards of forty years beacons have stood in the same spots on this side of the land facing the sea. It is unnecessary now to decide between these conflicting statements, because the existing beacons have been recognised by former owners and were pointed out to the applicant before he bought the land. In support of the application the case of *Barrington* v. *Colonial Government* (4 Juta, 408) has been relied upon, but that case was very different from the present. The boundaries of the farms in question were defined in the grants as being "contiguous to" certain rivers, the diagrams did not correspond with the beacons, and the beacons, if corner beacons, included a much greater extent of land than appeared in the grants. In the subsequent case of *Hirsch* v. *Gill* (10 Juta, 156), it was held that where the diagram attached to a deed of transfer does not conflict with the description of the boundaries given in the body of the deed, such diagram affords valuable evidence as to the boundaries of the land transferred. In the present case there is some obscurity in the description of the boundaries given in the grant. The words are capable of the meaning that the boundary on the north-east is the sea, but they are also capable of the meaning that the boundary is *towards* or *in the direction of* the sea. In this uncertainty the diagram affords valuable evidence as to what was really intended to be granted. That diagram corresponds exactly with the extent of the land granted. It corresponds also with the existing beacons which are some distance from the seashore. If the seashore were taken to be the boundary, this extent of land would be vastly greater than that which was intended to be granted. This clearly is not a case in which an amended title should be ordered to be given by the Surveyor-General, and the application must be refused with costs.

Buchanan, J: I am prepared to adopt and to apply to this case the principles laid down in *Barrington's case*, namely, that the grant constitutes the contract between the grantor and the grantee, and where the terms of the grant are clear, effect must be given to those terms even if the diagram presents a different figure from that which the land granted in those terms would assume; and further, that in construing a grant of land we must look at the meaning which the grantee was reasonably justified in placing upon the terms of the grant. The facts of this case however are very different from those proved in *Barrington's case*. Here the grant and the land itself as described by the diagram agree as to the extent. There may be some ambiguity as to the meaning of the words describing the north-east boundary, but when these words are compared with those used in describing the other boundaries I think they were not intended as conveying ground right up to the high water mark. The occupation of the ground by the grantees themselves shows they did not understand the seashore to be the boundary, and the beacons placed, as some witnesses say more than forty years ago, show that no claim had ever before this been set up to the boundary now claimed. Here then, we have the grant, the diagram, the extent, the occupation, and the beacons all against the applicant. Under these circumstances I am of opinion that the present application must be refused.

Maasdorp, J. concurred.

Application refused accordingly, with costs.

[Applicant's Attorneys, Messrs. Reid & Nephew; Respondent's Attorney, Messrs. Van Zyl & Buissinné.]

FORTUIN'S EXECUTORS V. ABRAHAM. { 1897. Feb. 2nd.

Griqua Law—Community of property.

In an action brought by a Griqua to recover his maternal portion of a certain farm in Griqualand East from his father, the question arose whether according by the law of that country, before its annexation to the Colony, the law of community prevailed between spouses.

Held on appeal, *that the burthen of proving such community lay upon the plaintiff, and, that in the absence of such proof, the Court below had properly granted absolution from the instance.*

This was an appeal from a decision of the Resident Magistrate, Kokstad, in an action wherein the plaintiff, Johannes Fortuin, in his capacity as executor testementary in the estate of Adriana Fortuin (born Abrahams), claimed a statement of account in the estate of the late Francina Abrahams from Frederick Abrahams, her surviving spouse.

The summons alleged:

1 That plaintiff was married, without community of property, to Adriana Fortuin (born Abrahams), who has since departed this life, and by whom he had three children, who are all still living.

2. That by her last will dated the 28th day of October, 1886, the said late Adriana Fortuin appointed plaintiff the executor of her estate, and that he has received the appointment accordingly.

3. That the said late Adriana Fortuin was a daughter and heir to Francina Abrahams, who was the predeceased spouse of defendant, and to whom the latter was married in community of property.

4. That the said late Francina Abrahams left three heirs, viz.: Frederick Abrahams, jun., Francina Jacoba Abrahams, and Adriana Abrahams, plaintiff's late wife.

5. That at the death of the late Francina Abrahams the joint estate of herself and her husband (defendant) consisted of sundry live-stock and the farm Driefontein, situate in the district of Mount Currie.

6. That the said Francina Abrahams departed this life in or about the year 1864 or 1865.

7. That defendant has not as yet rendered a proper account to the Master or to the heirs or any other persons of the estate of the said Francina Abrahams, neither has he given the heirs proper and legal possession of the portions due to them out of the said estate, neither has he taken the necessary steps to have the said estate administered according to law.

At the hearing before the Magistrate the defendant set up the following pleas:

1. That an executor should be appointed to administer the estate who could sue and be sued on behalf of the estate, and there is no cause of action by plaintiff against the defendants.

2. Defendant denies that the farm Driefontein was the property in the joint estate of defendant and his late wife, but says that it was the sole and separate property of defendants granted to him years after the death of his wife, that whatever estate was left at the death of Francina Abrahams was duly administered and distributed according to Griqua law and custom in the year 1864, and the shares of the heirs paid out to them in due course.

3. The general issue.

Upon hearing the case the Resident Magistrate gave judgment of absolution from the instance for the following reasons:

This is an action instituted by the plaintiff, Johannes Fortuin, in his capacity as executor testamentary in the estate of his late wife Adriana Fortuin, in which he claims a statement of account in connection with the estate of the late Francina Abrahams, wife of defendant. During the hearing of the case, it was admitted by plaintiff that the claim in respect of the movable property has been settled, and the question which therefore remains to be decided is substantially this, viz., whether the children of the said Adriana Fortuin have any claim to a portion of the farm Driefontein. Before proceeding to consider this question it will perhaps be advisable to give a brief summary of the circumstances out of which this claim has arisen. It would appear that defendant, a Griquaburgher, came to East Griqualand, which was then commonly called Nomansland, with his chief the late Captain Adam Kok, in or about the year 1863, under a promise that he would receive a grant of land. On the arrival of the Griquas in this part of the country, each burgher was allowed to pick out a farm for himself, subject to the approval of Adam Kok Defendant, it seems, selected the farm Dri fontein, and occupied it until a few mon

after his wife's death, when he removed to the Colony. Previous to his departure Adam Kok caused the movable property in the deceased wife's estate to be apportioned between defendant and his children, in accordance with what is alleged to have been Griqua custom at the time. After remaining away a number of years defendant returned, and again occupied the farm Driefontein, and subsequently his right to it was formally confirmed by Adam Kok in 1871. After this (but in what year is not very clear), plaintiff married defendant's daughter, by whom he had three children, on whose behalf he has now preferred this claim. Subsequent to their marriage, plaintiff and his wife were allowed by defendant to liv on a portion of Driefontein, where they built a house and made other improvements. Eventually the wife died, but plaintiff continued to live on the farm until disputes took place between him and defendant in consequence of his objection to bear a share of certain expenses connected with the erection of a fence between Driefontein and an adjoining farm, the result being that he was summarily ordered by defendant to quit. These seem to be the facts of the case as far as can be gathered from the evidence. A considerable portion of the evidence was directed to one particular question, viz., whether community of property between spouses existed amongst the Griqua immigrants. It is manifest that this is the crucial point in the case, and the decision mainly hinges upon the answer to it. A careful consideration of the evidence shows that there is considerable conflict between the witnesses. On the one hand, plaintiff and his witnesses H. Bezuidenhout and Werner state that the principle of community both as regards movable and immovable property was recognised by the Griquas, and that when one of the spouses died half of the joint estate was divided between the survivor and the children of the marriage; on the other hand, Jan Bergover says only landed property was subject to community, while it will be found that defendant and his witnesses maintain the opposite view to that advanced by plaintiff. According to Mr. Brisley (who at one time held office among the Griquas) community of property was not recognised. Husband or wife could hold property (either movable or immovable) separately, and in the event of the death of either of the spouses the property in the deceased's estate was divided between the children and the survivor. He states further that in the event of the death of a woman whose husband owned landed property, the latter was not bound to divide it with the children although it was a frequent thing for a father "to create community or make divisions of property," but there was no law to compel him to do so. It is also clear from his evidence that as regards farms granted to the burghers by Adam Kok such farms were not considered to be the joint property of husband and wife. After careful consideration I am inclined to accept the views advanced by defendant and his witnesses. It seems to me that the weight of evidence is on his side. Both Piet Bezuidenhout and Ludovick Kok appeared to understand what they were speaking about, which was a circumstances not equally manifest in the case of some of plaintiff's witnesses. For example Jan Bergover states that when his wife died his farm was sold and the proceeds divided between him and his children, but his son Franz Bergover alleged that the farm remained in the possession of his father who subsequently mortgaged it, the result being that it was sold, and the children never derived any benefit from it. As regards the evidence given by Piet Bezuidenhout and Ludovick Kok, I need merely say I found no reason to doubt their *bona fides*. In proceeding to give further considerations to Mr. Brisley's evidence, I may say I attach great importance to it; holding as he did a somewhat responsible position in the Griqua Government it is in the highest degree probable that matters subject to Griqua laws or customs frequently came under his cognisance. In addition to this he appears to be an intelligent man with a fair amount of education, and thus he was better fitted to acquire a comprehensive knowledge of those laws and customs than illiterate Griquas could be expected to gain. Again, I take it that he is a perfectly disinterested witness, and that the decision in this case cannot affect him personally as it might possibly the Griqua witnesses. For these reasons I am satisfied to accept his exposition of the Griqua laws and customs which were in operation at that time in preference to that given by Jan Bergover, or H. Bezuidenhout, or Werner. Under these circumstances I am forced to the conclusion that community of property as between Griqua spouses did not exist in times anterior to the annexation of the country by the Colonial Government. In the course of his argument, plaintiff's attorney, cited the case of *J. P. Wildredge* v. *W. Kok*, as supporting his contention that community did exist, but in my opinion that case if it can be said to prove anything proves the opposite proposition. It is shown there that by the advice of the then Chief Magistrate, William Kok ceded the half of his farm to his wife. This cession, which was subsequently declared to be valid, would indicate that Kok looked upon the farm as his exclusive

droperty and that it was so regarded by the Court, which practically ratified the transaction.

The system which prevailed in respect of property was very simple, and was one which was adapted to the circumstances of a people who were not in a position to keep written records of their transactions. It would appear that when two persons were married, the property, whether movable or immovable, which each possessed previously was held separately. On the death of one of the spouses, the movable property of the deceased was divided between the children and the survivor, while the landed property was retained in the hands of the surviving spouse, and occupied by him or her as the case might be in conjunction with the children. This is exactly what has happened in the present case, the property belonging to the late Abrahams was divided between her husband and the children. Had any part of the principle of community of property between spouses been recognised at that time, it is reasonable to suppose that Adam Kok, who seems to have invariably taken steps to cause moveable property to be distributed, would have given directions that a proper and lawful disposition should at the same time be made of the landed property. But no instances in which he dealt with the farms granted by him to his burghers have been cited by any of the witnesses. This circumstance goes far to show that the statements of Mr. Brisley and Piet Bezuidenhout, to the effect that these farms were regarded as belonging exclusively to the grantees, are correct.

There seem to have been a tacit understanding, that any of the sons or daughters who got married had, and have during the lifetime of the surviving spouse, a sort of claim to settle on the land. This claim was not however based upon any right arising out of the estate of the deceased parent. It is not easy to define whence it arose, but it may be said it was derived from good feeling on the part of the surviving parent. Plaintiff alleges that defendant assigned a portion of the farm Driefontein, and told him that it was the share accruing to his wife Adriana Fortuin out of her mother's estate. That a part of the farm was apportioned among his children is not disputed by defendant, but he explains that in allowing them to live on the farm, he was actuated by paternal feelings and that none of them claimed a right of occupation by virtue of any title arising out of their mother's estate. It may be that plaintiff thought and still thinks that his wife derived her right of occupation through her mother and possibly the document marked A, which defendant signed when the question arose in regard to his passing a mortgage on the farm may have lent some colour to this idea.

This document was an undertaking signed by defendant declaring "that only my half-share of the farm Driefontein shall be liable for this debt," and that should the bond be called up "the portion belonging to my children will not be endangered."

But in my opinion the explanation given by defendant as to how his children came to have a portion of the farm allotted to them is not inconsistent with the documentary evidence that has been adduced. Plaintiff has failed to prove that the allotments of land given to each of his children by defendant on the farm Driefontein, can and ought to be regarded as the portions accruing to them out of their mother's estate. I accept defendant's explanation of what his intentions were when he so apportioned his farm. What rights this proceeding on his part really conferred on his children is not the point at issue in this action. I am only required to find an answer to the questions that have now been raised by the pleadings.

To sum up then the conclusions I have arrived at, I find:

1. That community of property between spouses was not recognised by the Griquas during Adam Kok's time.

2. That the farm Driefontein was the exclusive property of defendant and that on the death of his wife it did not form a part of her estate.

3. That the allotments on Driefontein given by defendant to his children were not portions due to them out of their mother's estate.

If these conclusions are correct then it follows that plaintiff is not entitled to succeed in this action and my judgment will therefore be absolution from the instance with costs.

Mr. Schreiner, Q.C., for the appellant, referred to *Sir Per. Maitland's Treaty* (1846); *Hertlet's Commercial Treaties*, (Vol. 9 page 106); *Strachen* v. *De Vries* (5 Sheil, 381); *Theal's History of South Africa* (1834-1854, pages 379 *et seq.* He contended that the history of the Griquas showed that they were a Monogamous people who came originally from the Colony where they were accustomed to be married according to christian rites. When the people left the colony, therefore the presumption would be that (failing any specific written law among such people) they took with them the common law—including the *status* which christian marriage in their original society conferred; including therefore community of property on marriage. This presumption is confirmed by every other fact of

their history that we know. There is no other presumption, for they were not a pure separate nation with defined national customs; but the people were a mixed race including half castes, &c. *Strachan v. Colonial Government* (11 Juta, 386). The main point in this case therefore is to determine the question of community. But even if the Court holds that there is no such community the children could still rely upon the contract (annexure A) whereby the father waived his rights as a usufructuary in regard to Driefontein. *Booyson v. Colonial Orphan Chambers* (Foord, p. 48).

Mr. Searle, Q.C., for the respondent.

The Court dismissed the appeal with costs.

De Villiers, C.J.: In order to succeed in this action the plaintiff had to satisfy the Court below that our law of community of property existed among the Griquas before the annexation of their territory to this colony. This Court has been favoured by Mr. Schreiner with a very interesting discussion of the history of the Griqua people and the gradual development of their laws and customs, but the discussion has not been of much assistance in deciding whether community of property between husband and wife was recognised by the tribe. The expert evidence is very conflicting, and, without now analysing that evidence, I incline to the view that a modified form of community did exist in regard to land, but with this distinction, that upon the death of one of the spouses the survivor remained in possession of the property as owner of one half and usufructuary of the remaining half. If this view be correct then the plaintiff is not entitled during the defendant's lifetime to claim any portion of the property, and the Magistrate was right in granting absolution from the instance. In any case the burthen of proving full community of property, as recognised in this colony, lay upon the plaintiff, and in the absence of such proof the Magistrate's judgment was correct. The appeal must be dismissed with costs.

[Appellants' Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SCHREINER V. S.A. TOBACCO CO. AND LUDINGTON. { 1897. Feb. 2nd.

Patent rights—Assignment—Breach of contract—Interdict—Rule *nisi*.

S. entered into an agreement with L. *in terms of which* S. *acquired the patent rights in South Africa of certain cigarette-making machines of which* L. *was the inventor.*

S. thereafter under a further agreement ceded his rights under the original agreement to H. *on behalf of the* T. Co. *which was to be formed to exploit the invention in South Africa. This second agreement provided that in consideration of payment of certain money in shares, and certain salary and percentage of the profits,* S. *should give his services to* T., *and hand over all his stock and machines and assign his patent and other rights in regard to the machine to* T.

Thereafter S. *prepared all the documents necessary for patenting the invention in South Africa, and obtained execution thereof by* L., *and handed them to* H. *for completion. The patent in the Cape Colony was obtained in the name of* L., *but* S. *alleged that this was on the distinct, understanding that* L. *should assign the patent to petitioner or his assigns, and* S. *consented that such assignment should be made to the* T. Co.

S. *duly handed over all his machinery, and gave his services for several months, but received no salary or shares. On the application of* S.,

The Court *granted a rule* nisi, *to operate as an interim interdict, restraining the assignment of the patent rights (registered in* L.'s *name) by* L. *to* T. *pending action to be instituted by petitioner.*

On the return day the rule was made absolute (omitting the words "pending action to be instituted by petitioner"), with leave to the T. Co. *to apply to the Court for the discharge of the interdict.*

This was an application to make absolute a rule *nisi* granted on the 15th September, 1896, upon the motion of Mr. Innes, Q.C., returnable last day of the November term (subsequently extended), to operate meanwhile as an interdict, calling upon Frank James Ludington, and the South African Tobacco Company, to show cause why the former should not be interdicted from

assigning his letters patent of the 17th June, 1896, to the latter, or to any one other than petitioner, and why the officer in charge of the register of patents and proprietors should not be restrained from registering such assignment, pending action to be instituted by the petitioner; rule to be served personally on Ludington and the company, as well as on the officer in charge of the register of patents and proprietors.

Mr. Innes, Q.C., for the applicant.

Mr. Searle, Q.C., for the respondent South African Tobacco Compan

No appearance was entered for Ludington.

There was no formal return of a service upon him in terms of the order, though a formal declaration by him was filed through the attorney for the South African Tobacco Company.

The original rule *nisi* was obtained upon the petition of William Schreiber, of Johannesburg, which was as follows:

1. That your petitioner is a resident of Johannesburg, in the South African Republic, and has been residing there since 1887.

2. That your petitioner has been brought up in the tobacco trade.

3. That in 1894, your petitioner was carrying on business in Johannesburg with his brother Renig Schreiber, under the style of W. S. Duke & Co.

4. That of date 11th October, 1894, your petitioner, as representing the said firm of W. S. Duke & Co., entered into an agreement with one Frank James Ludington, acting for the Ludington Company of New Haven, America, whereof the original is attached marked A, to which your petitioner craves leave to refer.

[This agreement provided for the sale to petitioner's firm (W. S. Duke & Co.) of two Ludington cigarette-making machines; petitioner's firm to get the sole right of selling these machines in South Africa and to be entitled to take out a patent (in the name of W. S. Duke) for South Africa.]

5. That the said agreement was duly carried out and completed so far as the delivery of the machines therein mentioned was concerned and as regards the payment of the purchase price.

6. That the attention of this Honourable Court is drawn to paragraph 3 of the agreement, whereby the vendors thereunder agreed to allow the purchasers to take out a patent for the machine therein mentioned in their name.

7. That subsequent to the entering into of the said agreement and the acquisition of the machines therein mentioned your petitioner approached Messrs. Hartlaub & Co., of Rotterdam, and of date 25th November, 1895, your petitioner entered into with them the agreement whereof a copy is hereunto attached marked B, to which your petitioner craves leave to refer.

[This was an agreement to assign to Hartlaub & Co. or their nominees all petitioner's rights in respect of the letters patent, &c., of the invention; for a consideration which petitioner acknowledges to have received].

8. That the invention therein referred to is the matter in respect of which by clause 3 of the agreement first above named it was to be permitted to W. S. Duke & Co. to take out a patent.

9. That at this time the firm of W. S. Duke & Co. had been dissolved under an arrangement by which *inter alia* the machines, rights, and interests mentioned in the said two agreements had passed to your petitioner.

10. That the Honourable Court will observe that the said Frank James Ludington concurred in the agreement second abovenamed and agreed to recognise the same.

[This was by an endorsement in which Ludington acknowledged that the contents of the agreement were known to him and gave his concurrence.]

11. That the agreement second above named was duly signed by all the parties thereto, including the said Frank James Ludington, and that the original is now in Holland in the hands of the said Hartlaub & Co. as representing the South African Tobacco Company of Johannesburg—a Dutch company having its domicile in Holland.

12. That subsequently on the 5th December, 1895, there was entered into between your petitioner and the said Hartlaub & Co. acting for the said company the agreement hereunto attached marked C, to which your petitioner craves leave to refer.

13. That this Honourable Court will observe that by the said agreement your petitioner agreed to give his exclusive services to the said company for a stated period at a fixed remuneration, as also to make over to them for the consideration therein mentioned (£1,000 in fully paid-up shares), the entirety of his plant and stock-in-trade, including the machines as aforementioned, as also all patents or patent rights.

14. By such patents or patent rights there was intended to be covered the particular patent referred to in agreements first and second abovementioned.

15. That thereafter your petitioner caused to be prepared the papers necessary for the patenting in his name of the invention referred

to in the agreements aforesaid, and did obtain the due execution thereof by the said Frank James Ludington.

16. That thereafter the said documents were by him handed over to the said Hartlaub & Co., in order that the completion of the letters patent might be arranged.

17. That your petitioner thereafter gave delivery to the said company through its manager, one Husheer, of Johannesburg, of the goods and machinery, which by the annexure third abovementioned he had agreed to make over, and he attachs hereunto the receipt of the said manager.

18. That no complaint has been made as to the weight of the tobacco referred to in the said receipt, and as concerns the snuff mill therein mentioned, that your petitioner ordered a new part from Germany to supply the defective part.

19. That your petitioner also entered into the service of the said company in terms of the agreement third abovementioned, and has in every respect performed his part of the agreement aforesaid.

20. That up to the present, although your petitioner has handed over the goods and machinery aforesaid, and has signed all necessary documents falling to be signed by him, yet he hath received no salary whatsoever, and no delivery of any shares.

21. That your petitioner hath made repeated application for payment of his salary and for the delivery of his shares, but hath obtained no satisfaction whatsoever, and he hath been advised to take action to reclaim the interests, goods, and machinery aforesaid delivered by him on the faith of the honourable performance by the said company of its engagements.

22. That the invention aforesaid was patented in Cape Town, in this colony, in the name of the inventor, the said James Frank Ludington, to whom letters patent were issued on the 17th June last; that a true copy of the specification, to which your petitioner craves leave to refer, is attached marked D.

23. That in taking out the patent in his own name the said Frank James Ludington did so on the understanding that he should assign the same to your petitioner or to his assigns.

24. That the assignment from the said Ludington to the said company as the intended assigns of your petitioner has not yet gone through the Register of Patents, although on the faith of the due performance by the said company of its undertakings your petitioner agreed that such assignment could take place.

25. That there is reason to believe that an attempt may be made at any moment to complete the said assignment on the part of the South African Tobacco Company.

26. That by reason of the total failure of the said company to carry out its obligations towards your petitioner there is grave reason to fear that your petitioner may lose the whole of his valuable property and rights aforesaid, unless steps be taken to attach the same pending the institution of proceedings with a view to the recovery thereof.

27. That it is highly necessary that the assignment of the said letters patent from the said Ludington to the said company should be prevented, pending the institution of an action by your petitioner to recover his property and rights, else your petitioner may be greatly injured and suffer the total loss thereof.

28. That the said Frank James Ludington is at present in London, England.

29. That your petitioner hath no reason to fear collusion as between the said Frank James Ludington and the said company, but is apprehensive that the said Frank James Ludington has already or is about to assign said letters patent to said South African Tobacco Company in pursuance of the arrangements aforesaid.

The petitioner prayed for a rule *nisi* to operate as an interdict restraining the assignment of the patent rights.

The following affidavit by G. Husheer, of Johannesburg, was filed opposing the rule *nisi* being made absolute.

1. I am the manager in South Africa of respondent—The South African Tobacco Company—a company incorporated in Rotterdam (Holland) and having there its head office.

2. That I have read the petition of applicant.

3. That the agreement annexed to applicant's petition and marked E, was made by applicant with respondents.

4. That respondent started business in Johannesburg after the necessary buildings were completed on the 1st day of July, 1896, and applicant entered in respondents' service at the same time.

5. That applicant until that period was employed in a certain tobacco business carried on under the name of W. S. Duke & Co., Commissioner-street, Johannesburg, in which business he had an interest, and he often told deponent that he would carry on his business for so long.

6. That as soon as the company's buildings were completed applicant delivered to deponent the goods (after valuation) specified in the

statement annexed to the order of the Court and now taken in execution and the said goods have never been offered for delivery before.

7. That a statement of these goods has been sent to Rotterdam, for the purpose of making up and signing the shares, as payment for the goods, according to valuation, which must be made in shares.

8. That applicant knew that payment for the goods and machinery to be delivered by him could not be made until after valuation of same and delivery, and that the amount had been stated to the directors of respondent in Rotterdam, that he never complained about the delay and never asked for the shares until a month after the valuation had been sent to Rotterdam.

9. That applicant at the time the agreement was made was indebted to the firm of Hartlaub & Co., for the sum of £444 17s. 6d. with interest, for goods delivered to him, in settlement whereof he made an agreement with the said firm entitling it for 12 (twelve) shares at 1,000 guilders each out of the shares coming to applicant, and empowering the said firm to take possession of these twelve shares in Rotterdam, as has been done.

10. That according to contract the applicant for the amount of £2,858 7s. 7d. was entitled to thirty-four shares of 1,000 guilders each at £25 10s. cash as balance for the amount of the valuation. That after deduction of the ten shares mentioned in 8 hereinbefore and the twelve shares mentioned in 7 hereinbefore there is a balance of twelve shares and £25 10s. which twelve shares only came in possession of deponent on the 21st day of September, 1896, when applicant was absent without leave.

11. That salary for the month of July, 1896, during which month applicant entered the service of respondent, was offered to him in the month of August, 1896, and at that time he for the first time claimed salary for the previous month, which was then refused to him.

12 That applicant remained in the service of the respondent until the 12th day of September, 1896, and at that time left the service of the respondent without leave.

13. That applicant before that time misconducted himself in the highest degree and was very impertinent towards the deponent; that during business hours he was often to be found in the business place of W. S. Duke & Co., whose business was done under the same firm and in the same premises as at the time the agreement mentioned in 8 hereinbefore was entered into; that during business hours the applicant ordered tools and applicances belonging to the respondent for making right certain machinery for the firm of W. S. Duke & Co., and has been working for and in favour of the said firm of W. S. Duke & Co. before, during, and after the business hours of respondent in the business place of the said firm, in contravention of the agreement mentioned in 8 hereinbefore.

14. That on account of the fact mentioned in 13 hereinbefore, the deponent held it that the applicant had left the service of the respondent when he went to Cape Town without leave, and respondent only later found out that applicant had gone to that place with the intention to institute an action against the respondent.

15. That the deponent is willing to pay salary to the applicant at £50 per month from the 1st June, 1896; however, he only entered in the service of the respondent in the month of July, and to pay salary until the 12th September, 1896, about which day he left the service of respondent without leave, and further to pay him 4 per cent. of the net profits made by the respondent from the date of starting business until the 12th September, 1896, to be paid as soon as the accounts have been inspected and the profits have been found, which will be done as soon as possible: payment of salary and inspection of respondent's books are herewith tendered to him and payment of 4 per cent. of the profits, to be made as soon as possible and the just amount can be stated.

16. That with respect to the agreement annexed to applicant's petition marked A, the applicant never fulfilled the condition of this agreement, and the same therefore became null and void.

17. That the applicant went to Rotterdam and made the agreement annexed to applicant's petition, marked B, with the firm of Hartlaub & Co., and c ded all his rights to the said firm, who is still the holder of the said rights.

18. That a portion of the documents and correspondence relating to these transactions are in Rotterdam.

19. That the respondent, as soon as he received notice of this action and of the action instituted at Cape Town, wrote to Rotterdam for the said documents and correspondence and for instructions from the respondent's directors, and gave instructions to get copies of the documents served by the respondent in Cape Town which copies have been received yesterday, but the documents, correspondence and instructions cannot be expected within six weeks at least.

20. That the respondent company never tried nor had the intention to make away with any of the goods and machinery taken in execution by the messenger, nor to make away to sell, or to in any other manner make away with

their other assets, and that the respondent is the holder of a lease for five years of its business place in Johannesburg, for which he pays £750 per annum, and that the respondent has a stock and other effects in Johannesburg at the value of fifteen thousand pounds (£15,000).

That summons has already been served by applicant, to be heard in the Circuit Court at Johannesburg. That on the application the Court decided that no interdict could be allowed against the estrangement of the aforementioned goods, and only made an order *ad fundandam jurisdictionem* with costs against him in accordance with copy of judgment as hereunto annexed.

Respondents also filed a declaration by Frank James Ludington, of Waterbury, Connecticut, in the United States, inventor, as follows:

The patent rights in respect of the above-mentioned invention for the whole of South Africa belong to and are invested in Messrs. Hartlaub & Co., of Rotterdam, under the following circumstances: A Mr. William Schreiber negotiated in the year 1894 with me, for the sale of two machines made under the said invention, the price agreed to be paid for the machine including the patent rights for the South African Republic. The agreement between us was that Mr. Schreiber was to pay for two machines in the year 1894, otherwise he would not secure the patent rights. The said Mr. Schreiber paid for one machine, but was unable to pay for the other, and the agreement was at an end. Subsequently, upon Messrs. Hartlaub & Co. paying for a second machine, I agreed to allow them to have the patent rights, and I am informed and believe that the said William Schreiber entered into a contract with the said Messrs. Hartlaub & Co., to assign them the patent rights aforesaid, which contract is dated the 24th November, 1895.

I am also informed and believe that Messrs. Hartlaub & Co. had advanced the money to pay for the first machine. I considered the agreement with Mr. Schreiber personally at an end, and I entered into the new arrangement with Messrs. Hartlaub & Co. under the above circumstances.

The applicant's replying affidavit set forth:

That I have read the declaration of Frank James Ludington, and in reply thereto state that his (Ludington's) statement that he cancelled the contract with me, dated 11th October, 1894, is utterly devoid of truth, as will appear from two letters addressed to me respectively dated 21st September, 1895, and 30th October, 1895, copies of which are hereto annexed marked A and B.

That the first machine was paid for by me by two sight drafts through the African Banking Corporation here in March, 1895, thus fully nine months before I had any transaction with the South African Tobacco Company.

That the second machine was paid for my account by the South African Tobacco Company in terms of the agreement between the said South African Tobacco Company, and myself, after which I ceded my rights to the said company for £1,000 and a three years' engagement, at a salary of £50 per month and 4 per cent. of the net profits of the company.

He further alleged that he had not left the company's service till the 21st September, 1895, when he received written instructions from the manager of the company to do so; and denied having had anything further to do with Duke & Co. after entering T.'s service except in T.'s interest.

That the High Court of the Transvaal did not refuse the application for our interdict but granted it—though petitioner had to pay the costs, as the Court held that the Johannesburg Special Judicial Commissioner who granted the provisional order had no power to do so.

Mr. Innes, C.C., now moved that the rule be made absolute.

Mr. Searle, Q.C., for the respondent: Clearly no rule should now be granted to restrain the assignment. The applicant intends to bring an action in the Transvaal Court for damages for breach of contract. He could not in this Court get *restitutio in integrum* unless he proves that there has been fraud or mistake; nor can he get both the remedy here by *restitutio* and in the Transvaal by damages for the breach.

Mr. Innes replied.

The rule was made absolute (expunging certain words) with costs.

The Chief Justice said: Upon the information before the Court, it appears to be clear that the rule should be made absolute. If there had been a tender on the part of the respondents to deliver the shares, which under the contract they had bound themselves to deliver, I should have refused to make the rule absolute. But the delivery of the shares seems to me such an essential part of the contract that there is almost a total failure of the consideration if these shares are not delivered, and if so then the respondent Ludington would not be entitled to transfer to the respondents, the South African Tobacco Company, the patents which had been registered in this colony. I think, however, that that portion of the rule including the words, "pending an action

to be instituted by the petitioner" ought to be omitted, because I do not see what object there can be in the petitioner bringing an action in this Court. If he succeeds in obtaining damages in the Transvaal Court then clearly he would not be entitled to a continuance of the rule, and leave ought therefore to be reserved to the respondents to have the rule discharged, as, for instance, if the respondents should at any time tender these shares or if damages should be obtained by the applicant in the Transvaal Court. As to the costs of this application, it seems to me that the Tobacco Company ought to pay them. Liddington is only a formal defendant. It is not quite clear that he has been personally served, and in any case he also would have the right to apply to have the rule set aside. The Court will now make the rule absolute, omitting the words "pending an action to be instituted by the petitioner," the respondents, the defendant company, to pay the applicant's costs.

[Applicant's Attorneys, Messrs. Walker & Jacobsohn; Respondents' Attorney, Gus. Trollip].

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

R. v. STUURMAN. } 1897. Feb. 3rd.

Mr. Justice Maasdorp stated that a case had come before him as Judge of the week in which the Resident Magistrate of Willowmore had convicted one Stuurman of having contravened section 28 of Act No. 23 of 1888, by having, in connection with others, attempted to break out of the Willowmore gaol. Stuurman pleaded not guilty, was found guilty, and sentenced to three months' hard labour. In his (Mr. Justice Maasdorp's) opinion, there was not sufficient evidence to justify the sentence, which must therefore be quashed.

BASSON v. VAN ZYL. } 1897. Feb. 3rd.

Magistrate's Court — Summons — Account — Costs.

The omission to deliver with a summons in a civil case in a Magistrate's Court, a full account relating to the claim is not fatal in case such omission has not prejudiced the defendant in his defence.

The plaintiff alleged in his summons that the defendant had, for valuable consideration, promised to pay a debt owing by the plaintiff to A., and that the debt not having been so paid, the plaintiff incurred and paid certain costs in defending the action brought against him for the debt by A.

Held that *these allegations disclosed no ground of action by the plaintiff against the defendant to recover the amount of costs so paid.*

This was an appeal from the decision of the Acting Resident Magistrate of Piquetberg, in an action (for the recovery of £16 12s. 8d.) in which the present appellant was plaintiff.

The summons in the Court contained two counts, the plaintiff claiming as follows:

1. The sum of eleven pounds five shillings sterling being balance for the work and labour of the plaintiff performed for the defendant at his request during the months of November and December, 1895, and January and February, 1896, and which said amount of £11 5s. defendant undertook: and promised to pay one Abraham J. van der Merwe, who was a creditor of plaintiff for a similar sum, but failed so to do.

2. The sum of £5 8s. 8d. being the taxed costs paid by plaintiff to the trustees of the insolvent estate of the said Abraham J. van der Merwe in July, 1896, incurred by them in recovering from the present plaintiff the sum of £11 5s. as above mentioned.

The following account was annexed to the summons:

J. J. VAN ZYL

Dr. to R. J. G. BASSON.

To work and labour done during months of November and December, 1895, and January and February, 1896	£59	12	6
Received on account by cash ...	48	7	6
Balance	£11	5	0
To costs of suit, Insolvent Estate, A. J. van der Merwe v. R. J. G. Basson	5	8	8

The defendant before pleading raised the following exceptions:

This summons is bad and vague in law and shows no ground of action.

In that defendant was not served with a proper copy of account upon which the demand is founded, viz.:

(*a*) That it is not stated what work and labour has been performed by plaintiff.

(*b*) What wages the plaintiff claims and what agreement there was between the plaintiff and defendant as to wages per day, week, or month.

(*c*) That no properly specified account has been served on defendant showing how plaintiff arrived at the sum of £59 12s. 6d. due for work and labour less £48 7s. 6d. as received on account by cash so as to arrive at the balance of £11 5s.

(*d*) That it is not properly and distinctly stated in the second part in the summons how plaintiff arrived at the amount of £5 8s. 8d., taxed costs paid. How these costs were incurred, by whom they were taxed, and that defendant was not served with a proper account of same, or copy of bill of costs taxed.

The Resident Magistrate upheld the exceptions for the following reasons:

In this case, before pleading, defendant's agent excepted to the summons (on the ground above set forth). Plaintiff's attorney in reply merely quoted *Robinson and Curlewis* (R.M. C. Act), which gives a copy of the plaints as laid down in section 16, schedule C of Act 20 of 1856, stating that as he had followed the form of plaint therein set forth his summons is good and sufficient, also that the accounts annexed are sufficiently explicit.

It is not my custom to encourage frivolous exceptions or to entertain them, unless in my opinion there are really good grounds for their being raised, but in this instance even supposing the plaint in the summons to be sufficient for *purpose of pleading*, the accounts annexed do not in my opinion set up *explicitly* enough the real cause of action in order to frame a defence.

Van Zyl, in his *Judicial Practice of South Africa*, states, p. 22: The summons should set forth briefly, but clearly the nature and cause of action or complaint, and the relief sought by plaintiff, so as to leave the defendant no room for doubt as to what is meant or demanded or required of him.

Also on p. 29, Van Zyl says: It is true that the object of a summons is to bring the defendant into court at as little expense as possible, and that if he intends to defend the action he will get the information from plaintiff's declaration to be served on him afterwards, but unless he has full knowledge of the plaintiff's claim, he is often unable to take advice on the summons as to "whether he can defend or not."

I am aware that the chapter above quoted bears upon judicial practice in the three Higher Courts, but I take it that the principle also applies to summonses in inferior Courts, and in these Courts it is the rule to set forth fully in the summons the *whole* ground of action, at all events the account required by Rule 10, Schedule 9 of the R. M. Court Act should be sufficiently explicit to supply the place of the plaintiff's declaration in the Higher Courts. In my opinion both accounts are vague and do not disclose a cause of action in such manner as to be able to establish a defence. I therefore upheld the exception with costs.

Against this decision the appeal was now brought.

Mr. McGregor, for the appellant: The summons is mainly in the form of plaint in Schedule C, Act 20 of 1856, and therefore is as clear as need be. The account served with the summons is not necessary if it is clear from the words of the summons what the claim is. The account annexed is not full—but need not have been annexed at all. On count I. the Magistrate should have heard the parties *Slater* v. *Brits* (7 E.D.C., 151). As to count II—unless it can be assumed that plaintiff was the mandatory of defendant, we must abandon it.

The Court intimated that it wished to hear counsel for the respondent on count I. only.

Mr. Buchanan, for the respondent: The whole point is whether the summons is clear. Now Rule 10 Schedule B, Act 20 of 1856, provides that the account shall be served with the summons; and the Magistrate can only excuse an insufficiency in the account if the defendant is not prejudiced in his defence. The account served in this case does not take the summons any further except as to the amount. The defendant is seriously prejudiced in his defence not knowing what case to meet. The rule of procedure in the Resident Magistrate's Court differs from that in the Supreme Court, where the issues are developed on the pleadings.

De Villiers, C.J.: If the omission to deliver a copy of an account with the summons is not fatal in case such omission has not prejudiced the defendant in his defence, then *fortiori*, the fact that an account which was in fact delivered was not quite complete would not under similar circumstances be fatal to the summons. The account delivered in the present case is fairly complete, but even if it were otherwise, I am satisfied that the defendant has in no way been prejudiced in his defence by reason of the form of the account. The exception to the first count ought not to have been sustained, and to this extent the appeal ought

to be allowed. As to the second exception, it was properly sustained by the Magistrate The count to which exception was so taken alleges, in effect, that the defendant had for valuable consideration promised to pay a debt owing by the plaintiff to a third party, that the debt was not so paid, and that the plaintiff incurred and paid certain costs in defending an action brought against him by such third party for the debt. These allegations clearly disclose no ground for an action to recover the amount of the costs so paid from the defendant.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

LOUW V. ANDREWS. } 1897. Feb. 3rd.

Pledge— Delivery— Attachment — Possession.

A certain horse belonging to a judgment debtor was found by the Messenger of the Court on a farm occupied by such debtor running with her other cattle, and was attached in execution of the judgment.

Before such attachment the horse had been pledged by her in security of a debt due to the pledgee and delivered to the pledgee's agent, and by him left in the possession of the debtor's minor son, who lived with his mother and was entirely under her control;

Held, *on appeal in an interpleader suit, that the attachment was valid as against the pledgee.*

This was an appeal from the decision of the Acting Resident Magistrate Albert, (Burgher sdorp), in an interpleader suit brought on 5th December, 1896, in which the respondent claimed as his property a certain mare which had been attached by the messenger of the Court under a writ of execution issued after an action brought by the present appellant, Katrina Louw, against one Anna Louw, of Vaalbank.

The evidence of the respondent before the Resident Magistrate was to the effect that after Anna Louw had lost a case with one Leecher she asked the respondent to pay the judgment debt and costs. This he did after getting security under a written agreement (marked A, as referred to by the Acting Resident Magistrate in his "Reasons") purporting to pledge with him certain six horses (amongst which was the chestnut mare in dispute) then running on the farm Vaalbank In this agreement Mrs. Anna Louw undertook to deliver the horses to Hans Louw, as agent for the respondent, "to hold as the respondent's sole and universal property." Hans Louw was one of the parties to the agreement, and therein undertook in accepting the agency to hold the horses at respondent's sole disposal to herd them, and not to remove them from Vaalbank without respondent's permission.

The respondent stated that his agent received delivery of the horses on his behalf; and that he himself took all the horses away from Vaalbank except the chestnut mare, which was astray at the time.

The respondent further stated that at the time the agreement was made the mares were only handed over as security, but that they were to remain his property absolutely (and irrespective of their value) in the event of the costs not being paid.

Philip Louw (son of Anna Louw) stated that after the horses were delivered to Hans Louw the latter delivered them to him to take care of and returned to Burghersdorp. The chestnut mare remained at Vaalbank, under his own charge on behalf of Mr. Andrews, running with the other cattle on the farm. He had always formerly looked after it on behalf of his mother, Anna Louw. He himself was 19 years of age, and entirely under his mother's care and control. He received no payment for looking after the horses.

The Messenger of the Court stated that he seized the mare in execution while running on the farm Vaalbank; the chestnut mare was claimed by Philip as his own property. No one said it belonged to Andrews, the latter had, a few days earlier, asked him to go to Vaalbank and bring in the mares belonging to him and running there.

The Acting Resident Magistrate declared the mare to be not executable for the following reasons.

I believe that the facts proved in this case are:

That the chestnut mare in dispute was the one mentioned in agreement marked A and was *bona fide* handed over and delivered to Mr. Andrews by Anna Louw through the agent mentioned—Hans Louw—and specially appointed for that purpose in that agreement and

was retained by Hans Louw's herd as Mr. Andrews' property, therefore virtually in the possession of Mr. Andrews until seized by the deputy messenger. The mare was delivered at Vaalbank on the first occasion referred to in the record and subsequently grazed at Paardenvertlies, whither Philip went to fetch it at a later date to bring it to Barghersdorp for Mr. Andrews, when the deputy-messenger seized it at Vaalbank. Notwithstanding the fact that the evidence is weak and unsatisfactory and the agreement ambiguous, as will be seen, I am convinced that the transaction was *bona-fide* and not a colourable one. It will be seen that the deputy-messenger was informed by Mr. Andrews that there were certain mares at Vaalbank, which he desired the deputy-messenger should bring in for him. It is true it was only three days before the writ was executed. The transaction might have been made more public and in this respect the case is weak. However I am convinced of the *bona-fides* thereof, and that justice has been done, the record and annexures speak for themselves. The transaction is subsequently confirmed as will be seen, and the intention of the contracting parties when entering into the agreement is shown.

Mr. Schreiner, Q.C., for the appellant: The decision in this case depends largely on the special facts *Beattie* v. *Fennell* (5 J., 37) shows that the onus in interpleader suits lies on the claimant. See also *Dos* v. *Colonial Government* (8 J., 19). In the present case the mare was not in the possession of the claimant at all. There must be delivery to the pledgee himself or his agents, and there must be retention of the possession.

Mr. Graham, for the respondent: The transaction was a *bona-fide* one. Hans Louw clearly was the appointed agent of the pledgee, and clearly stated he accepted Andrews' delivery for the purpose of the pledge, and appointed the herd then on the pledgor's farm to look after the cattle for him. This was the most convenient means of delivery. *Payne* v. *Yates* (9 Juta, 494) differs from the present case in that Jason, the holder there, did not remain the servant of the pledgor. But there is nothing here to show that Hans Louw or Philip remained the servant of the pledgor. See *N.W. Bank* v. *Poynter, Son & McDonald* (11 Vol. the Report 1895, page 125). The agent *in this case was* a relation of the pledgor, but *he was appointed* for the specific purpose of *receiving delivery.*

The Chief Justice: Did Hans tell Andrews *that he had appointed* Philip to look after the *horse?*

Mr. Graham: There is no evidence that he did.

The appeal was allowed with costs.

De Villiers, C.J.: The contract between the plaintiff and Anna Louw was in substance a contract of pledge and not of sale. There was a right to purchase under certain circumstances, but at the time when the horse was attached that right had not been exercised. The horse was one of several which had been delivered to the plaintiff as security for a sum of money advanced by him to Anna Louw. These horses were duly delivered to the plaintiff's agent, Hans Louw, and if they had remained in the agent's possession the pledge would have remained in force. But Hans Louw delivered the horses to his younger brother Philip, the debtor's minor son, who lived with her and was entirely under her control. Evidence was given to the effect that the horses were given to Philip to take care of, and if he had been an independent herd his possession might fairly be held to be the possession of the plaintiff's agent. But not only was Philip entirely under the control of his mother but the horse in question was by him allowed to run together with his mother's horses and when attached was found by the messenger on a farm in her possession. If the general principle is to be maintained that a pledgee loses his preference if the pledgor obtains possession of the articles pledged, the principle should certainly apply to a case like the present where the pledgor's minor son, who is entirely under her control, obtained possession of the pledged horse and allowed it to run on her farm with her cattle. The appeal must be allowed, with costs in this Court and in the Court below.

Buchanan, J., concurred: The effect of the evidence is that the pledgor retained possession and control of the property pledged.

Maasdorp, J., concurred.

Appeal allowed accordingly with costs.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

REYNOLDS V. OAK. } 1897. Feb. 4th.

Mr. Buchanan apolied for the final adjudication of the defendant's estate. The provisional order was granted January 25 last.

Granted.

TEUBES V. LAKAS.

Mr. Jones applied for provisional sentence on two mortgage bonds, one for £25 with interest at 8 per cent. from March 1, 1895, and the other for £10 with interest at the same rate from November 5, 1895, and asked that the property specially hypothecated be declared executable.

Granted.

In re G. A. P. BACHMESCH.

Mr. Buchanan applied for the discharge of the insolvent George Albert Paul Bachmesch, under section 106 of Ordinance No. 6 of 1843.

Granted.

GENERAL MOTIONS.

IN THE MATTER OF THE MINOR LOUBSER.

Mr. Jones moved for authority to the Master to pay the sum of £45 per annum for four years out of the funds in his hands belonging to the minor for the latter's maintenance and education.

Granted.

IN THE MATTER OF THE MINORS VAN NIEKERK.

Mr. Maskew moved for authority to the father to raise a sum of £150 on mortgage of certain landed property for the purpose of restoring buildings destroyed by fire.

Granted.

LAZARUS V. LEWIS; LEWIS V. LAZARUS.

Costs—Interdict.

These were a motion and cross-motion for the costs of certain proceedings heard in the Supreme Court on the 19th and 23rd November last (6 Sheil, 429).

Mr. Schreiner, Q.C., appeared for the applicant in the motion and the respondent in the cross-motion; Mr. Searle, Q.C., appeared for the respondent in the motion and the applicant in the cross-motion.

After argument,

The Chief Justice gave judgment. He said: All the proceedings in this case were set in motion by the respondent, and it was owing to him that the costs were incurred. He moved to interdict the Registrar of Deeds from registering the trade mark of Lazarus. That was fully discussed in court, and many affidavits were filed. Probably it may now be found that many of these affidavits were not necessary, but, at the same time, Lazarus was bound to be prepared with his affidavits, considering that Lewis in his affidavits had gone into the whole merits of the case. The Registrar of Deeds has decided the matter entirely in favour of Lazarus, and from his judgment there is no appeal. Lewis therefore has failed on every point, and he therefore is the one who must pay the costs upon every principle which regulate the granting of costs. The application of Lazarus must be granted, with costs, and the cross-application be dismissed, with costs.

[Applicant's Attorney, G. M. Walker; Respondent's Attorneys, Messrs. Findlay & Tait.]

THE PETITION OF THE METROPOLITAN AND SUBURBAN RAILWAY COMPANY.

Mr. Searle moved for an order for the attachment *ad fundandam jurisdictionem* of two locomotives belonging to John Fowler & Co., for the purpose of an action to be instituted against them by the petitioners.

The order was granted, with leave to sue by edictal citation, returnable on the first day of next term, personal service to be effected.

IN ESTATE OAK.

Mr. Buchanan applied for the appointment of a provisional trustee in this estate, with powers to sell the perishables and live-stock.

Granted.

WINDLEY V. FAVRE. } 1897. Feb. 4th.

British Bechuanaland Annexation Act, 1895—Magistrate's Court—Pending causes—Postponed case—Jurisdiction—Power of Attorney—Resident Magistrate's Court—Substitution Supreme Court.

Before the annexation of British Bechuanaland the plaintiff sued the

defendant in a Resident Magistrate's Court of that territory on a promissory note which was produced as evidence at the trial.

The case was postponed to enable the defendant to produce evidence for the defence, to the effect that the promissory note had been paid.

After the annexation the case was called on but before a different Magistrate, and, on exception taken, he held that he had no jurisdiction and that the action must commence de novo.

Held, on appeal, *that although the Magistrate was not bound to accept as evidence any oral evidence previously taken before another Magistrate, yet as the promissory note had been produced and the defence was payment, he ought to have called on the defendant to produce evidence in support of the defence.*

This was an appeal from the decision of the Resident Magistrate, Gordonia.

The appellant prior to the annexation of British Bechuanaland to the Colony, sued the respondent in the Resident Magistrate's Court, Gordonia, upon a promissory note for £59 6s. 6d. The case was partly heard, and the respondent obtained a postponement of the case for the purpose of obtaining witnesses to prove that the amount due on the note had been paid. Before postponement the note had been produced and filed with the records. Before the case came on again for hearing the territory had been annexed to the colony, and a new Magistrate had been appointed. On the case coming on again for hearing, respondent's agent raised an exception to the Resident Magistrate's proceeding with the matter, urging that the case should in view of all the circumstances be commenced *de novo*.

This exception was upheld by the Resident Magistrate, and he refused to proceed with the case, dismissing the action.

Against this the appeal was now made

Mr. Searle, Q.C., for the appellant.

Mr. Graham, for the respondent, stated that the Registrar had refused to accept the power given to appear in this Court, by the attorney. The latter's power was given to him to appear in the Resident Magistrate's Court, which he did. The power contained the usual clause giving powers of substitution, but it was entitled "In the Resident Magistrate's Court." The Registrar held that it applied only to the proceedings in the Resident Magistrate's Court and gave the attorney no power to substitute anyone to appear in the Supreme Court.

The Chief Justice: The Registrar was quite right in refusing to accept this informal power. Being headed "In the Resident Magistrate's Court" the power only applies to proceedings in that Court. But it will be better to proceed if the parties will consent.

Mr. Searle having consented, the informality was waived with the permission of the Court.

Mr. Graham then took the objection that the appeal was not lodged within the proper time. It was not as a fact noted till thirty days after judgment instead of by next Court day. The case was partly heard before annexation—the judgment was given after. Under Act 41 of 1895, the Resident Magistrate's Rules of Court would apply. It is true that in *Smith* v. *Pinto* (Buchanan 68, page 105) the Court extended the time for appeal. But the Rule of Court is very explicit. (33rd Rule, schedule B, Act 20 of 1856.)

The Chief Justice: When did your *client* get notice of intention to appeal? If Mr. Searle formally applies we will allow the appeal to be heard even now, on the ground that the parties may well have believed that the old Act applied; the matter having gone so far before the annexation. The notice was given within the longer period allowed before annexation.

Mr. Searle then formally applied accordingly; and leave was granted to proceed.

Mr. Searle referred to section 11, Act 41 of 1895; and *Will* v. *Humphreys* (6 Sheil, 5); and continued: Act 20 of 1856 makes special provision as to criminal cases; where the case is remitted the Act is careful to show that it is the Court, not the individual magistrate, which is of importance. But there is no provision as to civil proceedings. Still the Resident Magistrate had a right to proceed with the case as he found it. He ought not to begin *de novo*; he could go on with the record. The note was part of the record. The signature was not denied.

Mr. Graham: The Resident Magistrate could not give judgment on evidence part heard by another Resident Magistrate. The Resident Magistrate had no legal evidence before him on which to give judgment.

De Villiers, C.J.: This case, it appears, came on for trial before a Magistrate of British Bechuanaland before the annexation of that territory. It was an action on a promissory note which was produced at the trial and the case was postponed to enable the defendant to

produce evidence in support of his defence that the note had been paid. After the annexation the case was called on but before a different Magistrate and the exception was taken that the case must commence *de novo*. The Magistrate upheld the exception on the ground that he could not accept as evidence any evidence previously given before another Magistrate. I quite agree that, notwithstanding section 11, sub-section A of Act 41 of 1885, the Magistrate was not bound to accept oral evidence previously taken before another Magistrate, but that was what the Court was asked by the plaintiff to do. The promissory note had been produced and presumably was of record, and the only question was whether the note had been paid. In order to enable the Court to decide that question the defendant ought to have produced his witnesses, but instead of taking that course he excepted to the jurisdiction. Clearly, the Court ought not to have put the plaintiff to the expense of issuing a fresh summons but ought to have called on the defendant to produce his evidence. The appeal must be allowed with costs, and the case remitted to be tried on its merits. Costs in the Court below to be costs in the cause.

[Appellant's Attorney, Gus. Trollip; Respondent's Attorneys, Messrs. Walker & Jacobsohn].

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

**In Re* THE BARQUE "OBERON." { 1897. Feb. 5th. Feb. 12th.

Ship—Attachment *ad fundandam jurisdictionem*.

This was an application on petition by Messrs. Woodhead, Plant & Co. for the attachment of the barque Oberon, which was about to leave the Docks. An affidavit had been filed by Messrs. Woodhead, Plant & Co. to the effect that in October, 1896, at Middlesborough-on-Tees, their agent shipped by the Oberon 19,281 bags of Thomas's phosphate powder. The ship arrived in December, 1896, and subsequently came into dock, where, owing to the negligence of master and crew, the cargo was damaged by salt water. Messrs. Woodhead, Plant & Co. sustained damages to the extent of £3,590, and were apprehensive that the ship would leave without satisfying their claim, and further, they intended to institute proceedings against the owners of the barque for the recovery of damages.

The Chief Justice: When did the damage occur?

Mr. Schreiner said that it occurred after the vessel came into dock on January 21, 1897.

The Chief Justice: Why have they waited until she is about to leave?

Mr. Schreiner said that efforts had been made to settle the question, but they had not so far been successful. The ship was then moving out into the Bay, and the petitioners required an attachment for the purpose of founding jurisdiction. It was quite possible that a settlement would still be effected.

The Chief Justice: You say it was through the neglect of the master.

Mr. Schreiner said the petitioners contended that there was no due delivery, and the damage was due to no peril of the sea. The ship was moored alongside the quay when she was discovered to be sinking, but there had been no discharge of cargo.

The order for the attachment of the ship, *ad fundandam jurisdictionem*, was granted with leave to the master to apply on Tuesday next or some future date on due notice for the discharge of the attachment.

Postea (February 12th).

Mr. Schreiner mentioned the matter of the barque Oberon, which was recently attached by order of the Court. He said that an agreement had been arrived at between the parties with a view to releasing the ship from attachment. Security had been arranged in the sum of £2,000, and this sum being in the hands of the Standard Bank, jurisdiction would still be maintained after the release. The parties were satisfied with the security if the Court would approve of the vessel's release.

The Court granted an order for the release of the ship from attachment.

[Applicants' Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, C. C Silberbauer.]

* See the subsequent case of Woodhead, Plant & Co. v. Gully, heard 24th February, 1897.

WILL V. DE JUY. } 1897. Feb. 5th.

Settled account—Written acknowledgment of debt—Opening account—Attorney and client—Mistake.

Where, on a sett ement of accounts, a written acknowledgment of debt has been given by one party in payment of the balance found to be due to the other, the Court will, in a suit on such acknowledgment, allow the accounts to be opened and re-examined upon proof of some material mistake in such accounts.

A settled account between attorney and client, or between other persons standing in confidential relations to each other, will be more readily opened than accounts between persons standing in independent relations towards each other.

This was an appeal from the decision of the Resident Magistrate of Gordonia in an action brought by the plaintiff against the defendant for the recovery of £7 16s. 4d., with interest from December 3, 1895, upon a good-for signed by the defendant in favour of the plaintiff, and for six shillings and seven pence for work done between December, 1894, and July, 1896, being balance of an account of £2 6s. 2d. less £1 14s. 7d. paid on account.

Mr. Searle, Q.C., a. peared for the appellant, and Mr. McGregor for the respondent.

Mr. McGregor raised an objection to the appeal being proceeded with on the ground that the appeal was not noted in due time. The case was heard on August 4, and the appeal was not noted till September 3, 1896. He submitted, as the plaintiff was an attorney himself, he should have been specially careful to have conformed to the rules, and that he could not now be heard.

Mr. Searle said he could not deny that the appeal was not noted in due time, but he would ask under the special circumstances (as c'early it was a matter in which the plaintiff had been misled by the practice which had previouly prevailed in Bechuanaland), that special leave might be given to proceed with the appeal. He cited *Smith* v. *Pinto* (Buch. 68, p. 105) and referred to *Windley* v. *Faere* decided yesterday. Our appeal was noted within the time prescribed by Proclamation 198 of 1894, which was law prior to the annexation As a fact respondents have themselves delayed in giving us notice of this objection.

The Chief Justice: How is it that this objection was not taken earlier?

Mr. McGregor: Some of the correspondence was mislaid. Appellant has suffered no possible prejudice through our delay. Counsel cited *Queen* v. *Prins* (1 Sheil, 199); *Wiggett* v. *Mossel Bay Municipality* (9 J. 246).

The Chief Justice: If this had been an appeal from one of the older and more settled districts in the Colony I should have had no hesitation in refusing to allow this appeal to proceed, but we cannot lose sight of the special circumstances under which the parties have been acting, and it is quite possible that the new law might have escaped their notice. It is quite true that Mr. Will is an attorney of this Court, and ought to have known better, but probably the fact that the law had been changed escaped his notice, and under all these circumstances it would be better to allow the appeal to proceed, if Mr. Searle makes a special application.

Mr. Searle then formally made the special application, and the appeal was therefore proceeded with.

At the hearing before the Resident Magistrate the plaintiff stated that he had acted as the defendant's attorney; that he had repeatedly endeavoured to obtain a settlement of the amounts due to himself; that finally the accounts were gone into with defendant who gave the good-for for £7 16s. 4d., the amount ascertained as the balance due. On the account annexed to the summons there appeared an item £1, which plaintiff at first stated was an amount for which he had guaranteed defendant with one Holmes, at whose shop defendant wished to buy some goods; but in cross-examination, plaintiff could not deny that the amount was due to defendant for his expenses as a witness in a case brought by one Marquardt. The defendant stated that on applying to plaintiff for payment of his witness expenses the latter said he could not give him the money just then, but would instead give him an order on Holmes for goods, which he did.

The account rendered defendant on which the settlement was arrived at also contained charges for pound fees, and on a bill of costs as attorney for the defendant in a case *Lennox* v. *De Juy* (the present respondent). The plaintiff refused to answer questions put to him as to whether he had renderd Mr. Lennox an account or had credited him with the costs now charged against defendant. As to the pound fees the defendant admitted the correctness of some of the items but disputed the rest.

The Resident Magistrate gave judgment of absolution from the instance with costs; the following were his reasons:

In this case the plaintiff sued defendant on a good-for and other charges amounting to £8 2s. 11d.

It has been proved in evidence that the amount of £1 paid by one Holmes on account of plaintiff to defendant was for witness expenses due to defendant; also this was subsequently admitted by plaintiff after production of an order to Holmes. Consequently the defendant could not be charged with the amount and interest thereon.

The items for pound fees are very doubtful, and the plaintiff has not clearly proved that he is entitled to charge these items.

The case of *Lennox* v. *De Jay* was settled out of court; the bill of costs charged by plaintiff who is an attorney of this court is absurd and illegal and the plaintiff clearly has no right to make this exorbitant charge.

Most of the charges appear so doubtful that I find it impossible to separate the items really due from those doubtful.

For these reasons my judgment will be absolution from the instance with costs, leaving the plaintiff to bring on his case again if so inclined in a more correct and legal form.

Against this decision the appeal was now made.

After argument,

The Court dismissed the appeal.

De Villiers, C.J.: There is no doubt that in a suit on a written acknowledgment of debt, the burthen of disproving its correctness lies upon the defendant. As between men of business dealing independently with each other it would be difficult to satisfy any Court that a good-for or other acknowledgment of debt given on a settlement of accounts does not truly represent the defendant's indebtedness. Where, however, errors are shown in such accounts the defendant would be entitled to have them thoroughly investigated, notwithstanding any settlement which may have taken place. In the present case, not only have errors been admittedly made in the accounts rendered by the plaintiff, but his relation towards the defendant was the confidential one of an attorney towards his client. The Magistrate was quite justified in more readily opening the accounts between them, although these had been settled by means of a good-for. That document itself shows the defendant to be a somewhat illiterate man, for the signature is that of a man who is hardly able to write his own name. The result of opening the accounts was to show that there were two important items which required some explanation from the plaintiff. As to the first of these items he refused to answer perfectly relevant questions put to him in cross-examination, and the Magistrate was justified in drawing his own deductions from such refusal. As to the other item he did not refuse to give information, but the explanation which he gave was quite unsatisfactory. The two items together exceed the sum claimed, and the Court below correctly pronounced absolution from the instance. The appeal must be dismissed with costs.

Buchanan, J., and Maasdorp, J., concurred.

Appeal dismissed accordingly, with costs.

[Appellant's Attorney, Gus. Trollip; Respondent's Attorneys, Messrs. Walker & Jacobsohn.]

SUPREME COURT

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

SHEAR v. RADEMEYER. } 1897. Feb. 9th.

Summons—Pleading—Material allegation—Oral contract—Written agreement—Variance.

R. *and* S. *entered into an oral agreement for the sale to* S. *of the feathers of certain twenty ostriches.*

Thereafter a written agreement was entered into confirming the oral arrangement, but not specifying the number of ostriches the feathers of which were sold.

S. *sued* R. *upon the oral agreement for damages for breach of contract, but the defendant excepted to the summons on the ground that it did not state that as a fact the ostriches had borne any feathers, and further that the summons was at variance with the written agreement. The Resident Magistrate upheld the exceptions.*

On appeal the Court held that *the presumption was that in the ordinary course of nature the ostriches would bear feathers and that it was not necessary to allege that the ostriches*

had borne them, and held further that the parties did not intend to embody the whole of the oral in the written contract, and that plaintiff was entitled to sue as he had done.

This was an appeal from the decision of the Resident Magistrate, Uniondale, in a case in which the appellant was plaintiff and the respondent defendant.

The summons in the Court below called on defendant to show why he had not delivered to Zelich Shear, of Uniondale, trading at Uniondale, the plaintiff, the feathers of certain twenty-one ostriches or paid him the sum of £11 10s. sterling, and at the same time to show cause why he should not be condemned and ordered: (1) To deliver to the plaintiff the feathers of certain twenty ostriches sold by the defendant to the plaintiff as agreed upon orally at the house of the plaintiff in the village of Uniondale on or about the 24th day of March, 1896, by the plaintiff and defendant, which said feathers defendant undertook to deliver to the plaintiff during the months of April and October, 1896, on his farm Souterwater, which agreement was partly ratified and confirmed in writing by the defendant on or about the 2nd day of April, 1896, at Souterwater, in respect to his (defendant's), liability and undertaking to deliver date of delivery and price of the said feathers per lb. only, but in which confirmation of said agreement the defendant failed to specify the number of ostriches of which the feathers had been sold and had to be delivered by him to the said plaintiff, copy of which confirmation of said agreement is hereunto annexed, and which the said defendant on divers occasions subsequent to the 2nd day of April, 1896, was requested and undertook, but now refuses and neglects to deliver to the said plaintiff; or in default thereof to pay to the said plaintiff the sum of £10 sterling as damages sustained by the said plaintiff by reason of the breach on the part of the said defendant of the said agreement and contract as set forth above, and failure and refusal to render and deliver the feathers of the said twenty ostriches to the said plaintiff during the time intervening between the said months of April and October, 1896, and in that the said plaintiff went out several times to the said farm Souterwater, about forty-two miles from the village, to get delivery of said feathers and which could have been sold by him to others at a profit.

A second count in the summons set forth that defendant had agreed to deliver the feathers of three other ostriches at 15s. per ostrich, but had failed to deliver the feathers of more than two of the birds though plaintiff had paid the amount of £2 5s.

The plaintiff admitted that certain tenders had been made by defendant, which tenders the plaintiff deemed insufficient. Wherefore the plaintiff prayed that the defendant might be ordered:

(*a*) To deliver to the said plaintiff the feathers of the said twenty ostriches as set forth in plaint of this summons or in default thereof to be adjudged to pay the sum of £10 sterling for damages.

(*b*) To deliver to the said plaintiff the feathers of one ostrich as set forth in plaint two of this summons, or in default thereof to be adjudged to pay the sum of £1 10s. sterling, together with interest *a tempore morae* and costs of suit.

The following was the agreement signed by Rademeyer and annexed to the summons:

"I herewith promise to sell ostrich feathers to Mr. Shear at £1 2s. 6d. per 100 just as the feathers are plucked, with white feathers, also to pluck and deliver the last of the feathers in October, 1896. I am still to receive the money."

Before the Resident Magistrate the defendant by his agent took exception to the plaintiff's summons as follows:

1. That no cause of action is disclosed in said summons, thereby prejudicing defendant's defence.

2. That the said summons is entirely at variance with the written agreement between plaintiff and defendant and annexed to said summons. Wherefore defendant prayed that said summons be dismissed, with costs of suit.

The Resident Magistrate upheld the exception for the following reasons:

The reasons which the Court held and considered would prejudice the defendant in his defence are that the summons is defective in that it states that an oral agreement was entered into between the parties at Uniondale on the 24th March, 1896, and that this agreement was partly ratified and confirmed in writing at Souterwater on the 2nd April, 1896.

Against this decision the appeal was now brought.

Mr. Innes, Q.C., for the appellant: The summons clearly discloses a cause of action. It is not very artistic, but it is clear what are the grounds of plaintiff's grievance. He sues upon the oral agreement and annexes the subsequent written contract; which was unnecessary, as the document might have been put in as evidence at the hearing. It is clear that what the plaintiff means by saying that the oral agreement *partly* ratified the verbal under-

standing is that the document was incomplete, as it did not state the number of birds. The annexing it to the summons does not embarrass plaintiff; it is not inconsistent. The summons does not mention the purchase price but claims damages. The Resident Magistrate's reasons are absurd.

Mr. McGregor, for the respondent: The summons is so prolix as to be actually embarrassing and prejudicial to the defence.

Buchanan, J.: It rather benefits you; the plaintiff shows his hand.

The summons discloses no cause of action.

Plaintiff founds on a contract for the sale of ostrich feathers to be delivered in April and October. There his claim is for things not yet *in esse*: it appeared to be in the nature of *emptio rei operatæ*. That being so, there must be an allegation that at the respective dates when delivery could be claimed, there actually were feathers *in esse* and deliverable. *Pothier on Sale*, p. 5; *Meyle's Civil Law of Sale*, p. 31). Further, there was no allegation that any price had been agreed on, nor was any price mentioned in respect of the agreement of March 23 and 24. But that was the agreement sued on, as appeared from the remarks of appellant's counsel also. It is clear law that without any agreement as to price the *emptio* is *imperfecta*. The written agreement of 2nd April mentioned a price, but that was not the agreement founded on, and there the number of the birds was not mentioned. Plaintiff should clearly state in his summons on what agreement he founded; as it stood it was impossible to fix the time at which it alleged that there was mutuality. Regarding second count: Amount in dispute really is only 15s. (*vide* tender) and if the appeal were only allowed as to that small amount that should not affect the question of costs: *Klopper* v. *Van Straaten* (11 J., 94).

The appeal was allowed with costs.

The Chief Justice gave judgment. He said: There have been two exceptions to the summons in this case. The first is that no cause of action is disclosed, thereby prejudicing the defence, and the second is that the summons is at variance with a written agreement entered into between the plaintiff and the defendant. Now there is no doubt that the summons is exceedingly prolix. It is inartistic, and not such as one would expect from a practitioner of this Court; but we must consider the circumstances of the country, and the circumstances under which Magistrates' Courts are held. Agents are allowed to practise who have no experience, but what the Court has always required is that the defendant may know from the summons the case he is called upon to meet. Now although this summons is somewhat lengthy, I think there is no difficulty in ascertaining what the plaintiff really sued to recover. The main objection is the first exception. Now, reading the summons as a whole, it is quite clear that the plaintiff alleged: I bought from you the feathers of twenty birds, when they were plucked, at £1 2s. 6d. a bird. That is really what it comes to. You have to read the whole of the summons in order to come to that conclusion. If the defendant wished to prove that these birds had no feathers, it was quite competent for him to plead thus: It is quite true I sold to you the feathers that were to be plucked, but it so happened that those birds have not produced any feathers. Probably that would have been a good defence. When it comes to a question of pleading it appears to me sufficient if it is stated that the feathers of certain twenty ostriches were sold at £1 2s. 6d. a bird, the presumption being that those ostriches would in the ordinary course of nature bear feathers, and I don't think it was necessary to allege that those ostriches did bear feathers. Therefore on this point of pleading I am of opinion that the exception cannot be sustained. Then a second exception is raised with regard to the summons being at variance with the written agreement, and that is the ground upon which the Magistrate based his judgment. There was a complete oral agreement, but afterwards when they came to state in writing what they had agreed upon, they omitted to add what was in their minds, viz., that the feathers were the produce of twenty ostriches. All that seems to have been agreed upon before, but they omitted it in the written agreement, thinking that both would remember that they were contracting with regard to the feathers of twenty birds. Well, I don't see how the omission of "twenty" in this subsequently written agreement can in any way prejudice the defendant. This writing was not intended to embody the whole of the contract. It is not like a case where the Court has held that a written contract must be deemed to have embodied the whole of the oral contract. I think this is really too technical an objection, and full justice would have been done by the Magistrate by going into the matter. We must allow the appeal with costs, and remit the case to the Magistrate to be heard on its merits, the costs in the Court below to be costs in the cause.

[Applicants' Attorneys, Messrs. Walker & Jacobsohn; Respondents' Attorneys, Messrs Van Zyl & Buissinné.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

In re E. T. WINQUIST. { 1897. Feb. 10th.

Mr. Graham appeared on behalf of the creditors in the insolvent estate of Ernest Theodore Winquist, wine and spirit merchant, of Plein-street, and aerated water manufacturer, of Somerset-road, and applied for the appointment of Mr. James Jackson Bolam as provisional trustee, in order to carry on the business. The assets in the estate were valued at £3,011, and the liabilities amounted to £4,093, the petition being signed by creditors representing claims to the amount of over £2,000.

The application was granted.

HAUPT V. HAUPT. { 1897. Feb. 10th.

Marriage — Minor — Fraud — Restitution—Matrimonial domicile—Community of property.

The marriage of a minor must be deemed to be valid until annulled by judgment of a competent Court.

Minority is not per se *sufficient ground for annulling a marriage.*

If either party is entitled to restitution by reason of the fraud of the other, proceedings must be taken within a reasonable time after discovery of the fraud.

The matrimonial domicile must decide whether the marriage is in community or not.

The parties having gone to England with the intention of returning to this colony and residing here, the marriage took place during their temporary residence in England;

Held that *this Colony was the matrimonial domicile, and that, in the absence of an ante-nuptial contract, the marriage was in community of goods.*

H

This was an action for divorce instituted by Mrs. Johanna Maria Haupt against her husband, Pierre Frangois Haupt, on the ground of his adultery.

The plaintiff's declaration set forth:

1. The plaintiff resides at Mowbray, in the Cape district; the defendant, her husband, resides at Cape Town.

2. The plaintiff and defendant were legally married at the parish church of St. Marylebone, in London, on 3rd May, 1882. The said marriage still subsists, and there were born thereof six children; to wit, four boys and two girls all minors.

3. At the time of the celebration of the said marriage both the plaintiff and the defendant were domiciled in the Colony, and the said parties were married in community in accordance with the law of their domicile,

4. In or about July, 1896, at Cape Town, and subsequently on board the U.S.S. Greek, and thereafter during the years 1896 and 1897, and more particularly in January, 1897, at Cape Town, the defendant committed adultery with one Annie Steele.

The plaintiff claims:

(*a*) A decree of divorce.

(*b*) A division of the joint estate, including therein the defendant's life interest in respect of certain interest, income, and dividends accruing under and by virtue of the will of the late Daniel Egbertus Haupt.

(*c*) Custody of the children.

(*d*) That the defendant be ordered to pay the sum of £100 *per annum* towards the support and maintenance of the said children.

(*e*) Alternative relief and costs of suit.

The defendant was barred in default of filing plea. The defendant admitted (in court) the adultery, but contended that there was no community of property, and that the marriage with the plaintiff was not a legal one on account of the fact that he was not of full age at the time.

Mr. McGregor appeared for the plaintiff, and the defendant conducted his own case in person.

Johanna Maria Haupt, now residing at Mowbray, said that she was born at Drakenstein in the Colony, and her maiden name was also Haupt. She left the Colony before she was married to the defendant, who had lived in the Colony up to that time. They went to England together, and were married at St. Marylebone parish church about a month after their arrival in England. The defendant was supposed to be studying for the medical profession. They remained in London while the defendant was studying for about five years, and then the defendant came out to

the Colony, and she followed him. There were six children of the marriage, four of whom were living with witness, while two of the boys were taken away recently by the defendant. The eldest child was fourteen years of age. While they were in England she and her husband, who were cousins, were supported by an uncle, who remitted to them a sum of about £200 to £250 per annum. Witness had been permanently separated from the defendant since June, 1896. She knew a certain Nellie Steele, and recognised her photograph (produced). She was staying at Newlands, opposite witness's house, and witness had seen her on one occasion quite drunk in the afternoon. Since June she had seen Nellie Steele in company with the defendant and the two boys.

The defendant, proceeding to cross-examine, asked the witness whether she had ever misconducted herself before her marriage.

The Chief Justice: You cannot put that question. You have not pleaded misconduct.

Cross-examination continued: She was married in May, 1882, and her first child was born five months after the marriage, the defendant being the father. She had condoned all previous offences by the defendant up to last June, and had condoned certain offences when he returned from the Transvaal.

By the Court: She wished to have the custody of all the children, but she had no means of her own to support them, and was dependent on what the defendant could give her. She thought she could maintain the children on £30 a month.

Frederick Orken Cheese, porter at the Royal Hotel, stated that he knew the defendant fifteen years ago, when he was living in England with Mrs. Haupt as a married man. In June last the defendant came to the Royal Hotel with Nellie Steele, and they occupied the same room there, giving the names of Dr. and Mrs. Haupt. Since then he had seen them together at the Railway-station.

Cross-examined: He could not say whether there was another Mr. Haupt staying at the hotel at the time.

George William Steytler, secretary of the Colonial Orphan Chamber, said he was trustee under the will of the late Daniel Egbertus Haupt. Defendant had a life interest under that will, and received half of the total annual income from the estate, which amounted to about £1,000. The other £500 went to Daniel Haupt Brown. An arrangement had been made between the parties by which Mrs. Haupt received £17 a month and Mr. Haupt £7 a month. The defendant had surrendered his estate, and a loan had been raised to extinguish the debts, and defendant had insured his life to secure the loan. The defendant's debts would be finally extinguished in twelve or thirteen years. At present the creditors were receiving the net income less £24 a month.

Cross-examined: For the last six months he had paid the £7 a month to Mrs. Haupt on the defendant's instructions. Mrs. Haupt was the revisionary legatee after her husband's death. He was not aware that there was another bond of £2,000 upon the defendant's life interest.

By the Court: The payment of the £7 a month to Mrs. Haupt had been stopped since January. The defendant had been insolvent, but all his liabilities had been discharged by witness.

The defendant then entered the box. He said that he was married on May 3, 1882, and was then fifteen years of age. His present age was twenty-nine. He had no means to go to England. Plaintiff took him to England, but he did not know where she got the means from. She there forced him to marry her, and he found himself married before he knew what he had done.

The Chief Justice: But there is no plea of fraud or anything of that kind.

Defendant (continuing) said that in the August after the marriage a child was born Their married life had always been of a very unpleasant nature, both here and in England. He was not in a position to take steps to have the marriage declared illegal, and had had no means since his birth till the legacy came to him.

The Chief Justice: But you declared that you were of full age when you were married.

The defendant said he remembered making no such declaration. He had received notice that morning of the intention of the mortgagee (Daniel Brown) to foreclose in respect of the bond for £2,000 on his life interest.

The Chief Justice: But there is a complete cession to Mr. Steytler. How could you cede it to a second person.

Cross-examined: Daniel Brown was a co-legatee under the will.

Defendant, on leaving the box, and arguing upon the case, contended that his wife had not looked after the children, whom he had found in a state of neglect. She spent her time in going to religious meetings and Salvation Army meetings. He had no means, and only made enough to keep himself by an occasional speculation.

A decree of divorce was granted.

De Villiers, C.J.: The defendant denies the validity of the marriage, but I am satisfied that it was perfectly legal. He declared himself at

the time to be of full age and, in the absence of any proof to the contrary beyond his statement in the witness box, we must assume that the declaration was true. But even if he was not of age, his marriage must be deemed to be valid until it is annulled by judgment of the Court. His minority at the time of his marriage would not by itself have been sufficient ground for relieving him of the bonds of marriage: see Voet (4, 4, 45). If by fraud he had been inveigled into a marriage with the plaintiff without his father's consent, he would have had good ground for restitution, but only within a reasonable time after discovery of the fraud. No steps of any kind were taken, and now, after several years of married life and after six children have been born of the marriage, he seeks to raise this somewhat discreditable defence to an action for divorce. The next question is whether or not the parties were married in community of property. No ante-nuptial contract was executed and, therefore, if their matrimonial domicile was in this colony their marriage must be held to have been in community. The marriage took place in England, but according to the plaintiff's evidence, which I believe, the parties had gone there with the intention of returning to the Colony and residing here. Their relations lived here and the defendant's object in going to England was to study there for the medical profession. Clearly therefore the Cape was the matrimonial domicile, and in the absence of a contract the marriage must be held to have been in community. The adultery having been clearly proved, the plaintiff is entitled to a decree of divorce and to a division of the common estate. The Court will give her the custody of the minor children and order the defendant to pay her the sum of £1 10s. per month, in respect of each child, until such child shall reach the age of sixteen.

Buchanan, J., and Maasdorp, J., concurred.

Judgment for plaintiff accordingly.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

TEUBES V. MATTHEWS. { 1897. Feb. 11th.

Mr. Jones applied for provisional sentence on a mortgage bond for £30, with interest at the rate of 8 per cent., from March 1, 1885, and that the property might be declared executable.

Granted.

DE VILLIERS V. BURGERS.

Mr. Maskew applied for provisional sentence on a promissory note for £203 12s.

Granted.

SAMSON V. SAMSON.

This was an action for divorce, instituted by Johannes Adam Samson against his wife Katherina Maria Samson, by reason of her adultery with one Joseph Adams. Plaintiff claimed a decree of divorce, the custody of the minor children, and the forfeiture by the defendant of her rights in respect of her marriage to plaintiff in community of property.

Mr. Close appeared for the plaintiff; defendant was in default.

Reginald Douglas Herold Barry proved the marriage between the parties, which took place at Beaconsfield on June 30, 1891.

Johannes Adam Samson, the plaintiff, said he was married at Beaconsfield to the plaintiff, and there were two children of the marriage aged four and two years respectively. A man named Joseph Adams, his cousin, lived near him at Kimberley, and was very intimate with him. About two years after Adams came to Kimberley, in consequence of what he heard, he spoke to his wife, and told her not to put Adams's room in order which she was in the habit of doing. Subsequently his wife went away to her mother, and witness fetched her back, but she again left him. He had property when he married, but his wife had none.

The Rev. Thomas Haylett, minister of the Dutch Reformed Church at French Hoek, said he was formerly a minister at Beaconsfield, where plaintiff was an elder in his church, and was a very steady man. On returning to Beaconsfield he made inquiries, and found

that the plaintiff's wife had gone away to East London. Witness proceeded to that port, and found the plaintiff's wife living with Adams. They admitted that they were living together as man and wife; Mrs. Samson admitted that she was pregnant, and Adams said that he was the father of the child.

A decree of divorce was granted, the plaintiff to have the custody of the children, and the defendant to forfeit her rights in respect of her having been married in community of property.

[Plaintiff's Attorney, V. A. van der Byl.]

CRUYWAGEN V. GOID. } 1897. } Feb. 11th.

Rule 333—Documents—Inspection.

A defendant having in his plea stated that the contents of a certain document in his possession relating to matters in question in the action had been supplied to the plaintiff:

Held *on an application under the 333rd Rule of Court, that the defendant was bound to give inspection of such document to the plaintiff, who had not had sufficient opportunity to take a copy of the document.*

This was an application by the plaintiff (John Jacob Cruywagen) in a pending action (in which a plea had been filed by defendant) calling on the defendant Emily Goid to show cause, if any, why she shall not be ordered to allow the plaintiff to inspect and make a copy of the report referred to in paragraph 4 of her plea.

The action was one to recover money due for certain work performed by plaintiff in constructing a building for defendant which, the defendant alleged was constructed in a defective and unworkmanlike manner.

The following affidavit was filed by plaintiff's attorney, Mr. G. M. Walker:

1. The pleadings in the above matter have been closed, and I crave leave to refer this Honourable Court thereto as filed with the Registrar.

2. The defendant in paragraph 3 of her plea alleges that the work for which payment is sought by the plaintiff was performed in an unskilful, negligent, improper, and unworkmanlike manner and not according to the contract; also, that said work was left unfinished by the plaintiff; and, in paragraph 4 thereof, she alleges that she has called upon the plaintiff forthwith to complete the said work according to contract, and remedy the defects therein as set forth in the report of an architect which was duly supplied to the plaintiff.

3. Acting on the advice of his counsel the plaintiff of date 25th January, 1897, called on the defendant through his attorney under Rule of Court 333, sub-section (*d*), to produce for his inspection the architect's report referred to in paragraph 4 of her plea aforesaid.

4. The defendant has not complied with the requisition of the said notice, nor has she in any respect complied with sub-section (*f*), of the said Rule of Court.

5. Not receiving any response to the said notice, I twice personally interviewed the defendant's attorney and made request for an inspection of, and for leave to copy the said report, but without result. The said attorney declined to allow any copy of the said report to be made or any notes thereof to be taken, alleging that the report formed his case, and that he would not comply with the requisition of said notice, save under order of this Honourable Court.

6. I am aware that prior to the action brought, the said attorney verbally communicated to the plaintiff the gist of the said report, but the plaintiff cannot recall its many details, and it is absolutely necessary that he be permitted not only to inspect, but to make a copy of the said report. But no copy of the said report has ever been furnished to the plaintiff.

7. To enable the plaintiff to meet the case set up by the defendant, it is in his and his counsel's view necessary that a copy of the said report should be obtained by him.

The following answering affidavit was lodged by defendant's attorney, Mr. J. C. de Korte:

1. The architect's report referred to in the above affidavit was obtained by the respondent for her own information.

2. The said report was submitted to the applicant for his information and perused by him in deponent's presence in September last. That the applicant after perusing the report, deponent has been informed, called on Mr. Vixseboxse, the architect, who drew up the report and requested him to alter the same so as to enable him to obtain payment of the alleged claim.

3. After the notice referred to in the above affidavit had been served deponent met the applicatn's attorney in the Public Buildings, Cape Town, and offered to allow him to inspect the report, and informed him that deponent could not allow him to take a copy or notes thereof, as the report contained a portion of the respondent's defence to the action.

4. The respondent will be prejudiced in her defence to the action if she allowed the applicant a copy of the said report, and that the said architect (Mr. Vixseboxse) will be produced at the trial as a witness on behalf of the defence.

5. Deponent verily believes that the reason the applicant is so desirous to have a copy of the report is to give him an opportunity to inquire into the evidence the respondent intends to produce at the trial and thereby enable him to prepare his evidence for the trial.

Mr. Schreiner, Q.C., for the applicant: The plea states that the defects complained of in regard to the building are mentioned in an architect's report "which has been supplied" to the plaintiff.

The Chief Justice: But could you claim to see it if there were no mention of it in the plea?—They could not use the report in evidence.

Mr. Schreiner: We could at least have got particulars. The report now is part of the *res gestae*. Practically their whole case is in the report. See Rule 333, sub-section (*d*). We do not know what case we have to meet.

Mr. Searle, Q.C., for the respondent: Clearly the rule does not apply in a case like this. We have not to make a case for plaintiff to meet, nor make his case for him. Even if the words relating to the architect's report are struck out, the plea will be a perfectly good one. The applicants have had all the information they want, the mention of the report is a mere surplusage in the pleadings.

De Villiers, C.J.: *Prima facie* when reference is made by either party to any document which relates to matters to question in the action the opposite party is entitled, under Rule 333, on due notice to inspect the document and make a copy thereof. The party to whom notice has been given may object to the inspection, but he must state the grounds of his objection. One valid ground would be that he would be unjustly prejudiced by allowing the inspection, but this ground is taken away from under the defendant's feet by his own statement in his plea that the contents of the document now in question had been supplied to the plaintiff. It appears that the plaintiff had not sufficient opportunity to make himself acquainted with the contents, and he must now be allowed to inspect the document and take a copy thereof. The application is allowed with costs.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorney, J. C. de *Korte.*]

MAMA V. MAGISTRATE OF HERSCHEL. { 1897. Feb. 11th.

Review — Gross irregularity — Native Locations Act.

Where a person charged in a Magistrate's Court with a criminal offence shows good ground to the Clerk of the Court that the Magistrate is a necessary and material witness for the defence, the refusal of such Magistrate to allow his clerk to issue process to compel the attendance of such witness, under the 69th section of Schedule B to Act 20 of 1856, constitutes a ground, if objected to at the trial, for setting aside a conviction by the same Magistrate.

This was an application to have certain proceedings which took place before the Resident Magistrate of Herschel on the 16th June, 1896, reviewed and set aside.

The case in question was one in which Shadrach Boyce Mama, Elizabeth Mama, and Ignatius Mama were charged with contravening section 20 of Act 37 of 1884.

At the hearing before the Resident Magistrate on the 16th June, 1896, the following evidence was *inter alia* led:

Charles Joseph Dovey, Superintendent of Natives in the Herschel district, stated that upon instructions he went to Mama and inquired by what authority he was living in the location (Ngesiman's location). Mama stated that he and Ngesiman, the headman, had seen the Resident Magistrate at his office and obtained his authority to live there. He (the superintendent) had never had any application from Mama for leave to live there, nor had he given such leave. Subsequently Mama repeated that he had the Resident Magistrate's permission. Upon the Resident Magistrate's instructions Mama and the headman were brought to the Resident Magistrate's Office on the 3rd June, when an interview took place. The Resident Magistrate asked Mama why he had alleged that the Resident Magistrate had given him permission to live in the location. Accused admitted he had alleged it, and maintained that this was true. The Resident Magistrate said that it was absolutely false; and warned Mama to leave the location in seven days. Mama did not leave. All natives had to obtain the Resident Magistrate's permission to live in a location through witness.

Ngesiman, the headman, stated that he had gone with witness to see the Resid nt Magistrate in December, 1895, about accused living in the location; and that he alone saw the Resident Magistrate (Mama staying outside). The interpreter was the only other person present. The Resident Magistrate gave him permission for Mama to live in the location outside the magisterial reserve. He (the headman) informed the superintendent, who then pointed out the spot where Mama could build his house.

Silas, the interpreter, stated that he was present at the conversation in December, 1895, between the headman and the Resident Magistrate. The headman asked for a site for Mama to build on. The Resident Magistrate asked whether the site was in the magisterial reserve or outside. Ngesiman stated it was in the location. The Resident Magistrate then told him to go to the superintendent, but gave no permission whatever to build.

Thompson Smith, a trader, called for the defence, stated that a fortnight before the trial he had a conversation with Mama, who told him the Resident Magistrate had ordered him off the native reserve. Witness asked him how it was that the Resident Magistrate had given him permission to live there. Mama replied that it was a lie t at he had told; as he had really only received the headman's permission.

Shadrach Boyce Mama, the accused, stated that he was an enrolled agent practising in the Resident Magistrate's Court, Herschel. He acknowledged that he had only applied to the headman for leave to live in the location. He had not known he had to see the Resident Magistrate and he had never got the Resident Magistrate's permission to live there.

"The accused was found guilty of being in a native location without authority" and ordered to remove from the Herschel native location.

On the 4th December, 1896, Mama made an affidavit stating that previous to the hearing of the case, he presented subpœnas to the Clerk of the Court for issue, calling the Magistrate (Mr. F. Whitham) as a witness for the defence; that the clerk insisted on consulting the Resident Magistrate before issuing the summons, and that thereafter the clerk informed deponent that the Resident Magistrate declined to allow himself to be subpœned; that at the hearing of the case, deponent's attorney requested the Resident Magistrate to recuse himself on the ground of his being prejudiced in the matter; that the application was refused; that the headman was at a subsequent Circuit Court tried for perjury alleged to have been committed at this trial and acquitted.

The Resident Magistrate in an answering affidavit denied that any statements made or acts done by him were of such a nature as to prejudice him in any way or to render him incompetent to try the case; that he was never properly rescued; or that there were at any time any grounds for such a step, that he had never improperly consulted with or advised the Clerk of the Court. He stated that on the clerk showing him the subpœna for him (the Resident Magistrate), Mama was sent for. The Resident Magistrate informed Mama that a mere request to subpœna the Magistrate was insufficient to justify him in asking Government to appoint another Resident Magistrate to try the case; that he was ignorant of any evidence that he could give for Mama, and that under section 69, schedule B, Act 20 of 1856, he must be informed as to the nature of the evidence which was required from him to satisfy himself that it was material and necessary for the defence; that the application would then be considered. Mama left, and did not approach him again. At the trial defendant's attorney referred to Mama's request to subpœna the Resident Magistrate; the latter thereupon answered him in the same terms as above, stating that he was *then* still prepared to consider the application; that defendant's attorney stated that he was not prepared to show grounds and did not press the application. The Resident Magistrate denied that his action was in any way malicious.

The summons for review called upon the Acting Attorney-General to show cause why the judgment and proceedings should not be reviewed and set aside on the following grounds:

1. That the said Magistrate (Fred. Whitham) was incompetent to try the said case by reason that statements made and acts done or alleged to have been made or done by him were of the essence of the question tried by him.

2. That the said Whitham was duly and properly recused, but nevertheless insisted on hearing the case.

3. That there were gross irregularities in the proceedings in that the defendant desired to subpœna the said Whitham as a witness, but that the Clerk of the Court refused to issue the subpœna; that said Whitham improperly consulting with and advising the said clerk before the hearing of the case with regard to the issue of the said subpœna.

4. That legal and competent evidence was thus excluded.

5. That there was no evidence before the Court on which the accused could have been properly convicted.

6. That the action of the said Whitham was malicious, and that the proceedings were in other respects grossly irregular and contrary to law.

7. That the sentence passed by the said Whitham, sitting as Resident Magistrate, was in excess of his jurisdiction, inasmuch as he had no authority to order the removal of the accused from the Herschel native reserve.

The summons also called on Mr Whitham to show cause why he should not individually pay the costs of the proceedings.

The following was the Proclamation by Sir Henry Smith (issued on the 31st July, 1850) constituting the Herschel reserve a native location:

Whereas I have deemed it expedient to include in the division of Albert, the country occupied by certain Aborigines attached to the Wesleyan Missionary Station at the Wittebergen; now therefore, I do hereby, in the name of Her Majesty, subject to Her Royal confirmation, under and by virtue of the several powers and authorities in me vested, proclaim, declare and make known, that the eastern boundary of the division of Albert shall henceforth be defined as commencing (south) from a point (common to the two divisions of Albert and Victoria) on the summits of the Stormbergen, due north from where the most easterly sources of the Witte Kei River rise, with the same mountains; the boundary shall then run in a direct line to where the Kraai river takes its rise in the Witte or Drakensbergen; from thence in a north-westerly direction, along the summits of the Wittebergen, until the waters of the Wilge River, henceforth to be known as the Tees, run in a northerly direction to the Orange River, the eastern bank of the Tees forming the boundary of the Colony, from its sources in the Wittebergen to its junction with the Orange River, which river forms the northern boundary of the division of Albert and of the Colony.

And I do further proclaim, declare, and make known, that all territory to the west of any portion of the line aforesaid shall be, and the same is hereby annexed to, and incorporated with the Colony of the Cape of Good Hope, as part and parcel thereof; and also, that this whole tract, about 150 square miles in extent, is hereby designed and appropriated, subject to Her Majesty's confirmation and approval, as a "native reserve," for the use of the Aborigines, or persons of Native African descent, and that no farms or lands shall, unless otherwise directed, be granted within that district to persons of European race.

Mr. Graham for the appellant: The summons is detective, as it charges the appellant with an offence which is not created under the section under which the action is brought, viz., section 20, Act 27 of 1884. This section merely points out the procedure to be taken where a person is unlawfully on a location; the Resident Magistrate seems to think that constitutes an offence—which it clearly does not. The Resident Magistrate moreover was incompetent to try the case as he was an important witness.

Mr. Justice Buchanan: There is nothing on record to show that any objection was taken at the trial.

Mr. Graham: In any case it was a gross irregularity for him to sit when the issue in the case was the correctness of his statements as compared with those of another witness; and it was an exclusion of evidence for him to sit when it was a question of his oath against that of another man. See Ordinance 40 of 1828 section 5; see also *Regina* v. *Tomato* (6 Sheil, 11). Further, the Resident Magistrate exceeded his jurisdiction in regard to the order which he made.

Mr. Sheil, Acting Attorney-General, for the respondent: The summons is good in form; the part which charged applicant with a contravention of section 21 is mere surplusage. The Resident Magistrate is alleged to have rejected competent evidence; but the defendant should have recused the Resident Magistrate and have had the objection noted on the record. *Kook* v. *Zackon and Resident Magistrate, Van Rhyn's Dorp* (5 Sheil, 155). No specific ground for review is now clearly alleged. The test is not were the proceedings irregular merely; but were the proceedings *grossly* irregular? If the Resident Magistrate had given evidence he knew well that he could not give it for the defendant. If anything was irregular as to not issuing summons—it was a dereliction of duty on the part of the clerk, not a gross irregularity by the Resident Magistrate The district of Herschel has been reserved, and as such is a location under section 7 of the Act 27 of 1884 (*vide* Proclamation, Sir George W. Smith, August 1, 1850). Even if it is not the matter should have come before the Supreme Court by way of appeal not review. In the absence of the proclamation the place where Mama erected his house could not be called a location by itself, but the *entire* Herschel reserve (in which the site is) was at the time of the passing of the Act of 1884 a location.

Mr Graham replied.

De Villiers, C.J.: I wish to remark at the outset that the Magistrate has, in my opinion, acted with perfect good faith. He believed that his evidence could be of no assistance to the accused, and he therefore refused to allow

his clerk to issue process to compel his own attendance as a witness at the trial. He lost sight, however, of the fact that, from the point of view of the defence, the evidence was material and necessary. He knew that the headman of the location asserted that he had been told by the Magistrate that he could allow the accused to settle in the location. If this assertion was true, then clearly the accused could not be said to "have no right or authority to be in the native location" in terms of the 20th section of Act 37 of 1884, under which the prosecution took place. It is said that the evidence, if given, would have been adverse to the accused, but he had a right at all events to claim that such evidence should be given under oath and subject to cross-examination. This is not a case, such as frequently comes before the lower Courts, in which the competency of the Court to try the case is challenged on frivolous grounds. The accused, fortified as he was by the evidence of the headman, was justified in regarding the Magistrate as a necessary and material witness for the defence. At the trial the objection that the Magistrate had refused to allow a subpœna to be served on himself was taken and practically disallowed. After the accused had been convicted, the headman was charged with perjury, but he was acquitted. All this shows how important it was that the Magistrate who tried the case should not have been one who could give material evidence, and whose evidence, if given, would, on a most important point, have been at conflict with that of the headman who was a witness for the prosecution. It was a gross irregularity, under the circumstances, to refuse the issue of the process and thus prevent the accused from objecting to the competency of the Court, or from having the evidence recorded of a witness whom he honestly and reasonably regarded as being a necessary and material witness for his defence. The judgment and order of the Magistrate must be set aside, but as he acted in good faith there will be no order as to costs.

Mr Justice Buchanan concurred. The irregularity, he said, consisted in the Magistrate refusing to allow himself to be subpœnaed as a witness. The Magistrate was a material witness in the case, and being a material witness, ought not to have sat and tried the case.

Mr. Justice Maasdorp concurred.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

IN THE ESTATE OF JOHN EVERETT MESTAER: THE PETITION OF CHARLES WALTER MESTAER KIRCHHOFF. 1897. Feb. 12th.

Will—Bequest—Discrepancy in name—Intention.

A testator bequeathed by codicil a sum of money to "my godson, Charles Walter Mestaer."

The testator had only one godson, whose correct name was Charles Walter Mestaer Kirchhoff; and no person answering to the legatee's name was known.

The executor refused to pay to the godson the amount of the bequest but paid the money into the Guardians' Fund; and the Master similarly declined to pay to the godson.

The Court *ordered payment to be made to Charles Walter Mestaer Kirchhoff.*

This was an application by Charles Walter Mestaer Kirchhoff for authority to the Master to pay out to petitioner, for whom it was intended, the sum of £55 7s. 4d., standing to the credit in the Guardians' Fund of Charles Walter Mestaer, out of the estate of his godfather, John Everitt Mestaer.

The applicant's petition set forth:

That your petitioner is a son of George Joseph Kirchhoff and Mary Ann Kirchhoff.

That at the time of your petitioner's baptism one John Everitt Mestaer, a great friend of the petitioner's family, asked to be allowed to and did stand as godfather to your petitioner.

That the said John Everitt Mestaer signed as a witness to the said baptism, as will appear from the copy of baptismal certificate hereunto annexed.

That in his baptismal certificate your petitioner is called Charles Walker Mestaer, the surname of Kirchhoff being omitted, as is customary.

1. That thereafter on the 20th May, 1873, the said John Everitt Mestaer executed a codicil bequeathing to his godson Charles Walter Mestaer the sum of one hundred pounds sterling, as a legacy.

2. That in this codicil as in the baptismal certificate applicant is called merely Charles Walter Mestaer, but your petitioner and the person designated Charles Walter Mestaer in the said codicil are one and the same person.

3. That the estate of the said John Everitt Mestaer has now been finally liquidated and distributed with the exception of the *pro rata* share which is due to the person called Charles Walter Mestaer.

That according to the plan of the distribution in the estate of the said John Everitt Mestaer a sum of about £55 7s. 4d. was shown to be due to Charles Walter Mestaer, the legacy of £100 having to abate to that amount owing to there not being sufficient funds in the said estate to pay out the legacies in full.

That the executor in the estate of the said John Everitt Mestaer would not pay out the money shown to be due to Charles Walter Mestaer to applicant owing to the slight discrepancy in the names, and to get over the difficulty the money was paid into the hands of the Master of this Honourable Court.

That the Master aforesaid will not pay out the money to applicant without an order of this Honourable Court.

Wherefore your petitioner prays that your lordships may be pleased to grant an order authorising the Master of this Honourable Court to pay out to him the said sum standing to the credit of Charles Walter Mestaer in the Guardians' Fund, or for such alternative relief as to your lordships may seem fit.

The father of the applicant stated in affidavit: that testator in his lifetime was very fond of the applicant; that he was present when the codicil was drawn up, and that all present understood that the bequest was to applicant; that the testator had no other godson named Charles Walter Mestaer.

The Master reported:

The sum of £55 7s. 4d. was paid into the Guardians' Fund on the 26th February, 1884, to the credit of Charles Walter Mestaer by the executor dative of the estate of the late John Everitt Mestaer.

I have refused to pay this amount to the petitioner without an order of this Honourable Court.

Mr. Close moved.

The application was granted, subject to the Master being satisfied that the executor dative raised no objection.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

I

VAN NIEKERK V. FAGAN. { 1897. Feb. 12th. „ 16th.

Evidence—Books—Refreshing Memory —Tradesman.

In an action for a debt brought by a tradesman six years after the alleged debt had been incurred, he produced his books, which had been kept by his assistant, but he produced no proof that the assistant was dead or ill or absent from the Colony, or that he himself had read the entries while the transactions were fresh in his memory. The defendant admitted the purchases but alleged that they were paid for at the time when made. Held that *the evidence was insufficient to prove the debt.*

This was an appeal from the decision of the Resident Magistrate, Tulbagh, in an action in which the appellant, Henry Fagan, sued the defendant, Jacob van Renen van Niekerk, for the sum £9 7s., being £5 for goods sold in 1890 and 1891, by plaintiff himself, and £4 7s. for goods in the estate of the late H. A. Fagan, sold to defendant at public auction.

The defendant pleaded (1) the general issue; (2) that he had duly settled any indebtedness for goods which he might have got from defendant.

At the hearing before the Resident Magistrate the plaintiff produced the original day books and ledger in which the entries in regard to the £5 claim were entered. The plaintiff stated that the shop books were kept by his assistant. He had called on defendant to produce his receipts, which he was unable to do. He stated that in 1892 he fell ill, and since then had not been able to attend to his business, and that in consequence he had not since then been able to call in outstanding amounts due to him.

The assistant who kept the books was not produced as a witness, nor was any evidence led as to where he was.

The defendant stated that he paid for all goods within a month of the dates of purchase and obtained receipts. He never bought on credit. The goods purchased at auction might have been purchased by his brother, but he had not instructed his brother to purchase for him nor had he received the goods.

Judgment was given for £4 9s. with costs, absolution from the instance being given in respect of £4 18s.

The following were the Resident Magistrate's reasons:

In giving judgment the Court came to the following conclusion:

1. That although evidence was led on behalf of the defendant for the purpose of throwing discredit on the books kept by plaintiff, in certain cases (never sued upon) the Court held that the books were not altogether unreliable.

2. That the entries appearing against the defendant in this case appeared to be genuine.

3. That as the defendant admitted receiving most of the articles in the shop account, but failed to produce a receipt and could not even remember to whom the money was paid, the weight of evidence was in favour of the plaintiff.

4. That absolution from the instance was given on the ground that no evidence was produced to prove the cession of the vendu roll in support of the item £4 7s., nor that defendant instructed his brother to purchase the bag of oats on his behalf for 11s., thus failing to prove agency.

Against this decision the appeal was now made.

Mr. Schreiner, Q.C., for the appellant: In this Court we do it is true pay great attention to properly kept books; but they are not by any means *prima facie* proof.

The Chief Justice: Yes, but does the law of Holland apply or is it superseded by the English law of evidence? The question has never been properly discussed here.

Mr. Schreiner: In the first place the books are faulty in numerous instances, and the faith given to a merchant's books implies that they are carefully and accurately kept. *Van Leeuwen* (Roman-Dutch Law, 5, 20, 11). Moreover, the practice has in our Courts been to go in the opposite direction to the rules in force in Holland, and though judgments under Rule 329 are often given practically upon the books they yet are not specifically so.

Mr. Innes, Q.C., for the respondent: We cannot contend that mere production of the books will have the effect that it would have had under the old law of Holland. But the books are important evidence. The books once sworn to by the person who made the entries are evidence, so also if the owners swear to their correctness.

The Chief Justice: Declarations in the ordinary course of business made in books are evidence, but only when the maker is dead. *Price* v. *Torrington* (1 *Salk.* 285).

Mr. Innes: Our practice has been simply to wear to the correctness of the books. If the English law prevailed, we would have to prove not only the sale but the delivery. No objection was taken to these books being put in.

Mr. Schreiner in reply referred to Vol. I. *Menzies* (prefatory remarks on Provisional Sentence, section 6, page 7); *Best* (on Evidence, p. 442).

C.A.V.

Postea (February 16th.)

The Chief Justice, in giving judgment, said: This action was brought in the Court below by a shopkeeper to recover the amount of a debt alleged to have been incurred as far back as 1890 and 1891. In proof of the debt the plaintiff produced his shop-books which had been kept by his assistant, but he did not call the assistant to prove the correctness of the entries, nor did he produce any proof that the assistant was dead or could not be found. According to *Van der Linden* (Inst. B. 1, C. 17, section 2) the books of merchants were admissible as evidence, according to the law of Holland, provided they were properly kept and confirmed by the oath of the merchant. In support of this view he refers to *Voet* '22, 4, 12), who says that, in favour of commerce, the rule had been introduced that the books of merchants, containing debit and credit entries, constitute semi-full proof, and when confirmed by the oath or death of the merchant constitute full proof of the balance of his account, provided he be a man of good fame and reputation. The difference between *plena* and *semiplena probatio* is practically obsolete in our law, and accordingly we find that the Dutch rule has not been maintained in our Courts In the case of *O'Connell* v. *Stander* (3 Menzies, 389) it was held in this Court in the year 1841 that a plaintiff merchant's books, verified by his oath, are *per se* insufficient to prove the balance of account claimed by him. It should be borne in mind that, at the date of that decision, parties to a suit were not competent to give evidence as witnesses on their own behalf, and that the case is, therefore, no authority for holding that, since the passing of Act 4 of 1861, a merchant cannot prove the correctness of his books by his own evidence. But the rule established by the 37th section of Ordinance No. 72 still holds that "every party on whom in any case it shall be incumbent to prove any fact shall be bound to give the best evidence of which from its nature such fact shall be capable." If the assistant who made the entries in the plaintiff's books is still alive—and there is no proof that he is not—his evidence that the books have been duly kept and all credit sales duly entered at

the time when the sales were made or while the transactions were fresh in his memory would be the best evidence of which these facts are capable. He would, therefore, be entitled to refresh his memory by referring to the books. If he were dead his entries made in the ordinary course of business, at or near the time when the sales were effected, would be evidence in the case. But without proof of the assistant's death the plaintiff produced the books. If the plaintiff could have sworn that the entries were read by him while the transactions were fresh in his memory, and that when he read them he knew them to be correct, he would also have been entitled to refresh his memory by referring to the books, but evidence to this effect is wanting. It is said that the assistant, if called, would have been an adverse witness, but that was no reason for dispensing with his evidence. It is po sible to conceive of cases in which books might be admitted as evidence, without calling the person who kept them, although he be alive, but the present is certainly not such a case. There is no complication in the accounts, the demand is a stale one, the assistant who kept the books is not even proved to be ill or absent from the Colony, and the debt appearing in the books is entirely denied by the defendant. After the evidence for the plaintiff had been given, the Magistrate would have been quite justified in granting absolution from the instance. This was not done, and if the defendant, on cross-examination, could have been made to admit the debt, the Court would rightly have given judgment for the plaintiff. But the defendant, while admitting that he had bought most of the articles sued for, stated that he paid for them at the time they were purchased. That would sufficiently account for his not producing receipts for his payments. But even if the sales had been on credit, it is unreasonable to expect a customer to keep receipts for payments made by him six or seven years after payment. A tradesman has himself only to blame if he delays in enforcing his claims until he can himself no longer produce the best evidence in support of them, or until his customers may fairly be expected to have lost or destroyed the vouchers which could have disproved the claims. Upon the evidence in the Court below judgment ought not to have been given for the plaintiff, and the appeal must therefore be allowed, with costs, and judgment of absolution from the instance entered, with costs, in the Court below.

Buchanan, J., and Maasdorp, J. concurred.

Appeal allowed accordingly with costs.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

FORREST AND CO. V. STAGLER. { 1897. Feb. 15th.

This was an action for breach of contract. The plaintiff's declaration alleged that plaintiff is a miller residing at Rondebosch, and carrying on business under the style of John Forrest & Co. The defendant is a tailor and produce dealer at Venterstad, in the Cape Colony. That in August and September, 1896, the plaintiff supplied and delivered to defendant at his special instance and request flour, meal, and mealies to the value of £54 9s. 3d., and paid railway carriage on them to an amount of £17 8s. 5d., as shown on the account annexed to the declaration. That in October, 1896, the plaintiff further supplied to the defendant flour and meal to the value of £59 17s., and paid railway carriage and charges to an amount of £17 13s. 6d., also shown on an account annexed. That the terms and conditions of the said sales were that the defendant should pay cash and railway charges. That the defendant did not pay cash in accordance with the terms of sale, and after the goods supplied in August and September had been delivered the plaintiff stopped the actual delivery of the goods supplied in October, which were in the hands of the railway authorities at Norval's Pont, whither his goods had been sent in due course, and that the goods were lying at the said railway station at defendant's risk and expense. That the defendant refused and neglected (and still does so) to pay the purchase price and railway charges.

The prayer of the declaration was that defendant be ordered: (1) To pay plaintiff the sum of £71 7s. 7d.; (2) to pay the sum of £77 10s. 6d., he tendering to hand over the goods at Norval's Pont; (3) to pay interest *a tempore moræ*; (4) with alternative relief and costs of suit.

Mr. Tredgold appeared for the plaintiff, defendant being in default.

John Forrest stated that he carried on business at Rondebosch under the style of J. Forrest & Co. The defendant had communicated with him by letter, and in September last witness supplied him with goods amounting to £54 9s. 2d., the railway charges being £17 18s. 5d. A further consignment was forwarded in October amounting to £59 17s., the railway charges in this case being £17 13s. 6d. Witness, not having received payment for the first consignment, stopped the second at Norval's Pont, and gave instructions for the sale of the goods there, the defendant being at the same time notified that the goods were lying there at his risk. He received £68 15s. from the sale of the goods, but he was put to further expense in regard to correspondence and telegrams. The total amount claimed was £84 8s. 7d.

The Court gave judgment for £84 8s. 7d. with costs.

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

COLONIAL GOVERNMENT v. GERTENBACH'S EXECUTOR. } 1897. Feb. 16th.

Expropriation—Land—Transfer.

Held, *in an action instituted by the Government to compel transfer of certain land in Port Elizabeth, which had been expropriated for railway purposes under Act 19 of 1874, that the executor of the estate of the person whose land had been expropriated was bound to pass transfer.*

This was an action to compel transfer of certain property at Port Elizabeth, expropriated by the Railway Department in 1877.

The declaration alleged that in the year 1877 the Colonial Government, under the powers conferred upon it by Act 19 of 1874, expropriated for railway purposes a certain piece of land situate at Port Elizabeth, being lots Nos. 3 and 4, sub-division of lot No. 50 of section F of the Jennings estate, measuring fifteen square roods and forty square feet, registered in the name of C. J. Gertenbach.

That the Colonial Government being unable to agree with Gertenbach as to the amount of compensation to be paid for the land so expropriated, it was agreed between the Government and Gertenbach to submit the matter in dispute to arbitration in terms of Act 9 of 1858 and Act 19 of 1874, and for that purpose the Colonial Government and Gertenbach signed a deed of submission, under which two arbitrators were appointed, one on behalf of the Government, and the other on behalf of Gertenbach.

That there was a difference of opinion between the arbitrators as to the amount of compensation which should be awarded to Gertenbach in respect of the said land, and in terms of the deed of submission they called in as umpire one Joseph Simpson, who thereafter duly published his award, under which he awarded Gertenbach £25 (which amount had been tendered to Gertenbach by the Government before the execution of the deed of submission and refused by him) as the full value of the land expropriated, and ordered Gertenbach to pay the costs of the arbitration.

That the costs exceeded the sum of £25, and on Gertenbach's refusal to pay the costs they were paid for and on his account by the Colonial Government.

That on the publication of the award the Colonial Government entered into possession of the land expropriated, and have since that time remained in possession.

That, though frequently requested during his lifetime, Gertenbach wrongfully and unlawfully refused to pass transfer to the Government of the land so expropriated, and since his death the defendant, though frequently requested, refused to pass transfer.

The prayer was that the defendant, in his capacity, should be ordered to pass transfer in due and customary form of law, the plaintiff tendering to do all necessary acts to obtain transfer, alternative relief, and costs.

The defendant in his plea admitted the expropriation and the execution of the deed of submission. As to the other allegations in the declaration, he alleged that he had no knowledge, save that he admitted that the Government has been for many years in possession of the land, and that he refused to recognise any obligation to pass transfer. He put the plaintiff to proof of the remaining allegations in the declaration.

He specially pleaded that the plaintiff was not entitled, in terms of Acts 9, 1858, and 19, 1874, or either of them, or at all, to claim from

him transfer of the land; but that if the plaintiff were at all, after the lapse of so many years, entitled to transfer (which he did not admit), he should prove his title thereto in accordance with the Derelict Lands Act, 1881, to the satisfaction of a judge, and afterwards of the Court, such proceedings being taken at his own cost.

He further specially pleaded, if the above plea were deemed insufficient, but not otherwise, that the plaintiff was not entitled to claim transfer of the land without tendering to pay all costs incurred in connection with giving such transfer, and he said that no such tender had been made by the plaintiff in this suit.

The replication was general, save that it alleged that the plaintiff was, and always had been, ready and willing to pay whatever costs might be incurred by the defendant in passing transfer of the land in due and customary form of law, as the defendant was well aware.

Issue was joined on these pleadings.

Mr. Sheil, Acting Attorney-General, with him Mr. Bisset, appeared for the Government.

The defendant was in default.

The following evidence was led for plaintiff:

D'Urban Dyason, senior partner in the firm of Messrs. Dyason, Hasell & Wilson, attorneys for the Government at Port Elizabeth, said that in the year 1877 the firm, which was then styled Dyason & Carlisle, were acting for the Government. Witness received instructions for the expropriation of certain part of the Jennings estate, and carried out the preliminaries of the expropriation, and also drafted the deed of submission. The award of the umpire was sent to the Railway Department and subsequently got mislaid. A letter was sent to Gertenbach, with a copy of the award, on May 14, 1877. A certain Thomas O'Brien was Gertenbach's agent and attended the arbitration on behalf of Gertenbach. Witness made frequent application for transfer for about two years, but O'Brien continually put him off, and finally told him that Gertenbach had withdrawn his power. Witness attended the arbitration on behalf of the Government, and the amount of compensation awarded was £25, Gertenbach being ordered to pay the costs, which amounted to over £25. At the time the property was expropriated, property had not risen in value at Port Elizabeth, but the same land, if expropriated now, would fetch about £1,000. The Government took possession of the land, and a line of railway now ran through it. The executor lived at Uitenhage, and had only recently been appointed.

As the original deed of submission could not be found a copy was put in from which it appeared that the parties agreed to go to arbitration on the basis of an out-and-out sale and purchase.

Mr. Sheil, Acting Attorney-General, for the Government: The first defence raised in this case is that there is no obligation on the defendant to pass transfer either under Act 9 of 1858 or Act 19 of 1874.

It is true that there is no express provision on the subject in either of these Acts, but expropriation is a forced sale, and the mere fact that it is a forced sale does not deprive the buyer of his ordinary common law right to demand transfer of the property bought under the statute.

A very clear indication that expropriation is a sale is afforded by the language used in sections 12 and 13 of Act 9 of 1858. In both these sections the words "purchase" and "purchase price" are used, and these terms show that the transaction must be regarded as a sale, subject to all the incidents of a sale, and that the statutory buyer is not deprived of his ordinary right to claim transfer. See *Landmark* v. *Van der Walt* (3 Juta, 305).

In England it has been held over and over again, under the Lands Clauses Act (1845), that notice by a railway company to take lands under their compulsory powers and the subsequent fixing of compensation by arbitration together constitute a contract of sale and purchase which can be enforced against either party by an action for specific performance. See *Durham* v. *Crackles* (32 L.J., N.S., 111); *Harding* v. *Metropolitan Railway Co.* (41 L.J., N.S., 371); *In re Pigott and the Great Western Railway Co.* (18 Ch. Div., 146).

The Chief Justice: Does the question not depend upon the intention of the parties in going to arbitration? In other words, did the parties arbitrate upon the basis of an out-and-out purchase and sale, or was a servitude only bought? The point was discussed in *Clayton* v. *Metropolitan and Suburban Railway Co.* (3 Sheil, 405; 10 Juta, 291).

In this case the parties arbitrated upon the basis of an out and out purchase and sale. See the terms of the deed of submission.

That being so, *Clayton's Case* is clearly in our favour. A further indication is afforded by the fact that the umpire only awarded Gertenbach the amount which the Government had tendered, viz., £25, and gave costs against him.

The Court gave judgment in terms of the prayer of declaration, the Government to pay

the costs of transfer; in case the defendant still refused to pass transfer after the order of the Court, the Sheriff was authorised to pass transfer.

[Plaintiff's Attorneys, Messrs. Reid & Nephew.]

SUPREME COURT.

Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

MATTHEWS V. DE SWART. { 1897. Feb. 18th.

Mr. Tredgold applied for provisional sentence on a promissory note for £22, and also for judgment for £16 17s. 6d., under Rule 329.

Granted.

KRYNAUW'S EXECUTORS V. SEDAN.

Mr. Maskew applied for provisional sentence on a mortgage bond for £150, and also for £6 9s. 4d. on a taxed bill of costs arising out of previous proceedings, and that the property be declared executable.

Granted.

THE MASTER V. COOKE'S EXECUTOR.

Mr. Sheil applied for provisional sentence for the sum of £500.

Granted.

ILLIQUID ROLL.

BAKER AND CO. V. DE VILLIERS.

Mr. Buchanan applied for judgment under rule 329 for £14 13s. 2d., due for goods sold and delivered to the defendant's wife.

Granted.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF BAREND MEYER.

Mr. Graham applied for an order making absolute a rule *nisi* for registration under the Titles Registration and Derelict Lands Act of certain property in the name of the petitioner.

Granted.

IN THE MATTER OF BEEDLE AND CO., LIMITED.

Mr. Buchanan appeared to present, and applied for confirmation of the second and final report of the liquidators.

The Court granted the usual order.

IN THE INSOLVENT ESTATE OF WILLEM ADOLPH HAUPT.

Mr. Graham applied for authority to the Master to call a special meeting of the creditors for the election of a trustee in the room of one deceased.

Granted.

IN THE ESTATE OF ACHMAT MAHED.

Mr. Buchanan applied for authority to raise a sum of £600 on security of the landed property in the estate, and that this sum, together with £300 to the credit of the estate in the Guardians' Fund, may be expended on certain works in connection with the estate required by the Town Council, and also that Mr. Tonkin may be appointed by the Court to administer this money.

Granted. The payment of the money to be subject to the production to the Master of tenders for the execution of the work.

FOURIE V. MAGISTRATE OF WORCESTER AND THACKER. { 1897. Feb. 18th.

Private prosecution—Public Prosecutor—Certificate—Declining to prosecute—Appearance by counsel or agent—Committal for trial—Preparatory examination—Summary trial.

A Resident Magistrate cannot convert a summary prosecution at the instance of a private party into a preparatory examination to be conducted by and at the expense of such private prosecutor, unless there be produced to the Magistrate a certificate under the hand of the Public Prosecutor to the effect that he declines to prosecute for the offence. The right to conduct a private prosecution implies the right to appear in Court by counsel or agent.

This was an application upon a notice of motion calling on the respondents to show cause why an order in the nature of a mandamus should not be granted directing the Acting Resident Magistrate to entertain and admit a formal application in the Resident Magistrate's Court, Worcester, made by the above applicant to be allowed legal assistance (by a duly enrolled agent of the said Court) in prosecuting the respondent Thacker for perjury in a trial commenced in that Court at the instance of applicant on the 4th February, 1897. At these proceedings applicant's request for legal assistance was refused and the present order was asked for on the ground that the refusal was bad in law.

The proceedings in the Resident Magistrate's Court were initiated by a summons against Thacker for perjury, taken out by Fourie. On the day of hearing, however, the Resident Magistrate instead of trying the case summarily commenced to take a preliminary examination. Mr. Home appeared for the accused, and Mr. Shaw, a duly-enrolled agent, appeared for the complainant; whereupon the attorney of the accused objected to the agent for the complainant assisting in the prosecution or taking any part whatever therein, he having no *locus standi* nor any substantial or peculiar interest in the issue arising out of any injury which he individually had suffered; contending that this was a private prosecution by Fourie, who as the summons set forth "prosecutes in his own name and on his own behalf," and that he alone could appear.

The exception was upheld, and a postponement of the trial was granted to allow the complainant to apply for such an order as that now asked for.

From the affidavits, it appeared that in August, 1896, Fourie was prosecuted for a breach of one of the railway regulations, and was convicted. The prosecution was instituted and supported by Mr. Thacker. Chief Constable of Worcester; that in October, 1893, Mr. Fourie sued Mr. Thacker and another civilly in the Circuit Court to recover damages for wrongful arrest; that Thacker gave evidence; that subsequently in consequence of certain information application was made by Fourie to the Attorney-General to have proceedings instituted for perjury against Thacker. A reply was received from the Secretary to the Law Department stating, with reference to the request for warrants to be issued against Thacker and others: "I am directed to inform you that the Attorney-General is not prepared to interfere in the matter." Subsequently an application was made by Mr. Fourie's agent for the power of the Attorney-General to prosecute. The reply was that, as the Attorney-General was informed that the prosecution was a private one, and that a summons had already been issued not at the instance of the Crown, the Attorney-General declined to grant the power asked for.

When the Magistrate intimated, on the case being called on, that he intended to take a preliminary examination, no objection was raised: and the Resident Magistrate held that, in terms of Ordinance 40 of 1828, the witnesses should be examined by the Magistrate alone; and that there is no provision in the law of the Colony for legal advisers to act for the complainant in a preliminary examination. The summons and subpœnas all set forth that the prosecution was a private one. After the preliminary examination was begun the complainant applied for the issue of a subpœna for a further witness, but the Clerk of the Court refused to issue it unless the ordinary fee were paid on the ground that it was a private prosecution.

Mr. Innes, Q.C., for the applicant.

Mr. Sheil (Acting Attorney-General) for the Acting Resident Magistrate.

Mr. Graham for the respondent Thacker.

Mr. Innes: This application is properly brought before this Court for an order in the nature of a mandamus. The question is as to whether the applicant should not have been allowed the services of an agent at the proceedings.

Mr. Justice Buchanan: Should not the proceedings have been begun properly by the filing of affidavits?

Mr. Innes: *Le Sueur* v. *Geary* (Buch. 77, p. 115) shows that our procedure was quite regular. *Brown* v. *Hudson* (Buch. 69, page 170) guided the procedure which the applicant has adopted in this case, although that was a civil case and this is a criminal one. In each case the Resident Magistrate refused to allow plaintiff to appear by an agent. Ordinance 40 of 1828 places all public prosecutions in the hands of the Attorney-General. But under sections 13 and 14 private prosecutions under certain circumstances may take place. The applicant certainly had not the certificate provided for in section 14, but Ordinance 73, section 6, dispenses with the certificate in certain cases.

The Chief Justice: Once the private prosecution is turned into a preliminary examination is not the prosecutor then bound to get the certificate of the Attorney-General?

Mr. Innes: The Resident Magistrate has not decided that this is a case for a public prosecution, *i.e.*, one where the Resident Magistrate *must* refuse to allow the private prosecution to go on unless the certificate of the Attorney-General is produced. The Resident Magistrate has not taken the course laid down in section 7 of

Ordinance 73. Even after taking the course he did, in turning the proceedings into a preliminary examination, he still continued to treat the matter as a private prosecution.

The Chief Justice: His duty was to stop the proceedings, seeing what a serious matter it was, in terms of Ordinance 73, section 7.

Mr. Innes: But the Resident Magistrate has a certain discretion in the matter. He might have stopped the private prosecution, but he has not actually done so.

Mr. Justice Maasdorp: Ordinance 73 of 1830 only allows the issue of summons without the certificate in cases where the prosecution is a summary private one; the moment it becomes a preliminary examination, section 6 does not apply.

The Chief Justice: Can a private preliminary examination be held till the Attorney-General refuses to certify?

Mr. Innes: See section 14, Ordinance 40 of 1828, and *Le Sueur* v. *Geary* (Buch p. 77, 115). It was never argued in the latter case that there could be no such thing as a private preliminary examination. As Mr. Cole there said, it is only after the preliminary examination is sent to the Attorney-General that the Attorney-General gives his certificate, and then the Attorney-General by section 14, Ordinance 40, has to endorse on the *indictment* his refusal. But that means that it is not until the indictment is naturally drawn that the certificate is required or is in question. The objection taken by Thacker and the Resident Magistrate was simply that it *was* a private preliminary examination.

The Chief Justice: Yes, but it comes now before this Court, and the Court must see that proceedings are proper.

Mr. Innes: Section 5 of Act 15 of 1864 shows that before a private prosecutor can bring a person for trial before the Supreme Court, the prisoner must have been committed for trial, and the Supreme Court on the application of any party interested may order the Resident Magistrate to take a preparatory examination. Why was the proviso "*any person interested*" (other than Attorney-General) put in, in line 14 of section 5? Surely to allow private prosecutors to come before the Court to get an order requiring the Resident Magistrate to commit a prisoner for trial, the law contemplating that a man could take all the preliminary examination steps privately.

The Chief Justice: Probably a private preliminary examination can take place, but can that be done till the certificate is produced? Is there any other section in our law than section 7 which allows private prosecution without certificate?

Mr. Innes: Apparently not. Moreover there is no express provision entitling a private prosecutor at any stage of a prosecution to be represented by an agent. All other cases we admit are provided for, *e.g.*, the Attorney-General may appear in public prosecutions by his deputy. The parties in civil suit can appear by their legal advisers, and so also persons charged with criminal offences can under section 45, Act 20 of 1856, be represented in court. But there is no express provision for legal advisers appearing in *private* prosecutions. The Resident Magistrate appears to think that this cannot be done except by express statutory provision. But the Resident Magistrate is in error, the converse is the correct rule, *i.e.*, we contend that every person is entitled to be represented by a duly enrolled agent unless the law *prohibits* it. It is not correct to hold, as the Resident Magistrate does, that only those are entitled who are *authorised* by law. Common law does not deal with private prosecution. There are no private prosecutions by common law, but there is no provision that agents cannot appear in any case whatever. *Voet* (48, 1, 2) supports our contention. Wherever there are enrolled agents they surely are qualified to appear for anyone who is legitimately before the Court. On every ground of law and convenience the Resident Magistrate was wrong.

[The Court intimated that they only wished to hear counsel on this point: Supposing the Attorney-General does give the certificate is the Resident Magistrate right in refusing to allow the prosecutor to appear by his agent?]

Mr. Sheil, Acting Attorney-General, for the Magistrate: Express provision is made in the law for allowing any person charged with a criminal offence to make his defence by counsel, attorney, or agent. See Act 20 of 1856, section 45, and even now on a preliminary examination he may have legal assistance; Act 17 of 1874, section 13, repealing Ordinance 40, section 39.

A plaintiff or defendant in a civil case may have legal assistance. See Act 20 of 1856, Schedule B, Rule 13.

Except in certain specified cases no provision is made in the law for allowing a private prosecutor legal assistance. See Rules 68, 69, 73, and 74 of Schedule B. But see Act 40 of 1889, section 56, and Act 38 of 1884, section 7.

In private prosecutions there is no necessity for professional assistance as the examination is practically directed by the presiding Magistrate, who will be careful to see that there is not a miscarriage of justice.

Mr. Graham, for the respondent Thacker, referred to sections 15 and 40 of 1828. In any case, if the agent wished to appear he should have put in his power.

De Villiers, C.J.: By the common law of this country all criminal prosecutions must be conducted by a public prosecutor. A private individual, who under the Roman law had the right to prosecute in his own name, could in Holland only lay his complaint before the proper public official whose duty it became, upon sufficient cause shown, to conduct the prosecution on behalf of the State: see *Voet* (48, 2, 18). In 1828, however, it was enacted in this colony, by Ordinance No. 40, section 13, that where the public prosecutor declines to prosecute, it shall be competent for any private party, who alleges that he has suffered injury by any crime or offence, to prosecute the offender in any competent Court. The 14th section further provides that it shall not be competent for such private party to obtain the process of any Court for summoning the alleged offender without the production, in the higher Courts, of a certificate under the hand of and subscribed by the Attorney-General to the effect that he declines to prosecute, and, in the lower Courts, of a similar certificate from such other officer as is by law entitled to prosecute therein at the public instance. The latter part of this section was modified, in 1830, by the 6th section of Ordinance No. 73, which dispenses with the necessity of a certificate in cases of summary prosecution by private persons in inferior Courts. The 7th section, however, enacts that where, in the course of such a summary prosecution, it shall appear that the crime or offence is, from its nature or magnitude, one which ought not to be prosecuted at the instance of a private party, until the public prosecutor shall have exercised his discretion, the Magistrate shall stop all further proceedings until the party prosecuting shall produce such a certificate as has already been mentioned. The proviso to this section shows that it was not intended by this section to alter the law which requires a Magistrate, in the case of any crime which from its nature or magnitude is more proper for the cognizance of a superior Court, to stop the trial and commence a preparatory examination. The first question which now arises is whether, after a Magistrate has decided, in the case of a summary prosecution for perjury, at the instance of a private party, that the crime is one which from its nature or magnitude is more proper for the cognizance of a superior Court, he can commence a preparatory examination to be conducted by and at the expense of such private party. The Ordinance No. 73, it should be observed, does not expressly enlarge the right of private individuals to prosecute in superior Courts. It allows them to prosecute summarily in inferior Courts but requires the Magistrate to stop the proceedings in the event to which I have already referred. If a crime is of such a nature or magnitude that a preparatory examination must be taken, it would seem to follow that it is of such a nature or magnitude that it ought not to be prosecuted at the instance of a private party without a certificate from the proper official. The preparatory examination forms part of the proceedings of a prosecution, and therefore if a private party is allowed to conduct the preparatory examination he is allowed to conduct part of the prosecution. Without a certificate from the public prosecutor such as I have mentioned a private party ought not, in my opinion, to be allowed to conduct such a preparatory examination. The next question is, by whom should such a certificate be given? In my opinion, seeing that the preparatory examination can only be taken with a view to a prosecution in the higher Courts, the certificate should be given by the superior public prosecutor, such as the Attorney-General or Solicitor-General, as the case may be. Without such a certificate the Magistrate should not allow a private prosecutor to conduct the preparatory examination as part of a private prosecution. In the present case a letter addressed to the private prosecutor by a clerk in the Attorney-General's Office is forthcoming, but that is not such a certificate as the law requires. The object of the present application is to compel the Magistrate to allow the private prosecutor, Fourie, to be represented by his agent in the conduct of the preparatory examination. In the absence, however, of a proper certificate from the Attorney-General I am of opinion that the examination ought not to proceed. It follows that the order asked for cannot be made. It is reasonably clear from the affidavits that there will be no difficulty in obtaining a proper certificate from the Attorney-General, and it is well, therefore, that the Magistrate should know what, in the opinion of the Court, would be his duty in regard to the admission of a law agent to conduct the examination of the witnesses produced at the preparatory examination, in case he should still be of opinion that such examination must be conducted at the instance and expense of the private prosecutor. In my opinion the privilege to conduct a private prosecution implies the right to appear in court by counsel or agent. It would in many cases be a useless privilege if the law were otherwise. An

ignorant person is charged with an offence and convicted. He subsequently discovers evidence which proves to his satisfaction that the conviction was obtained on perjured evidence. He may not in the first instance be able to induce the public prosecutor to take the same view of the case, but in order to lay his case properly before the Magistrate with a view to a committal of the alleged offenders for trial, he wishes to be assisted in court by his legal adviser. I do not say that the present is such a case, but cases of that nature may arise. In the absence of any express prohibition by law, I am of opinion that the right to appear by agent must be held to exist. It is necessary for the proper conduct of the proceedings that the Magistrate should have the evidence brought before him in such a form as to enable him to decide, in terms of the 35th section of Ordinance No 40, whether or not there are sufficient grounds for putting the accused on trial. If the examinations are transmitted to the Attorney-General under the 43rd section, it is important that he should be in a position to decide whether, notwithstanding his previous certificate, the case is not one for a public prosecution. The obstacles in the way of a private prosecution are so great that it is impossible to expect a private and unlettered individual successfully to encounter them without legal assistance. While, therefore, refusing to grant the mandamus prayed for, the Court wishes an intimation of its opinion to be made to the Magistrate.*

Mr. Justice Buchanan: The Magistrate did not, as he ought to have done, stop the summary proceedings, and say that the prosecutor had no right to go further until the certificate of the Attorney-General was produced, and he was wrong in considering the case as a preliminary examination under the circumstances. I quite agree that the prosecutor had every right to be represented by a legal adviser. It is a common right which, unless expressly taken away, a person should not be deprived of.

Mr. Justice Maasdorp concurred.

[Attorney for Fourie, D. Tennant, jun.; Attorney for Thacker, C. C. Silberbauer.]

* Subsequently the Magistrate committed Thacker for trial on a charge of perjury, and, as the Acting Attorney-General declined to prosecute, Fourie applied to the Court under Act 15 of 1864, section 5, for leave to proceed with the prosecution. On this application the Chief Justice made the following orders

"I have consulted Mr. Justice Buchanan, before whom the perjury is alleged to have been committed, and after reading the evidence taken at the preliminary examination I have come to the conclusion that the interests of justice would not be served by granting the leave asked for.—10th April, 1897.—J.D.S.

IN THE MATTER OF THE MINORS DE LANGE AND OTHERS.

Mr. Innes, Q.C., appeared in the matter of the confirmation by the Court of the sale by Maria Johanna de Lange (formerly married to Johannes Hendrik Classen) to Joseph Benjamin Watson of the share in the landed property transferred to her as the executrix in the estate of the late Johannes Hendrik Classen.

The case was ordered to stand over until March 12 in order to admit of notice being given to Mrs. Lange and to Classen, counsel drawing attention to the fact that in terms of a previous order of Court notice had been given, but for a different date.

IN THE MATTER OF THE CO-OPERATIVE BAKING COMPANY.

Mr. Graham applied for an order directing the winding up of the company under the Companies Act of 1892, and for the appointment of J. S. le Sueur as official liquidator.

The order was granted.

IN THE MATTER OF CARL BENEDICTUS ZIERVOGEL.

Mr. Molteno applied for the removal of Elsie Maria Ziervogel from her position as one of the executors in the estate.

The Court granted the order, and authorised the remaining trustee to act alone.

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

VAN DEN HEEVER v. DU TOIT. { 1897. Feb. 23rd.

This was an application by the defendant for the discharge of the notice of trial and for the appointment of a commission to examine Pietrus Daniel du Toit, one of his witnesses, at Hanover.

Mr. Searle, Q.C., appeared for the applicant.

Mr. Innes, Q.C., for the respondent.

The Chief Justice said: The Court will make no alteration in the date of the trial, which will remain fixed for Friday next and plaintiff's wit-

nesses will be heard. If defendant's witnesses are not here the Court will postpone the case until Friday week, so the witnesses may be subpœnaed for that date. As for the evidence of old Mr. Du Toit, the Court will allow his evidence to be taken on commission, and appoint the Resident Magistrate of Hanover as commissioner. Costs will abide the result of the action.

[Applicant's Attorney, Gus. Trollip; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

CRUYWAGEN V. GIRD.

Application by defendant for the postponement of trial, owing to the illness of a necessary witness.

Mr. Searle, Q.C., appeared for the applicant.

Mr. Innes, Q.C., appeared for the respondent.

The Chief Justice said: Had this case been set down earlier in the term the Court would certainly have refused the present application. But the practice has sprung up lately of putting off everything during the first few weeks of term; and just at the end of term squeezing all the cases into the last few days. The Court in this case will mark its disapproval of that course. It was quite practicable for the plaintiff to have set down this case earlier in the term; but he sets down the case on the day before the last day of term, when he must have known that there would be a rush of cases. This case, therefore, must be postponed until next term. Mr. Vixseboxse appears to be a material witness. No doubt there are other architects, but the defendant relies on Mr. Vixseboxse, and he certainly is, under the circumstances of this case, in a better position than any other to judge of the manner in which the work was done. He is too ill to attend, and probably will be too ill to attend next week. It is, however, only justice that the defendant must make some offer. She has offered to pay £200 without prejudice, and the Court will now make an order that the case be postponed until next term on condition that before Friday next, on which day the case is set down, the defendant pay to plaintiff the sum of £200 without prejudice to his defence to the action. Costs to be costs in the cause.

[Applicant's Attorney, J. C. de Korte; Respondent's Attorneys, Messrs. Walker & Jacobsohn.]

IN THE ESTATE OF THE LATE WILLIAM AND CAROLINE DOROTHEA CHIRVELL AND OTHERS V. CARLYON AND OTHERS.

For the opinion of the Supreme Court upon certain legal questions referred to it by the Chancery Division of the High Court of Justice in England.

Mr. Innes, Q.C., appeared for the petitioners.

Mr. Searle, Q.C., appeared for the defendants.

The Court decided to hear counsel in the case on Thursday, 25th February.

TREGIDGA AND CO. V. SIVEWRIGHT, N.O. { 1897. Feb. 23rd. March 1st.

Carriers—Railway Department—Praetor's edict—Negligence—Cattle—Damage.

The Railway Department are liable for the non-delivery of cattle entrusted to them for conveyance by railway.

The responsibility of the department, as carriers by land, is the same as that of carriers by water.

Where one of several head of cattle belonging to the same owner is injured through being trampled upon by the rest while being conveyed by railway, the department is not liable for the loss in the absence of proof that it was an improper mode of conveyance to place several oxen loose in one truck, or that the injury was otherwise facilitated through negligence on the part of the department.

This was an action for £10 damages for non-delivery of certain oxen, instituted by Messrs. Tregidga & Co., carrying on business as butchers at Mowbray and elsewhere in the Cape Division, against the Colonial Government.

The declaration alleged that the Railway Department of the Colonial Government, carrying on business and acting as common carriers by railway, did by its servants or agents receive from certain consignors, acting as agents or representatives of the plaintiffs, certain three consignments of cattle, which the department as such common carriers undertook to convey and duly to deliver in good order to the plaintiffs at Mowbray, to wit: (*a*) On or about the 19th June, 1896, certain sixty-four cattle; (*b*) on or about the 5th July, 1896, certain sixty cattle; (*c*) on or about the 2nd October, 1896, certain thirty cattle, for which services as such carriers the plaintiffs became indebited to and paid to the department the several sums due by way of carriage (all which would more fully appear by reference to the waybills of the several consignments).

That not regarding and neglecting its duty in the premises the said department by its servants and agents failed to deliver to the plaintiffs one ox out of each of the said three consignments of the value in all of £35, and further delivered to the plaintiffs another ox out of the said third consignment not in good order, but in a damaged condition and depreciated in value to the extent of £5, which said consignment was moreover unduly and unreasonably delayed in transit.

The plaintiffs claimed delivery of the three oxen or their value, £35, and £5 damages, alleged to have been sustained by depreciation in value of the fourth ox, or in the alternative, £35 damages for non-delivery, and £5 for depreciation in value, with costs.

The Government in their plea admitted the receipt of the three consignments of cattle, but said that the first only consisted of sixty-three, and not sixty-four oxen as alleged in the declaration.

The Government denied the allegations of negligence, and specially pleaded that when the trains conveying the cattle in consignments "B" and "C" arrived at Middelburg-road Station it was found that two oxen, one forming part of each consignment, were so seriously injured by having been trampled upon by the other oxen in the trucks that it was found necessary to remove them from the trucks, as they were unable to continue the journey, and the department, acting in the best interests of the plaintiffs, sold the said two oxen for and on account of the plaintiffs. That the said two oxen realised the sum of £7 10s., which amount was tendered to the plaintiffs before proceedings were instituted in this action, to wit, on or about the 15th October, 1896, but the plaintiffs refused to accept the said sum. That due care and diligence were exercis d by the department in carrying the said consignments, and they were delivered in good order and condition to the plaintiffs. The Government again tendered the sum of £7 10s., and subject to the tender prayed that the plaintiffs' claim might be dismissed with costs.

The replication was general, save that it admitted the tender.

On these pleadings issue was joined.

Mr. Innes, Q.C. (with him Mr. Stoney), for the plaintiffs.

Mr. Sheil (Acting Attorney-General), with him Mr. Bisset, for the Government.

Benjamin Manning, stationmaster at Mowbray, said he had waybills of cattle consigned to the plaintiffs. On June 17, 1896, the waybill specified that sixty-four cattle left Queen's Town for the plaintiffs. Of that consignment sixty-three reached Mowbray. There was an account sent to Messrs. Tregidga for the carriage of sixty-four bullocks, but there was a footnote to the account in the Mowbray Station clerk's handwriting that only sixty-three had been received. He had ordered the clerk to make that footnote. The carriage charge was made per truck, not per bullock.

Cross-examined by Mr. Sheil: The trucks on their arrival were in good condition and suitable for the purpose of carrying the cattle. Mr. Loubser, an employé of the plaintiffs', gave him a receipt for sixty-four head of cattle. It was uncertain how many came at the time. The porter counted eighteen cattle in the first three trucks, and he counted forty-five in the other trucks. He could not swear that there were sixty-three received, but he trusted his porter.

Mr. Innes: Their case is that they only received sixty-three at Queen's Town.

Mr. Sheil: We say we delivered the number we received.

Alfred James Fleischer, buyer for the plaintiffs at Queen's Town, said that in June last he consigned sixty-four head of oxen from Queen's Town. He counted them himself twice just before they were trucked. He would not swear that he counted the cattle in the trucks.

Cross-examined: The cattle were put in the trucks during the day. It was towards five o'clock. The trucking was finished about dusk. The trucks were all right. He had never known the Railway Department lose an ox in that way before. The loading was done by his (witness's) men. The stationmaster at Queen's Town made out the waybill from his consignment note. The contract was for the hiring of the trucks. He took no receipt for the cattle from the stationmaster.

By the Court: There was nothing analogous to a bill of lading received from the Railway Department. Only since the beginning of the present year had he obliged the Railway Department to give him a receipt for any cattle he trucked. The cattle had travelled forty-two miles before being trucked. They had not travelled all that distance in one day.

Re-examined: None of the cattle had been overdriven before trucking.

By the Court: The value of the first consignment of oxen was from £7 to £9 per head, of the second and third £9 to £13 per head.

Nicholaas E. Loubser, employed by plaintiffs, remembered cattle being sent from Queen's Town in June. There were eighteen cattle in the first batch of three trucks.

Cross-examined: He was not there when the second batch arrived. He signed for sixty-four

cattle a week afterwards. He did not know what number he was signing for. He knew that only sixty-three had come.

Matthys Michiel Loubser, employed by plaintiffs, said he received the second batch of the first consignment from Queen's Town. There were forty-five cattle.

Thomas Mossop, one of the plaintiffs, a partner in the firm of Tregidga & Co., said it was the rule of the firm not to put more than six cattle in a truck. He saw the first batch of the first consignment from Queen's Town, and there were eighteen cattle On the day after the second batch came. There were forty-five of them. The value of the lost ox delivered in Cape Town would be nearly £10. In July they received another consignment of cattle from Queen's Town, one being short, valued at about £12. In October a consignment of thirty cattle was sent from Kei-road. The consignment arrived one ox short, and in addition one of the lot which was delivered was in a very bad condition, exhausted and trampled so that it had deteriorated to the extent of £5. In the last twelve months sixteen cattle had been delivered short, and nine delivered injured or lost. He was bringing this as a test case. He intended to bring an action for the value of the others if he won the present case. He was, however, really more anxious about the future than the past. He wanted the case settled to see if the Government was really liable.

Cross-examined: They had always contended that the Railway Department should forward any injured animal. The Railway Department had maintained that in the interest of sanitary law, if nothing else, oxen that had been killed or damaged in the trucks should be taken out at once and sold. Since the present action had been instituted the Railway Department had in some cases delivered oxen that had died on the journey. A dead ox was worth £1 for the hide and 10s. or 15s. for the tallow. The Railway Department had sold some oxen at a less figure than that, so low as 9s., 10s. 6d., and 14s. The Railway Department had paid compensation for oxen trampled on in the trucks on very many occasions, *e.g.*, in a case where the shutters of the trucks had been closed and the animals rendered faint by suffocation. He had the railway tariff book, and knew that there was a clause in it to the effect that the department would not be liable for damages.

J. Herselman said he had assisted to truck the cattle of the first consignment at Queen's Town. He was sure there were sixty-four of them. They were trucked just at sundown. He was sure the full number of sixty-four were trucked, and that they were all in good condition, and not overdriven when placed in the trucks.

Joe, a Kafir, said that he had driven the cattle of the first consignment from Tarkstad to Queen's Town. They took two and a half days on the journey. There were sixty-four oxen. He counted them in Kafir language. He could not count in Dutch. They were all trucked properly.

Cross-examined: It was not dark when they finished trucking.

Herbert S. Ball, stationmaster, Queen's Town remembered cattle being loaded there by Mr. Fleischer in June last. He did not count the cattle. It was not the practice to do so unless a receipt had been given for the cattle. A waybill had been made out from Fleischer's consignment note, and signed by his clerk. The trucks in which the cattle were sent were in good order, it would be impossible for the cattle to get out. It was quite dark when the cattle in question were trucked.

Cross-examined: The train had been delayed owing to the late loading of the cattle in question. In making out the waybill they took the word of the sender, except where a receipt for the number of cattle was asked for. When a receipt was asked for, the cattle were counted.

By the Court: Every case of cattle falling down in the trucks was not due to violent shock received by shunting.

Arthur C. Harding, guard of the train in which the first consignment of cattle from Queen's Town was sent, said that as far as Stormberg, to which station he took the train, none of the cattle got out. There was no violent shunting.

Cross-examined: Some of the trucks were pretty old, but in good order. He had not frequently seen cattle injured in the trains.

Re-examined: A truck could not have been opened and an ox taken out whilst he was in charge of a train. He had known instances of cattle injuring each other in the trucks.

Andrew James Gardner, guard, said that he relieved the last witness and took the train in question to Middelburg-road. The trucks were not interfered with whilst he was in charge. There was no violent shunting.

Cross-examined: He had never known cattle injured in a train of which he had charge. He had been a guard for about a year.

Thomas Clench, guard, said that he took the train from De Aar to Beaufort West and lost no cattle whilst he was in charge.

The Chief Justice: What's the value of the chain of evidence with one link wanting? Where is the guard from Middelburg to De Aar?

Mr. Sheil: The guards are constantly changing. We have made every endeavour to get these guards, but have been unable to do so.

Samuel J. R. Brown, stationmaster, Middelburg-road, said he remembered oxen consigned to the plaintiffs being found lying trampled in the trucks at his station on dates in July and October. They would not have reached their destination alive if he had sent them on. He therefore had them removed and sold. One of the oxen fetched £4, and the others £3 10s.

By the Court: He had a general authority to sell cattle found in such a condition, and an entry was made as to the action that had been taken.

Continuing, witness said he had sold dozens of cattle so injured. Combrincks had never complained. He attributed the lying down and being injured of cattle to the fact that they were often put in tired after a long journey to the station. Eight was the maximum allowance of cattle to a truck, but five were as many as ought to be placed in a truck. It was an impossibility to get eight oxen in a truck. Cows they might possibly get eight in a truck. He had seen cattle dead in a truck within three hours of their being trucked.

Charles Duffett, stationmaster, Grootfontein, said that on October 5 a train arrived having a truck with oxen for the plaintiffs. Two of the oxen were lying down. He had the truck removed from the train and the oxen off-loaded. The two were completely exhausted, and could not eat. He watered them, and sent them on next day. The truck was numbered 4,478.

Benjamin Manning (recalled) said that on October 7 a truck, No. 4,478, with oxen for Tregidga & Co. arrived, one of the oxen being down and trampled on. It was quite the practice to sell injured oxen of the plaintiffs at stations up the line.

Cross-examined: About four days was the usual time for cattle to take to come from Keiroad.

Mr. Innes for the plaintiff: The Government is alleged in the declaration to be common carriers, this is not denied in the plea. If this is admitted the defendant's case falls to the ground, common carriers being insurers and liable in every case except for loss by act of God or the Queen's enemies. The point has never been decided whether the Government when carrying goods is a carrier, bound by English law.

The Chief Justice: What does our law say on the point?

Mr. Innes: The whole of the doctrine of the carrier's liability in Roman-Dutch law is based on the Edict of the Praetor (*Digest* 4, 9.) A carrier whether by land or water, in Roman law is in the same position, and so also in Roman-Dutch law. Now according to Roman law—those who took goods to carry for hire were liable even without negligence, except in the case of *damnum fatale*. Now there is nothing like *damnum fatale* in this case. But in Roman-Dutch law the rule is laid down by *Voet* (4, 9, 2), who extends a little the doctrine laid down by *Modestinus* in the digest. *Voet* puts robbery from a stable or inn on the footing of goods taken by force from a ship by pirates. See also *Van Leeuwen* (R.D. Law (4, 2, 10), and *Censure Forensis*, (Pt. I. 5, 30, 3). True other writers, *e.g. Schorer*, differ, but see *Peckius* (De Nautica, page 818, folio E.D. Opera ommia), while *Leyser* (Meditationes Vol. I. p. 710, specimen 66) says that in actions "*De receptis*" no *culpa* or *dolus* need be proved—but the plaintiff need only show that he brought the thing to the carrier with the knowledge of the person receiving and that it is immaterial by whom the damage is done. The nearest case in our law is *Naylor* v. *Munnik* (3 Searle, 187); see also *Jones* v. *Union S.S. Co.* (1 Juta, 125), and *Stretton* v. *Union S.S. Co.* (1 E.D., 315), and Shippard's judgment, p. 335); *Story* (on Bailments, section 488) *Burge* (Vol. 3, page 697). The question is whether we must plead and prove *culpa*.

The Chief Justice: The more important question is the *onus probandi*. Does it lie on you to prove negligence or on the Government to prove diligence?

Mr. Innes: That is assuming that negligence must be averred. We do not admit this; and see Act 19 of 1861, section 20. The words used there are applicable properly only to an insurer. Even if the department are not insurers by common law they surely are by their regulations. See Regulations 130 and 131 of the Railway Department. Regulations which clearly contemplate the payment of insurance rates for anything over £12, showing that the Government clearly consider themselves insurers (for amounts under that figure) under the common law and statute; the schedule merely limits the common law liability to £12. Otherwise in terms of the Statute and Regulations a man shipping goods on railways under the department is always insured for an amount £12 less than the actual value. We rely on the Roman-Dutch authorities, but the Statute and Regulations are useful as showing what view the Railway Department takes of its position. The Government is now relying on Regulation 128—but it should have been pleaded as setting up the contract as contained in the Regulations. All considerations of equity and public polic

are in favour of the views laid down by the Roman-Dutch authorities. Our broad principle is that *culpa* is not necessary to be proved, but that the carrier is an insurer and is liable for any damage save *damnum fatale*. The consignor is not bound to send a man with the cattle to feed and water them, it may not be practicable. The Government has not pleaded contributory negligence, and we have not come to meet such a case. If the Court finds that *culpa* is an essential, the onus is on Government to prove due diligence, as we have proved that we delivered the cattle to the department in good order. But the chain in the Government evidence on this point has broken down, for the Government failed to produce all the guards on the various sections.

Mr. Sheil, Acting Attorney-General, for the Government: Assuming that carriers by land are in the same position as carriers by water under the Pretorian Edict, it is clear by our law that the same extent of liability does not attach to them as the law of England imposes upon common carriers. See *Stretton* v. *The Union S.S. Co.* (1 E.D.C., 315), *per* Barry, J.P., at p. 324, and *per* Shippard, J., at p. 335. In *Jones* v. *The Union S.S. Co.* (1 Juta, 125), the Chief Justice regarded the defendants in that case as being in the position of depositaries or, as the English law calls them, bailees. See *Story on Bailments* (sub-section, 428, 457). This being so the liability or non-liability of the Government in the present case depends upon whether the Railway Department has discharged the onus of showing that there was no negligence on its part.

No evidence whatever of negligence has been given. The trucks were proved to be in good order and condition. No accident occurred to the trains which carried the oxen, and under such circumstances there is only one inference that can be drawn and that is that the injured animals sustained damage in consequence of their own "proper vice," or by the vice of the other animals in the trucks, in which case the department, even by English law, would not be held liable, as the loss was occasioned by mere accident and inevitable casualty. See *Blower* v. *The G.W. Railway Co.* (7 C.P., 655); *Kendall* v. *L. & S.W. Railway Co.* (7 Exch. Cases, 373); *Carr* v. *L. & Y. Railway Co.* (7 Exch., 711, 21 L.I. Exch., 262); *Pardington* v. *S.W. Railway Co.* (26 L.J., Exch., 108); *Gabay* v. *Lloyd* (3 B. & C., 793); *Lawrence* v. *Aburdien* (5 B. & A., 107.) Although these cases are not binding on this Court still the principles underlying them are sound, and fully support the doctrine laid down by *Story*.

It is purely a jury question whether the first consignment consisted of 63 or 64 oxen. If the Court is satisfied that 64 oxen were delivered at Queen's Town, the Government would of course have to submit to judgment for the value of that ox.

The Chief Justice: The Court has no doubt as to the liability in one case—the first; but as to the other, we will take time to consider.

C.A.V.

Postea (March 1st).

The Chief Justice said: This is an action against the Railway Department to recover damages for non-delivery of three oxen, which had been consigned to the plaintiffs, and for injury done to a fourth ox, which had also been so consigned. The cattle had been sent by railway from Queen's Town by the plaintiff's agent, Fleischer. The first ox alleged not to have been delivered to the plaintiff was sent in a large troop, filling eight cattle-trucks. The cattle were driven into the trucks by Fleischer himself, who states that he counted them while they were in a kraal adjoining the station, and found them to be sixty-four in number. He is supported in this statement by two other witnesses, and by the important fact that the receipt signed by the stationmaster's clerk at Queen's Town, and sent on to Mowbray, specifies sixty-four as being the number of oxen consigned. Strangely enough, no such receipt was demanded by or given to Fleischer at the time of the delivery. The defendant now alleges that only sixty-three were delivered to the Railway Department, but the only evidence given in support of this allegation is that of the guards who accompanied the train for a portion of the journey between Queen's Town and Mowbray. Each of them states that while he was in charge no oxen could have escaped or been stolen from the train, but such evidence is of no value if links in the chain of proof are wanting. No evidence is forthcoming as to the journey from Beaufort West to Mowbray. In the face, therefore, of the receipt given by the stationmaster's clerk at Queen's Town it is impossible to hold that only sixty-three oxen were placed in the trucks. The defendant was bound, in the absence of any legal excuse, to deliver the full number of oxen consigned, and must pay the full value of the missing ox, which according to the plaintiff's evidence, amounts to 8 guineas. As to the two other oxen which were not delivered to the plaintiffs, the Railway Department account for their non-delivery as follows: On their arrival at Middelburg-road Station in separate trucks and on different days each of the two was found lying down and badly injured from being trampled

upon by the other oxen in the truck. There were six in each truck. In order to prevent any further injury the station-master removed the injured oxen, and acting on instructions from the department, he had them sold to the best advantage. They realised the sum of £7 10s., which the defendant has tendered to the plaintiffs. If they had not been removed from the trucks they would in all probability have been trampled to death. A question has arisen in the course of the argument whether the department had any right to sell the oxen, but assuming that this right did not strictly exist, the question would still remain whether the department is liable for the injury done to the oxen. If the department is so liable the damages payable to the plaintiffs for the loss of the two oxen would be about twenty guineas, but if the department is not so liable there is no proof of damages beyond the sum of £7 10s., which has been duly tendered to the plaintiffs. The important question, therefore, to be decided is whether, under the circumstances disclosed in the evidence, the department, as carriers for hire, are liable to make good the loss occasioned by the injury done to the two oxen. In England the well-established rule is that a common carrier is responsible for all losses except those occasioned by the act of God or of the King's enemies, but even there such responsibility does not extend to losses occasioned by some internal defect or some inherent tendency to damage in the goods carried. Thus, "if horses or other animals are transported by water, and in consequence of a storm they break down the partitions between them, and by kicking each other some of them are killed, the carrier will," according to *Story* (on Bailments, section 576), "be excused, and it will be deemed a loss by perils of the sea." In this colony the liability of common carriers is not quite so wide as in England. It has never yet been expressly decided whether the Prætor's edict, relating to innkeepers, shipmasters, and stable-keepers, applies in this colony to carriers by land as well as by water. In the Netherlands the dearth of authority on this point may be accounted for by the fact that most of the carrying trade has always been done by water, but it is strange that in this colony, where there is no internal transport by water, the question has never been distinctly raised. The edict of the Roman Prætor extended in terms to carriers by water only, but the reasons stated for the rules which it lays down are equally applicable to carriers by land. The edict declared that if shipmasters, innkeepers, and stable-keepers did not restore what they had received to keep safe the Prætor would give judgment against them (*Digest.* 4, 9, 1). The reasons given by *Ulpian* for this edict are that it is for the most part necessary to place confidence in such persons, and to commit the custody of things to them, and that unless this rule were thus established an opportunity would be afforded to them to combine with thieves against those who trusted them, whereas they now have an inducement to abstain from such frauds. The construction placed on this edict was that the bailees named were liable in every case of loss or damage occasioned by theft, injury, or otherwise, although happening without any default on their part, unless it happened by superior force or by what was called "fatal damage," as, for instance, by shipwreck or by the act of pirates. Among instances of superior force being used, *Voet* mentions the cases of an inn or a stable being broken into by burglars, and the property of the guest or the horse of the bailor being stolen, but he adds that if the theft was facilitated by the negligence or default of the innkeeper or stable-keeper, he would be liable, and that the burthen of disproving negligence lies upon him (*Voet* 4, 9, 2). *Voet* does not mention the case of a carrier by land, but in the *Utrechtsche Consultatien* (Vol. I., C. 21) such carriers appear to be placed on the same legal footing as carriers by water. Among French writers on the civil law, *Domat* (Bk. I. t. 16, sub-sections 3 and 4) holds a similar view, which has been adopted in the Code Civile of France (Art. 1782, &c. In *Naylor* v. *Munnik* (3 Searle, 187) which was a case of a carrier by land remarks were made by the then Chief Justice of this Court, and were concurred in by his three colleagues, which tend to show that in their opinion the principles of the edict were equally applicable to carriers by land. "It appears to me," said Hodges, C.J., "that a carrier who undertakes to carry goods is bound to take faithful care of those goods, and is answerable for their loss even in the case of theft. It is for the interest of the public that this rule should be enforced, as otherwise a door would be opened for the perpetration of gross frauds when goods are handed over by their owners for the purpose of transit." Assuming then that carriers by land are subject to the same responsibility as carriers by water, it does not follow that the defendant is liable in the present case. The exceptions to the rule, as laid down by the Prætor, show that a carrier is not an insurer of the safety of the goods intrusted to his care. But Mr. Innes contends that even if by common law the department are not insurers of the safety of cattle carried by rail, their own regulations cast on them the liability of insurers. Under

the heading "Insurance Rates" the 131st regulation fixes the rate for cattle at ten shillings for every £10 or fraction of £10 of declared value above £12 for 151 miles and upwards, and requires that "the insurance premium must be prepaid unless a special agreement to the contrary has been made with the traffic managers." This insurance premium is a special charge over and above the ordinary freight. It can only be charged on the declared value above £12. The fact that no insurance rate can be claimed where no value has been declared, or where the declared value is under £12 for each ox, does not prove that oxen are insured to the extent of £12 by the payment of the ordinary freight. The ordinary rates for the conveyance of cattle and other live-stock are referred to in the 132nd regulation as "freight," and not as "insurance rates," and it is, therefore, impossible to hold that the department, by acceptance of freight, insured the plaintiff's cattle against whatever casualty might befall them during their journey. They are liable for any injury done to the cattle by their negligence or the negligence of their servants, and for loss by theft or otherwise, but so long as they take all reasonable care, they are not liable for damage done to each other by the plaintiffs' own cattle. If, for instance, the proper mode of conveying cattle by train were to place each bullock in a separate box and, without the consent of the owner, the oxen were allowed to be together unfastened in a truck, the department would be guilty of negligence. But it was assumed in the present case that the usual and proper mode of carrying oxen is to enclose about five or six in a truck and leave them standing loose. It was proved that the plaintiffs' own agent placed the cattle in the trucks, that the trucks were in good order and of the kind usually employed for cattle, and that the injury to the two oxen was done by the plaintiffs' own cattle. The department, having proved these facts, are in my opinion absolved from their common law liability, unless the plaintiffs prove actual negligence on their part. Such negligence would not, it is true, be the immediate cause of the damage, but the department would be liable for any harm which might reasonably have been expected to result from their negligence. Thus, if it had been proved that by reason of carelessness in shunting the trains the trucks had been shaken with unnecessary severity and some of the oxen knocked down, the department would be liable for the injury done by the trampling which might reasonably have been expected as the result of such carelessness. But in the absence of any proof of this nature, the Court cannot assume that negligence on the part of the department caused the plaintiffs' cattle to injure each other. The cattle had been driven some distance before they were placed in the trucks, and it is quite as likely that some of them lay down from fatigue as that they were knocked down by carelessness in handling the train. Every facility is afforded by the regulations for the conveyance of cattle drovers in trains carrying cattle, and the department cannot reasonably be expected to provide attendants to lift up any cattle which should happen to lie down or fall. In cases of this nature judges must be careful not to import their own knowledge of what they have known to occur. As frequent travellers by railway, they constantly witness the greatest carelessness on the part of subordinates of the department, but they are not entitled to assume that such carelessness was exhibited in particular cases coming before them. In the present case we only know that two of the plaintiffs' oxen were injured by the other oxen while being conveyed by train, and in the absence of proof that such injury was facilitated by the defendant's negligence, I am of opinion that the plaintiffs are not entitled to recover more than the amount tendered. As to the fourth ox, which arrived at Mowbray in an injured condition, that injury was also caused by trampling, and in the absence of proof of the defendant's negligence, the claim cannot be allowed. The judgment of the Court must therefore be for the plaintiffs for the sum of £15 18s., comprising the sums of £8 8s. and £7 10s. already mentioned, and as the defendant has only tendered the sum of £7 10s., the judgment must be with costs.

Mr. Justice Buchanan: In concurring in the decision just stated, I only wish to say that in my opinion contracts with carriers are governed by the same principles of law, whether the carriers are carriers by land or by water. In the case of carrier not returning property entrusted to him in like good order as it was received, the onus is upon him to show that he is not at fault. In this case there was not much evidence led on this part of the case, but looking at the practice of butchers which has been proved, the nature of the injury caused, the habits of the cattle carried, and the fact that the trucks provided by Government were in good order and that the consignor himself undertook the loading of the trucks, I think the Railway Department has sufficiently discharged the onus upon it of proving due diligence. There is no evidence of contributory negligence, and there is sufficient before us to account for the injury to cattle without there being any default on the part of the carrier. There is one other matter I would refer to, apart

altogether from the legal questions involved. The evidence discloses a mode of treatment of cattle carried on the railway, which if not absolutely cruel is the reverse of considerate. I know there is a diffieulty in watering cattle when on the train, in fact they will not take refreshment in the trucks, and sometimes not for hours after they are released, but at the same time I certainly do not think this justifies the poor brutes being kept four days and nights without food or water, as was shown the cattle were in this case.

Mr. Justice Maasdorp : I concur in the judgment, but I am inclined to take a different view in some respects of the law applicable to the case. It is necessary in the first place to ascertain generally what principles and rules of law govern the rights and liabilities of the parties to this suit. It is contended for the plaintiffs that the Roman law with respect to the liabilities of masters of ships, innkeepers, and stable-keepers, contained in the edict of the Prætor given in the *Digest* (Book 4, Title 9) is applicable to this case in all its original severity. On the other hand it is said the duties and responsibilities of the defendants are similar to those of depositaries for hire, who are bound to use ordinary diligence, and are liable only for damage and loss resulting from ordinary negligence. And it is further argued for the defendants that even supposing their responsibility must be measured by the rules of the civil law, the defendants would come within the exception introduced by the decisions of the Courts of England, where principles similar to those of the civil law are stringently enforced. This exception is admitted in cases where animals which are being carried are injured through an accident caused by what is called their own "proper vice." Under the edict of the Prætor, unless shipmasters, innkeepers, and stable-keepers restore what they have received into their custody for safekeeping they are liable in damages. Under this rule they are held liable for loss and damage, even though it did not result from any default or negligence on their part, unless it happened by what was called fatal damage, or *damnum fatale*. Circumstances and events which would bring losses under the term "fatal damages" are set forth in detail in the authorities, and, unless accidents resulting from some defect or "proper vice" in the animal itself can in some way be included under them, it seems to me the circumstances of this case would not bring the defendants within the exceptions. We have therefore to consider whether the defendants as carriers by land fall under the Civil law rules which regulate the responsibilities of innkeepers, masters of ships, and stable-keepers. They are not expressly brought within the limits of these rules by the terms of the Civil law, which has been adopted in the law of Holland, whatever modifications the latter law may since have undergone with respect to the persons falling under it. The most implicit authority upon this point is *Schorer*, who, in his note to *Grotius*, No. 468, says : "It has been been advised that a coachman, like the master of a ship and stable-keeper, is liable for damage sustained, even without any fault on his part, but *Lauterbach* dissents from this view on the ground that here the reason why the Prætor so decreed in the case of those persons, namely, because that class of men are a deceitful race and often very untrustworthy, and frequently conspire with thieves, fails. Hence, also, when a wagoner has undertaken to carry a box of specie to a certain place, and having lost the money, declared that it had been stolen and the theft also clearly enough proved, it was advised that the wagoner was not liable unless the owner of the money proved negligence on his part, and rightly so if he had authority from the owner to substitute another, otherwise *culpa* had preceded accident, in which case even *vis major* has to be made good, as I pointed out in note 332." If the reasoning in the above passage is sound the principles of the Civil law will for the reason there given not be applicable to the defendants in this case. *Voet*, in book 4, title 9, section 10, says the double penalty against masters of ships, innkeepers, and stable-keepers had become obsolete, the rigour of the Roman law and of the edict of the Prætor remaining in other respects in force *in nautas ac similes alios*. I do not think *Voet* intended by this casual phrase *similes alios* to extend the law beyond the classes of persons treated of elsewhere in this title. On the whole, I am of opinion that the responsibilities of the defendants are not to be tested by the principles which have been founded on the rule of the Civil law, but are similar to those of depositaries for hire. In that case they were bound to use ordinary diligence, and are liable for damage caused by their negligence. As to the burden of proof, I should say the onus lies upon the defendants to prove that the damage complained of was in no way caused by their negligence, but was the result of accident for which they were not responsible. The loss of one ox which, according to the evidence for the plaintiffs, was delivered to the defendants, has not been accounted for, and the defendants are liable for the consequent damages. As to the injured animals, I think there is sufficient evidence to lead to the con-

clusion that the injuries sustained by them were caused by accident beyond the control of the defendants, and not through their negligence. That the accident was not caused by the bad and unskilful management of the train can be inferred from the fact that none of the other animals in the same truck or in the other trucks sustained any injuries, and there is good reason for coming to the conclusion that the treatment to which they were subjected was such that in all probability some of them would succumb on the journey. For that treatment the plaintiffs themselves were to blame, and I am inclined to think that the consequent losses are quite within the contemplation of owners of cattle sent long distances by train, and that they insure themselves by making their calculations accordingly. I only wish to add that in my opinion even if the stringent rules of the English law, which are similar, if not more severe than the Civil law were applicable to this case, it would fall within the exception introduced by the decisions of the English Courts, where it is held that carriers are not liable for damage resulting from what is called the "proper vice" of the injured animal. As I have said before, I think the accidents in this case arose from the exhausted condition of the famishing animals, and for that the plaintiffs themselves were responsible. I am therefore of opinion that the plaintiffs are entitled to judgment for £15 18s., together with costs of suit.

[Plaintiff's Attorney, Gus. Trollip; Defendant's Attorneys, Messrs. Reid & Nephew.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

WOODHEAD, PLANT & CO. v. GULLY.

1897.
Feb. 24th.
March 3rd.
" 4th.
" 16th.

Ship — Charter party — Exception — Negligence of crew — Barratry — Perils of the sea — Warranty of seaworthiness.

By a charter party it was agreed that the defendant's ship "being tight, staunch, and strong, and every way fitted for the voyage," should go to Middlesboro-on-Tees and there load a cargo of slag manure and therewith proceed to Cape Town and deliver such cargo, always afloat in such dock or usual berth as consignees or agents may appoint, "the act of God, perils of the sea, fire, barratry of the master and crew, . . . stranding and other accidents of navigation excepted; even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowner." The ship on her arrival at Cape Town was taken into dock. Certain pipes in the ship were so fitted that by opening two valves sea-water could be made to flow into a ballast tank. One or more of the crew having intentionally opened the valves with the object of sinking the ship.

Held that *the damage thus done to the cargo fell within the exception of "barratry by the crew."*

Held *further, that the fact of the vessel being in port at the time of the damage did not exclude the operation of the exceptions.*

This was an action brought by plaintiffs against John Gully as master of the ship Oberon, representing the ship and her owners, in which the sum of £3,500 was claimed for damages to cargo sustained while on the Oberon.

The plaintiffs' declaration alleged:

1. The plaintiffs carry on business in partnership at Cape Town under the style or firm of Woodhead, Plant & Co.

2. The defendant is sued in his capacity as master of the ship Oberon, now in Table Bay and as representing the said ship and her owners.

3. On or about the 18th day of August, 1896, the said ship was duly chartered by or on behalf of the plaintiffs in London to load and convey from Middlesbro'-on-Tees to Cape Town a full and complete cargo of slag or manure in bags at a freight of 16s. per ton of twenty hundredweight gross weight.

4. The said cargo was duly laden and received on board the said ship in good order and condition, and amounted to 19,281 bags of slag or manure, and the said ship proceeded on her voyage and reached Table Bay, and was on or about the 24th day of January moored in dock at the South Arm for the discharge of her said cargo.

5. It became and was the duty of the defendant and the owners of the said ship in accordance with the aforesaid charter party and relative bill of lading to make delivery at Cape Town to the plaintiffs of the said cargo in like good order and condition, but the defendant and the said owners have failed and neglected to deliver the said cargo as to part therefore in like good order and condition, but have delivered portion thereof, to wit 5,581 bags or thereabouts, in a damaged condition, such damage having been occasioned by sea water which reached the said portion of the said cargo after the said ship was moored as aforesaid, but before any delivery of the said cargo or any part thereof.

6. The said sea water reached the said cargo through negligence on the part of the defendant or the persons employed by him on board the said ship, but independently of such negligence the plaintiffs contend that the defendant in his aforesaid capacity is liable for the damage and loss sustained by the plaintiffs who have received delivery of the damaged cargo without prejudice to their claim to recover such damage.

7. The damage so sustained amounts to the sum of £3,500, if a sum of £50 be included which the defendant contends that the plaintiffs should pay for the cost of pumping out the said sea water, but the plaintiffs do not admit that the said cost of pumping should be charged against them; and deducting that sum they are entitled to claim payment of the sum of £3,450 from the defendant and against the said ship which has been duly attached by order of this Honourable Court *ad fundandam jurisdictionem*.

8. The defendant in his said capacity neglects and refuses to pay the said sum of £3,450, or any part thereof.

9. The freight still due and available under the aforesaid charter party is £387 4s.

Wherefore the plaintiffs pray for judgment for the said sum of £3,500 sterling, and failing payment forthwith of the said amount, they pray for an order declaring the said ship and the amount of freight, to wit £387 4s., executable in satisfaction of the judgment aforesaid, together with costs of suit,

Or, that they may have such further or other relief in the premises as to this Honourable Court may seem meet, together with costs of suit.

For a plea to the declaration the defendant said:

1. He admits the allegations in the first four paragraphs contained.

2. Bills of lading were duly signed by the defendant and accepted by the plaintiffs in their favour for the whole of the said cargo. And the said bills contained the following conditions: "The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates and thieves, arrests and restraints of princes, rulers, and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowners. Ship not answerable for losses through explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, not resulting from want of due diligence by the owners of the ship, or any of them, or by the ship's husband or manager.

3. As to the 5th paragraph he says that he duly delivered all the said cargo to the plaintiffs in terms of the charter party and bills of lading, but he admits that 5,000 bags or thereabouts had been damaged by sea water, which reached the cargo while the ship was moored in dock through a valve connected with the ballast tanks. Delivery of the cargo had commenced before the said damage was discovered. He denies the other allegations in the 5th paragraph.

4. With regard to the 6th paragraph he says that the water did not reach the cargo through any default on the part of himself or the persons employed on board the ship; but even if it did he says that the owners of the ship are protected from liability by the terms of the bill of lading hereinbefore set forth. He does not admit the plaintiffs' contention in the 5th paragraph contained.

5. He denies the allegations in the 7th paragraph, and he says that owing to the quantity of water which flowed into the said ship through the valve aforesaid the ship and cargo were in danger of foundering, and that it became necessary for the safety of the entire ship and cargo to incur exceptional expenditure in pumping out the said water. The defendant engaged the steam tug Alert to pump out the said water, and incurred other liability for the benefit of the said ship and cargo. He contends that the expenditure thus incurred by him was on a general average expenditure, to which the plaintiffs, as owners of the cargo, are bound in law to contribute.

4. He admits the allegations in the 8th and 9th paragraphs, save that he says that the amount due for freight as aforesaid is the sum of £687 4s.

Wherefore he prays that the plaintiffs' claim may be dismissed with costs.

For a claim in reconvention the defendant said:

1. He asks leave to refer this Honourable Court to the matters set forth in his plea to the declaration.

2. The amount due by the plaintiffs as a general average contribution in terms of section 5 of the plea is the sum of £60 or thereabouts.

3. All things have happened, all conditions been fulfilled, and all time elapsed to entitle him to demand from the plaintiffs payment of the freight aforesaid, and also of the sum of £60 for general average contribution. Yet the plaintiffs neglect and refuse to pay any part of the said sums.

The defendant claimed in reconvention: (*a*) Payment of the sums of £637 4s. and £60 as aforesaid; (*b*) alternative relief; (*c*) costs of suit.

The plaintiffs, in their replication, admitted as to paragraph 2 that they accepted bills of lading for the whole of the said cargo, and that the said bills had certain conditions affixed and initialled by the master in the terms set forth in that paragraph, but they referred the Court to the terms of the bill of lading, and denied that the conditions are binding on them, and alleged that the bills of lading did not protect the defendants from liability for the loss or damage the subject of the action.

As to paragraph 4, they denied knowledge of the circumstances under which the damage was caused, and denied defendant's contention.

They admitted the water was pumped out from the vessel, and that it was necessary for the safety of the ship and cargo to do this, but denied liability for any part of the expense incurred.

In the plea to the claim in reconvention the defendants in reconvention denied liability for expenditure of pumping, admitted that the balance of freight is £687 4s., but claimed to deduct certain payments and liabilities incurred on behalf of the plaintiff in reconvention to the amount of £300, and tendered to pay the balance (£318 4s.) upon their claim as set out in the declaration being satisfied.

Upon these pleadings issue was joined.

Mr. Searle, Q.C. (with him Mr. Benjamin), for the plaintiffs.

Mr. J. Rose-Innes, Q.C. (with him Mr. *Graham*), for the defendants.

For the plaintiffs was called

William Spivey Woodhead, a member of the plaintiffs' firm, who said that the firm had an office in London. Witness was in London in August, 1896, and personally conducted the business of the charter of the ship Oberon. The cargo of manure consisted of Albert's phosphate powder. This was easily damaged by water. It contained 40 per cent. of lime, and hardened into lumps on contact with water. Its value lay in its fineness, and the powder was supposed to go through a sieve of 10,000 meshes to the inch. The firm had dealt in the powder for several years. When it was caked, it would take years for the plants to get any benefit.

By the Court: The stuff was not altogether unsalable in its damaged state; in fact, it had been sold by auction.

Examination continued: £690 was paid on account of freight in London. The full freight was £1,374. There was still a sum of £225 7s. 8d. in the hands of the plaintiff firm to the credit of the captain. The ship was docked on January 21. On that date witness saw the captain, and asked him what condition the cargo was in. He replied that it was in sound condition. Next morning witness was telephoned for, and when he got down to the Docks he found great excitement on board and the vessel apparently sinking. The water appeared to be beating into the deck scuppers. Witness afterwards saw the captain, who stated he had found the valves open, which had allowed the water to flow into the ballast-tank, which contained cargo. The captain told witness the ballast-tank was connected with the sea by two valves. The valve-wheels on deck must have been improperly turned in order to admit the water into the ballast-tank. The ballast-tank and manholes being uncovered, the water flowed into the fore and aft holds. The captain stated that his attention was called to the ship sinking by a hawker on shore and the captain found that this was so. The captain then had the vessel pumped, and the tug Alert was employed in this operation by the advice of witness and surveyors. Witness called in Messrs. Herbert and Watson, and went down to have the cargo surveyed. This was on the Saturday morning, when the ship was two feet higher and the water out. It was January 27 before the trucks were down to get delivery. The captain wanted witness to sign an average bond, which he refused to do, as the captain did not wish anything put in as to the valve being found open. Fifty pounds was paid into the bank on joint account to cover expenses of pumping. This was done instead of signing the average bond. Witness thought the best way was to

have the damaged cargo sold. There was no machinery here which would grind the manure sufficiently fine. The net proceeds of the sale of the damaged cargo was £455 17s. 3d. The stuff was sold by plaintiffs' firm at a price of 95s. a ton This showed a loss of £1,969. Nearly all the good cargo was sold.

Cross-examined: Witness was now familiar with the bill of landing. Upon it was pasted what was called the negligence clause. Witness held that this clause was not binding upon plaintiffs. He did not suggest that there was any fraud in the pasting on of the clause. The tank was for carrying cargo, but seeing that the valves were unlocked and unprotected, he thought the cargo was improperly carried in the ballast tank. Plaintiffs' firm charged commission on the sale in accordance with the regulations of the Chamber of Commerce. Witness endeavoured to get the damaged stuff re-crushed, but was not successful. A full week's notice of the sale was given. Witness proposed that the captain should take the damaged cargo back to Middlesborough as a means of reducing his loss.

By the Court: The cargo was insured free of particular average, which meant insured against total loss only.

Cross-examination continued: The well went down right to the bottom of the ship. It was easy for a sailor to get down. Mr. Advocate Searle had been down it. The wheels of the valves could not be turned from the deck. A person would have to go down to a platform to turn the wheels, which could not be turned except by someone acquainted with such machinery. The captain said he found the canvas cover of the well on the deck, and the rope missing.

Hans August Paul Burmeister said he had been a sea captain, but now had a berth ashore. He had seen the Oberon and the well where the two wheels were. Vessels of this kind were rare. He remembered one particular ship—the Bermuda - with similar valve openings and ballast-tanks coming here some years ago. On the Bermuda the valves were protected, a special chamber nine feet square being built and locked up, the key being in the captain's possession. When he saw the valves of the Oberon the thought struck him there should have been a proper lock to the lid, so as to prevent any tampering.

Cross-examined: Witness had had no experience of these ships himself.

John A. S. Watson, a member of the firm of Messrs. Searight & Co., said he had carried on business in Cape Town since 1878. In company with Mr. Herbert witness surveyed the damaged cargo and made two reports. In the second report they recommended that the damaged cargo should be sold. The damaged cargo was not in a merchantable condition. He had had experience as to chemical manures. He could not recommend the stuff to be sent back to England to be re-treated because of the expense. He had never before seen a vessel with ballast tanks of the same build as the Oberon. He had seen ships with smaller and separate tanks, but never one like this, with one big tank amidships.

Cross-examined: Witness knew the ship was classed A1 at Lloyds, and he certainly would not go against the surveyor's recommendation.

Joseph William Herbert, partner in the firm of Messrs. Attwell & Co., shipping agents, corroborated.

H. E. Pickstone said he had purchased some of the damaged stuff, which could be crushed with a spade. The stuff could be used for orchards, but was not much use for nursery purposes.

This closed the plaintiffs' case.

John Gully, master of the Oberon, said the owners were Messrs. James Fairlie, of Glasgow. The Oberon was one of three ships belonging to the same owners. They all had ballast-tanks. The Oberon was built three years ago last September, and was classed 100 A1 at Lloyds. When she left Middlesborough the ship was sound and seaworthy. Witness had been at sea twenty-five years. No one could see one of the wheels mentioned unless he could see through a 5-inch plank. The apprentice was on duty on the night of January 21. He was intelligent and reliable. On the morning of the 22nd Captain Sinclair, the marine surveyor, came on board, and certified that the hatches were well battened down. About a quarter past nine a boy, a dealer in feathers, came on board and said something as to the position of the ship in the water. Witness then found the ship was considerably below her marks, and the carpenter at once made soundings. The carpenter was now in prison for attempted desertion. The carpenter said the tank was full of water. They found the valves open, and they were at once closed. Then the ship was pumped, first by hand, then by steam, and then the Alert came along and rendered assistance. Witness thought the valves must have been opened about midnight on the night of the 21st. If the tank were empty, it would take about twelve hours to fill. It would be difficult to get on board except by the gangway. The crew were not now all on board. The carpenter was in gaol, one of the crew was in hospital, and four had deserted—the

first ten days after the accident. Witness had had no trouble with his crew; the mate had a "slight altercation" with a man in the roads. The mate was charged with assault and was fined 10s. Messrs. Haswell & Stephen had certified that the valves were in good condition, and could not be opened except by hand and of set purpose. Plaintiffs asked for security for £2,000, and witness wired to the owners to that effect. Witness made all endeavours to trace how the valves were opened without success. No stranger would have understood the nature of the valves.

Cross-examined: Witness had not sailed in a sailing ship with this kind of ballast tank before. So far as he could ascertain, the cargo arrived in dock in a sound condition,

Percival Ethelbert Hahn, apprentice on board the Oberon, was on duty between six p.m. on January 21 and six a.m. on January 22. His duty was to walk up and down and see that things were right During that time Charles Johansen and F. Johansen, an apprentice, the carpenter, and a seaman left the ship. The men went on shore by the gangway. Charles Johansen and the seaman came on board again about midnight; the others came on board between twelve and one o'clock. Witness spoke to them. One of the men (Scott) went forward; he could have gone to the valves without witness seeing him. When Scott came back Martin, the carpenter, went out of the deck-house for about five minutes. When the carpenter came back, Scott went out again for a few minutes. After that, so far as he knew, the men turned in. So far as he knew no one else came on board that night Charles Johansen had since deserted.

Cross-examined: Witness was often on duty during the night, and he walked up and down. Sometimes witness sat down. The ship came into dock about noon; and witness could not tell all the people who came on board from the time she was moored. Witness was not on duty the previous night.

Hugh K. Haswell, resident engineer for the Castle Company, said he inspected the ship on January 22, and advised that the services of the Alert should be obtained. This was for the benefit of both ship and cargo. There was nothing improper in putting cargo in such a tank as that in the Oberon. It was hardly possible for anyone not acquainted with the working of the valves to open them.

Cross-examined: Witness had mostly had to do with steamers, but had had experience in surveying ships. He had not seen many sailing ships built like the Oberon He did not remember the Bermuda. For greater security the well should have been locked.

William Stephen, Superintendent of the Alfred Docks, corroborated the evidence of the last witness. He had only seen one such ship as the Oberon before. He agreed that a stranger could not have turned on the valves.

William Toms, first mate of the Oberon, was on board most of the time she was in the Bay. There was only one visitor, a friend of the captain and witness. When the ship came into dock she was drawing the same water as in the Bay. The man-hole was not in a conspicuous place The covering was on when the vessel came into dock. Next morning the rope had disappeared from the man-hole. Two valves would have to be opened before the water could come into the ship.

Charles Duncan, second mate of the Oberon, said that when the captain went ashore he was with the boat's crew. He never took any visitors to the ship.

Arthur T. Edwards, manufacturer of manures at Diep River, said he had a complete plant for crushing. He examined the damaged stuff, and he could have crushed it through a sieve of 1,200 holes to the square inch. He could have crushed it to 3,000 to the square inch, but would have had to get special sieves. He thought the stuff could have been crushed for about 32s. per ton.

Cross-examined: The finest mesh procurable in town was 3,600 to the square inch.

Mr. Woodhead (recalled) said: £4 15s. per ton would be the value of the manure at the railway-station. The charge per ton for delivery from the Docks to the Railway-station would be 3s. per ton.

This closed the evidence.

Mr. Searle, Q.C., for the plaintiffs: It is admitted that the cargo was brought sound to the Docks on 21st January, and that a large portion of it was delivered in a damaged condition. The onus is on the defendant to show why it was not delivered in good condition. *The Freedom* (L.R., 3 P.C., 594). It is difficult to see from the plea what the defence is, though the defendant sets out the negligence clause. But such a clause is interpreted strictly as against a shipowner; it is for him to show that if he contracts himself out of liability; the present case falls within the exceptions. He therefore must show that this damage is due either to a peril of sea, barratry, or accident of navigation. *Scrutton* (Charter Parties and Bills of Lading, p. 185, and the cases there cited) deals with negligence of master or mariners. See *Taylor* v. *Liverpool S.S. Co.* (L.R. 9, Q.B. 549); *The Chartered Bank* v. *Netherlands Co.* (10 Q.B.D., 521); *Norman* v. *Binnington* (25 Q.B.D., 477); *Burton* v. *English* (12 Q.B.D.,

218): *Abbott* (Mercantile Shipping, 329, 333); *Notara* v. *Henderson* (41 L.J., Q.B., 158). As to perils of sea, see *Scrutton* (page 176); *Pandorf* v. *Hamilton* (16 Q.B.D., 629, 633)—and the definition of "perils of sea" there given; *The Accomac* (15 Prob. Div.. 210); *The Southgate* (Prob. Div., 1893, page 329). See also *Scrutton* (pp. 187, 188), as to when voyage can be considered as terminated for the purpose of the bill of lading; *The Canada Shipping Co.* v. *British Shipowners, Association* (23 Q.B., 344) and *The Pharaoh* (Prob. Div., 1893, p. 30). From the above cases it will be seen that the loss in the present case was clearly not an accident of navigation; it is not a peril of the sea when the ship is moored safely in dock and accident happens there through negligence of some person. *The Chasea* (4 L.R., A. & E. 446). Neither was it barratry, for barratry must be founded on fraudulent intention—and arise *ex maleficio* and the evidence does not support this. *Fletcher* v. *Inglis* (2 B. & A., 315). Our case of *Philip Bros.* v. *Koop* (4 Juta, 53) was overruled by *Pandorf* v. *Hamilton* (16 Q.B.D., 629), though in the latter case there was no negligence. See also *The Glen Ochiel* (Prob. Div., 1895, page 10); *Woodhouse* v. *Christian & Co.* (4 E.D., 183). It is not for us to prove how the damage was done, it is for the defendant to show how it was done and that it falls within the exceptions provided for in the bill of lading. Counsel also cited *The Carron Park* (15 P.D., 207); *Strange* v. *Steel* (14 App. C., 601).

Postea (March 3rd).

Mr. Innes, Q.C., for the defendants: To arrive at a correct estimate of the liability of the defendant we must look at the documents constituting the contract of affreightment. The chief one is the contract in the charter party, and particularly to be noted is the effect of the clause contained in the slip admittedly attached to the charter party before execution, in which all liability for damages from accidents, perils of the sea, and barratry, is provided against even when the damage is occasioned by the negligence of the master. The bill of lading is in all essential respects the same as the charter party in this case. What is the ordinary effect of such an exception? *Krohn* v. *Nurse* (Buchanan 73, page 85), and *Philip* v. *Koop* (4 Juta, 53); show that in ordinary cases where there is no negligence clause the shipowner is liable for negligence even if the damage is within the exceptions, but when the negligence clause is contained in the charter party the shipowner is guarded against at least negligence of servants: *Steele* v. *State Line Co.* (3 App. Cases, 72). True he cannot guard against his own neglect in providing an unseaworthy ship. Unless therefore the ship's tank in the present case was so constructed as to render the ship unseaworthy the owner is guarded. Defendant urges that the water was let in by one of the crew—and we are guarded against liability for this because of the exception as to barratry. If not by the crew, then by whom was the water let in? Then it is an accident due to an unknown cause, it is a peril of the sea. The mere fact of its being due even to an outsider assisting the forces of nature does not take it out of the category of perils of the sea. There was no water when the ship came into dock, next morning it was full. This could have been caused only (*a*) by an outsider. (*b*) by the crew acting negligently, (*c*) by the crew doing it wilfully. The Court sitting as a jury would be warranted in finding the facts inconsistent with the act having been done by an outsider. What motive could an outsider have? Besides, the man who did it must have known all about tanks and valves. The whole matter is surely highly suspicious as against the crew. It is pretty clear that one of the crew did let the water in, and if he did it wrongfully it was barratry at least. Even if it had been done negligently our case would have been stronger—and the case of *The Southgate* would apply (Prob. Div. 1893, page 329). If the act was barratry, see *Bevan* (on Negligence, Vol. II., page 1,299); *McLachlan* (Law of Merchant Shipping, p. 263). Barratry means some fraudulent, wrongful act by the master and crew against the interest of the ship or cargo. If the ship is lying in the dock—is her voyage finished? Her legal charter party voyage is not finished so long as the cargo remains to be dealt with though the actual sailing voyage is finished. *Laurie* v. *Douglas* (15 M. and W., 746) seems in conflict with *The Accomac* (15 Prob. Div., p. 208). But see *The Carron Park* (15 Prob. Div., p. 203); *The Southgate* (Prob. Div. 1893, p. 329). There may be a peril of the sea even where there is no navigation.

The Court intimated that it was not necessary to argue the point of damages.

Mr. Searle. in reply, referred to *The Glenfruin* (10 Prob. Div., 103) and *Tattersall* v. *National Steamship Co.* (12 Q.B.D., 297); *Xcauttas* (12 App. Cas., H.L., 512); *Armould* (on Maritime Insurance, Vol. II., page 76'); *Muter's Executors* v. *Jones* (3 Searle, 356); *Scrutton* (page 188).

C.A.V.

Postea (March 4th) the Court delivered judgment.

De Vil'iers, C.J.: The plaintiffs seek to recover from the master of the ship Oberon, as

representing the owners, the sum of £3,500 for damage done to a cargo of slag manure consigned to the plaintiffs, who were charterers of the ship. The charter party, which was executed in London described the ship as classed 100 A1 Lloyds, and as "being tight, staunch and strong, and every way fitted for the voyage." On a slip of paper, which is admitted to have been attached to the charter party before its execution, the following clause occurs: "The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers and people, collisions, stranding, and other accidents of navigation excepted; even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowner." The questions to be determined are whether the ship was seaworthy when she took in the cargo, and, if she was, whether the damage falls within any of the exceptions contained in the charter party. A portion of the cargo was stowed in a part of the ship which can also be used as a water-ballast tank. In order to fill this tank with water, it is necessary to open two valves, one of which allows the water to rise in a pipe communicating with the sea, and the other allows the water to flow into the tank. As the water flows into the tank, the ship sinks deeper into the sea and thus causes the water to continue flowing into the tank until it is filled. In order to reach the wheels for turning the valves, it is necessary for a person to go down a manhole five or six steps to a platform, which is about eight feet below the deck and about fifteen or sixteen feet above the bottom of the ship. There was no defect in the valves, nor could they have been opened without the use of some force. The manhole was kept closed by means of a wooden cover over which there was a canvas cover. The ship arrived in Table Bay on the 23rd of December last, and entered the dock on the 21st of January. On the morning of the 22nd the discharge of cargo was commenced, and between nine and ten a.m. the master observed that the ship was settling down in the water, and on investigating into the cause, he found that the two valves had been opened and that the water was entering into the ballast tank. He afterwards used every effort to discover the person who had opened the valves but was not successful. Judging by the quantity of water which had flowed into the tank, he came to the conclusion that the valves had been opened about midnight between the 21st and 22nd of January. The cargo in the tank was damaged by the seawater and it is for this damage that the present action is brought. The plaintiffs contend that the facility with which the valves could be opened is evidence of faulty construction and that the Court is bound to find that the ship was not in a seaworthy condition. In support of this contention they greatly rely upon the fact that after the damage had been done the master secured the valves by means of handcuffs to prevent a similar occurrence in future. The ship is admittedly classed 100 A1 Lloyds, which is said by one of the witnesses to be the highest class register. In the face of this fact it requires more evidence than has been adduced on behalf of the plaintiffs to satisfy the Court that the ship was not "every way fitted for the voyage." A wooden ship may be tight, staunch and strong and yet it would be as easy to bore a hole in her bottom as it was to open the valves of the Oberon. Precautions were afterwards taken to prevent the valves being opened again, but even these precautions would not be sufficient to prevent one of the crew from forcing open the handcuffs and opening the valves when a convenient opportunity offered. We are clearly of opinion that the ship was seaworthy when the cargo was loaded and at the time of sailing from the port of loading. The next question is whether the defendant is protected by any of the exceptions which I have enumerated. We are satisfied, after a careful consideration of the evidence, that the valves were intentionally opened with the object of letting in the water, and that this was done by one or more of the crew. It was a case therefore of barratry by the crew, just as much as if one of the crew of a wooden ship were to bore a hole in her bottom with the view of scuttling her. If this view be correct then clearly one of the exceptions applies. But assuming that the evidence be held insufficient to prove barratry, we are of opinion that the damage was occasioned by a peril of the sea. The exceptions in the present case embrace perils of the sea, &c., "even when occasioned by the negligence, default or error in judgment of the master or mariners," so that the negligence, if there was any, of the master or mate in not keeping a proper supervision over the valves cannot be relied upon by the plaintiffs. The main objection taken by them to the applicability of the exceptions is that the vessel was in dock at the time of the accident. I take the true rule, however, to be as stated by Mr. Scrutton on Charter Parties Article, 91, that "exceptions in the contract of affreightment, unless otherwise clearly worded, limit the shipowner's liability during the whole time he is in possession of

the goods as carrier, and therefore apply during the loading and discharging of the goods." The cases on the point are not perhaps reconcilable with each other, but in none of those where the shipowner has been held liable, was there a clause like the one in the present case. The terms "other accidents of navigation" in the charter party cannot have been intended to limit the preceding exceptions to the time when the ship was actually on her voyage. Thus if the ship had been destroyed by fire while in port, the exceptions would have been applicable, and it has not been contended that if the damage now in question was caused by barratry, as found by the Court, the shipowner would have been liable. We entertain no doubt whatever that if the damage had been done on the voyage and not in the port the exceptions would have applied. The loss would certainly have been recoverable under a marine policy, as due to a peril of the sea. To use the language of Lord Herschell in *Hamilton* v. *Fraser* (4 A.C., 530), "it arose directly from the action of the sea. It was not due to wear and tear, nor to the operation of any cause ordinarily incidental to the voyage, and therefore to be anticipated." In that case rice had been shipped under a charter party and bill of lading which excepted "dangers and accidents of the seas." During the voyage rats gnawed a hole in a pipe on board the ship, whereby seawater escaped and damaged the rice, without neglect or default on the part of the shipowners or their servants. It was held by the House of Lords, reversing the decision of the Court of Appeal, that the damage was within the exception, and that the shipowners were not liable. In the case of the *Xantho* (4 A.C, 503), the question was discussed by the House of Lords whether the term "perils of the seas" should receive a different construction according as they occur in contracts of affreightment or in policies of insurance, and was answered in the negative. "Was it," said Lord Bramwell, "by a peril of the sea that the defendants' ship foundered? The facts are that the seawater flowed into her through a hole and flowed in such quantities that she sank. It seems to me that the bare statement shows she went to the bottom through a peril of the sea. It is admitted that if the question had arisen on an insurance against loss by perils of the sea this would have been within the policy a loss by perils of the sea. Are the words to have different meanings in the two instruments?" and he answers this question with a decided negative. Lord Macnaghten was equally emphatic. "The Court of Appeal," he said, "start with the assumption that the same words have different meanings—when used in policies of assurance and when used in bills of lading. For that assumption there is not, I venture to think, any foundation. Different considerations, no doubt, apply to the two contracts, a contract of indemnity and a contract of carriage, and the same event may have a different, result in the one case from what it would have in the other, but in mercantile contracts so closely connected the same words must have the same meaning." Holding as we do that a policy of insurance against perils of the seas would have covered the damage done to the plaintiff's cargo we are of opinion that the defendant is not liable for the loss. The amount claimed in reconvention is admitted to be due and judgment must be given accordingly.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorney, C. C. Silberbauer.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

BANK OF AFRICA V. BENNETT AND OTHERS. { 1897. Feb. 25th.

Mr. Tredgold applied for provisional sentence on a promissory note for £15). Two of the parties had confessed judgment.

Granted.

SMUTS AND KOCH V. VAN JAARSVELD.

Mr. Jones applied for provisional sentence on a notarial bond for £4 0, dated January 31, 1894, and interest at the rate of 6 per cent.

Granted.

JOSLING AND CO. V. O'CONNOR.

Mr. Tredgold applied for the discharge of the provisional order for sequestration in this matter.

Granted.

LEGHORN, HARRIS AND STEPHEN, AND OTHERS V. SMITH.

Mr. Tredgold applied that the return day be extended to March 12.
Granted.

REHABILITATIONS.

Re JOHN ALFRED GREEN.

On the application of Mr. Close, the rehabilitation of John Alfred Green was granted.

Re EDWARD JOHN PRINGLE.

On the application of Mr. Close, the rehabilitation of Edward John Pringle was granted.

GENERAL MOTIONS.

IN THE MATTER OF THE PETITION OF JOHN LAWSON CAMERON.

Articled clerk—Attorney—Period of Service.

Mr. Macgregor applied for leave to petitioner to count the period Mr. Cameron has already served as an articled clerk in Scotland, viz., two years four months and one week, and to allow him to indenture himself to an attorney in this colony to serve the remaining period of seven months and three weeks, so as to complete a three years' service, and be thereafter admitted an attorney of this Court.

The application was granted, save that a period of twelve months' service was ordered, with production of certificate that applicant has passed the attorneys' examination before admission.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné.]

IN THE MATTER OF THE PETITION OF SARAH SOPHIA VAN SITTERT.

Mr. Searle, Q.C., applied for the appointment of a *curator ad litem* in proceedings to have her husband Peter John van Sittert declared of unsound mind, and for leave to give evidence by affidavit.

The Court granted the application. Mr. Meyer, chemist and J.P., of Queen's Town, in whose employ the alleged lunatic had been for thirteen years, was appointed *curator ad litem*.

CHIVELL V. CARLYON. { 1897. Feb. 25th.

Marriage—Community—Domicile—Immovable property.

Questions submitted by the High Court of England for the opinion of the Supreme Court.

1. *Assuming that two spouses were domiciled in this Colony at the time of their marriage here, and remained so domiciled here during their joint lives, would certain immovable property in England purchased by the husband during the subsistence of the marriage fall within the community of property created by the marriage?*
2. *Assuming that the spouses were so domiciled at the time of their marriage, but subsequently changed their domicile to an English domicile before the purchase of the immovable property, but during their joint lives, would such change of domicile have any effect upon their respective rights in regard to the said property.*

Held, that *the first question must be answered in the affirmative, and the second in the negative.*

This was a case stated for the opinion of the Supreme Court by the direction of his lordship Mr. Justice Stirling, Chancery Division, High Court of Justice, England. The facts of the case were: On August 3, 1887, William Chivell, then a widower, married Caroline Dorothea Dickson, then a widow, at Kimberley. No antenuptial contract was executed. Mr. W. Chivell, at the time, had one son (a defendant in the present action), William Richard Chivell, born during the previous marriage in England; his wife had had three children (defendants in the present action) by her first marriage, who were born in the Cape Colony. On February 10, 1888, Mr. and Mrs. Chivell made a joint will at the Cape of Good Hope, appointing the survivor and children of the prior and existing marriages to be sole and universal heirs, with a life usufruct in favour of the wife. There were three children (plaintiffs in the present action) issue of the marriage between the testators. The testators proceeded to England (which was Mr. Chivell's domicile of birth), and during their joint lives acquired immovable properties there in the name of Mr. W. Chivell, to whom it was conveyed. Mr. Chivell survived his wife and re-

the question at issue was settled by the proclamation of 12th July, 1822, added that "the great body of civil lawyers agree with *Voet* in upholding the ubiquity of the matrimonial domicile by virtue of the tacit contract which is everywhere of legal obligation." In the subsequent case of *Black* v. *Black's Executors* (3 Juta, 200), parties who had been married in Scotland changed their domicile and came to reside at the Cape, and the question arose as to the rights of the wife and of her heirs *ab intestato* in respect of immovable property acquired by the husband in this colony. It was not even contended that the change of domicile gave the wife any different rights in respect of immovable property situated here from those which she would have enjoyed in Scotland. It was admitted that the law of Scotland must prevail, and the only question to be decided was what the law of Scotland was. In the present case it is not stated where the money came from to pay for the property purchased in England. We may assume, however, that the money was paid by the husband himself. That money, at all events, until paid to the vendor, formed part of the community between the spouses. Does the fact that it is invested by the husband in the purchase in his own name of land situated in England deprive the wife of her share in the community? If such were the law a husband married here in community of property, who wishes to deprive his wife of her share, might change their domicile to a foreign country, where community does not exist, and then with impunity obtain the wife's share for himself by investing the whole of the partnership in immovable property situated in such foreign country. In this colony parents often prefer to see their daughters married in community instead of by ante nuptial contract, because they consider the tacit contract of community of more advantage to their daughters. All the advantage might, however, be lost if the husband had it in his power by a subsequent change of domicile and purchase of land in the new domicile to transfer his wife's property to himself. In answer to the first question, the Court is of opinion that the immovable property in England falls within the community of property created by the marriage. In answer to the second question the Court is of opinion that the change of domicile of the parties has no effect upon their respective rights in regard to the said immovable property.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Reid & Nephew; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

GOOSEN V. GOOSEN.

Mr. Jones appeared for the plaintiff; defendant in default.

This was an action for the restitution of conjugal rights, and failing that, for divorce. The parties were married at Seymour in 1881, and there were two children of the marriage. In September, 1884, the defendant deserted the plaintiff, and had not since contributed towards her support.

Henrietta Ann Goosen, the plaintiff, said she was married by the Rev. Mr. Shaw, at Seymour, in the year 1881. The clergyman, Mr. Shaw, had since died. Witness lived with her husband at Tarkastad for about two years. Shortly after the marriage her husband was convicted of fraudulent insolvency. There were two children —a boy and a girl. Defendant was in prison six months, after which he came back and stayed with witness about a year. After the desertion witness went back to Tarkastad. Defendant left witness at Seymour, saying he was going to Adelaide. Just after the desertion witness received a letter, but had never seen the defendant since; nor had he supported her in any way.

The Court granted a decree for the restitution of conjugal rights, defendant to return on or before March 31, failing which a rule *nisi* would be granted dissolving the marriage, and giving the plaintiff the custody of the two minor children.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret.]

JONES V. MATTHEWS. { 1897. Feb. 25th. „ 26th.

Insolvency — *Fidei-commissum* — Vesting - Conditional legacy.

In the absence of any indications of a contrary intention in the will, property bequeathed subject to a fidei-commissum *does not vest in the fidei-commissary legatee until the expiration of the previous fiduciary interest. Certain land having been bequeathed to the defendant's mother subject to a* fidei-commissum *upon her death in his favour he became insolvent, whereupon the plaintiff purchased the insolvent's expectancy from the trustee. The defendant's mother died after the account of the insolvent estate had been confirmed.*

Held that *the plaintiff was not entitled to recover the property from the defendant.*

The case of **Van Breda** *v.* Master 7 Juta, 360) *approved.*

This was an action brought by Charles Tennant Jones against George Frederick Matthews, individually and in his capacity as executor testamentary of the estate of the late Jane Matthews, to obtain an order for declaration of rights and transfer.

The plaintiff's declaration was as follows:

1. The plaintiff resides at Wynberg, in the Cape Division; the defendant resides at Port Elizabeth; and he is sued individually, and also in his capacity as executor testamentary of his mother, the late Jane Matthews.

2. On the 27th April, 1852, one John Parkin, the father of the said Jane Matthews, and the grandfather of the defendant, executed his last will and testament, in terms of which, *inter alia*, he bequeathed to his daughter Jane, then married to one John Matthews:

(*a*) Certain lot of ground marked No. 19, situate in Bird-street, Port Elizabeth, purchased by the testator from William Harris, as per deed of transfer, dated the 2 st March, 1849.

(*b*) Certain piece of Government ground, situated within the limits of the Garrison ground at Port Elizabeth, purchased by the testator from Ernest F. C. Gie, as per deed of transfer, dated the 6th December, 1847.

(*c*) Certain lot of ground with the buildings thereon, situated at Port Elizabeth, marked letter F, purchased by the testator from the trustees of the insolvent estate of Alice Eliza Whybrew, as per deed of transfer, dated 16th December, 1845: upon trust that she should stand possessed of the same, and be entitled to receive the annual rent, income, and profits therefrom for her on and during her lifetime; and that after her death the whole of the said property should revert to and become the property, free and unincumbered, of the lawful issue of his said daughter, who should then be living, in equal shares, and should forthwith be transferred to their joint names, and from thenceforth be and remain for their joint use and benefit, and be at their sole and absolute disposal.

3. The testator, the said John Parkin, further directed by his said will that the property so bequeathed should upon the marriage or majority of his said daughter Jane Matthews after his death be transferred to her in trust, and subject to all the provisions and conditions of his said will.

4. The said John Parkin died on the 13th October, 1856, leaving the said will of full force; on the 31st December, 1858, the property hereinbefore mentioned was duly transferred to the said Jane Matthews subject to the provisions of the will; and she continued to enjoy the rent, profits, and use of the said properties during the term of her life.

5. The said Jane Matthews died on the 19th September, 1896, leaving two children, namely, the defendant and a daughter, Elizabeth Ann Meyer (born Matthews), and also a grandchild, whose father survived the said John Parkin but died before the said Jane Matthews. The defendant is her executor testamentary, and has duly taken out letters of administration as such.

6. The 15th May, 1882, the estate of the defendant was compulsorily sequestrated as insolvent according to law, one William Arthur Currey was elected and confirmed as trustee thereof.

7. The defendant thereafter notified in writing to his trustee the existence, as an asset in his estate, of his rights aforesaid under the will of the said John Parkin, and the said trustee proceeded to sell all the said rights by public auction after advertisement in the "Government Gazette" and otherwise.

8. All the insolvent's said rights, both present and future, were purchased by the plaintiff from the said trustee for the sum of £200, which sum was paid on the 24th April, 1883, and was thereafter distributed as an asset of the said estate; and the plaintiff received full and formal cession in writing from the trustee of all the insolvent's interests under the said will.

9. The final liquidation and distribution account in the said estate was thereafter duly confirmed, and the insolvent received his rehabilitation on the 24th July, 1887; but there remains a deficiency in the said estate of £4,700 or thereabouts.

10. The sale of the rights aforenamed was made with the full knowledge and consent of the defendant who both before and after his said rehabilitation acquiesced in and acknowledged the said sale.

11. The defendant now unwrongfully contends that he is entitled to a full one-third share of the property hereinbefore referred to, and that the sale to the plaintiff as aforesaid was invalid and of no legal effect.

12. The trustee aforesaid has notice of this action and raises no objection to the claim of the plaintiff to the said property.

The plaintiff claimed:

(*a*) An order declaring that he is entitled by virtue of the premises to one-third share of the property in the 2nd paragraph of the declaration

mentioned; and that the defendant is not entitled thereto.

(*b*) An order compelling the defendant to do all things in his power necessary to enable the plaintiff to obtain transfer of the said share in the said property.

(*c*) Alternative relief.

(*d*) Costs of suit.

The following was the defendant's plea:

1. The defendant admits the allegations in paragraphs 1, 2, 3, 4, 5, 6 and 9 of the declaration, but for greater certainty begs to refer this Honourable Court to the terms of the last will of the late John Parkin.

2. As to paragraphs 7, 8, 10 and 12, he contends that the allegations therein set forth do not constitute against him any cause of action, and further says as follows:

3. He has no recollection and does not admit that he notified to his trustee the existence of any rights under the will of John Parkin as an asset of his, the defendant's insolvent estate, but he admits that his trustee in May, 1883, purported to sell and cede and the plaintiff purported to buy and receive all his, the said trustee's, right, title, and interest to the expectancy of the defendant under the will aforesaid, and that the plaintiff paid to the said trustee, for distribution in the said estate, the sum of £200 as the price.

He annexes hereto, marked A, a copy of the document whereby the trustee so purported to cede his, the said trustee's, right, title and interest as aforesaid, upon which document the plaintiff's claim is based.

4. He also admits that he had knowledge of and did not in any way object to the acts of his trustee as set forth in the premises, and says that even after the death of his mother on the 19th day of September, 1896, and until recently, he was under the erroneous impression that plaintiff was legally entitled to his, the defendant's, share in the property bequeathed to her by John Parkin.

5. Save as aforesaid, he denies the allegations in paragraphs 7, 8, and 10 of the declaration.

6. The trustee aforesaid of the defendant's insolvent estate never at any time had in law, under section 48 of Ordinance No. 6 of 1843, or otherwise, any right, title, or interest in or to the defendant's expectancy under the will of the late John Parkin.

7. The defendant's mother was fiduciary legatee of the property bequeathed to her as aforesaid, and at no time before the confirmation of the account and plan of distribution in his, the defendant's, insolvent estate, nor at any time before his mother's death, was any right vested in the defendant,

8. The defendant's trustee in insolvency did not in law by the aforesaid transaction sell anything to the plaintiff, nor is the defendant bound in law by the said transaction between the plaintiff and his said trustee.

9. He admits that he makes the contention alleged in paragraph 11, but denies that he does so wrongfully.

10. As to paragraph 12, he craves leave to refer this Honourable Court to such proof as the plaintiff may adduce in relation thereto.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

11. As executor testamentary of his mother's estate, and if the above plea be deemed insufficient, but not otherwise, the defendant says specially that, as fiduciary legatee, his mother largely improved the property bequeathed to her, and greatly enhanced its value by buildings thereon and other improvements, and he contends that the plaintiff has in no case the right to demand transfer of any share of the property so bequeathed until he shall have paid the amount of compensation to which the estate of his mother is entitled in respect of such improvements and enhanced value.

Wherefore he again prays that the plaintiff's claim may be dismissed with costs.

The following was Annexure A referred to in the foregoing plea:

I, the undersigned, in my capacity as sole trustee in the insolvent estate of George Frederick Matthews, son of Mrs. Jane Matthews (born Parkin), do hereby cede, assign, and make over unto and on behalf of Charles Tennant Jones, of Port Elizabeth, his order, heirs, executors, administrators, and assigns, all my right, title, and interest to and in the expectancy of the insolvent under the will dated the 27th day of April, 1852, of his grandfather, the late John Parkin, for value received.

Dated at Cape Town, this 1st day of May, 1883.

W. A. CURREY,
Sole Trustee,
Ins. Est. G. F. Matthews.

The replication was general as to the first plea. As to the second plea, the plaintiff said that improvements have been made upon the property which have to a certain, though not to a very large extent enhanced its value. He is and has always been willing to pay compensation for the value of the said improvements when transfer is passed to him, the amount to be settled either by agreement or by arbitration, or to allow defendant to remove them, but the defendant has never demanded payment of any

sum whatsoever in respect of such improvements: subject to this he joins issue with defendant.

On these pleadings issue was joined.

Mr. Innes, Q.C. (with him Mr. Jones), for the plaintiff.

Mr. Searle, Q.C. (with him Mr. Benjamin), for the defendant.

For the plaintiff,

Charles Tennant Jones, M.L.A., said he was acquainted with the land in dispute, which adjoined land belonging to his wife. Witness purchased the land in dispute from the trustee in the insolvent's estate, one of his objects being that he should have some rights when the property came to be cut off. Witness knew that if the son died before his mother he might lose the land at any time. Witness had hired land from Mrs. Matthews for the term of her natural life, upon which he had erected a kitchen and other buildings. Witness was willing to pay a fair value for improvements. Witness paid £200 for the share of the insolvent, and had had no value whatever. On July 7, 1896, shortly before the death of Mrs. Matthews, witness received a letter from the defendant, asking if witness was willing to sell back his inheritance. Witness wrote in reply, saying the share had gone up considerably in value. He was prepared to sell the share, which was a third, at a reasonable price, if defendant could have found the money. The estate was now worth about £3,000.

Cross-examined: Some time ago, when there were five heirs, he valued the property at £1,500, and would have taken £300. Since, however, two of the heirs had died, and the property had largely increased in value.

For the defence,

George Frederick Matthews, of Port Elizabeth, the defendant, said when he became insolvent in Cape Town, in May, 1882, he was a builder. Witness did not remember notifying to the trustee in his insolvency his rights under the will. The Bank of Africa were the principal creditors. Witness mentioned the inheritance to the manager of the bank. Witness's idea was that Mr. Jones had only bought one-fifth share of the estate. The value of the improvements made in the various properties was about £1,000.

Cross-examined: At the time of the sale witness thought it was quite fair to sell what was then a one-fifth share. It was only recently, after taking advice, that he disputed the ownership of the present one-third share of the estate.

This closed the evidence.

Mr. Innes, Q.C., for the plaintiff: The question is does the law give the trustee the right to dispose of the defendant's interest under the will, for if not, this transaction is invalid as against the insolvent. Now there are two facts to be noted especially:

1. The will limits the children who are to obtain benefits to those who survive the testatrix.

2. The will directs that the absolute *dominium* of the property should be transferred. In view of this we must admit that this is a case of *fidei-commissum*, *i.e.*, Mrs. Matthews was fiduciary heir, and after her death such of her children as survived her should get benefits after her. The case of *Quin* v. *Baartman* (Buchanan, 1870, page 78) is important, and that case must now be finally maintained or overruled. If maintained it conclusively governs this case. Can a fidei-commissary heir have anything to sell to a *bona-fide* purchaser for value? *Quin's case* has been criticised in two ways:

(*a*) Either (because there is such a meagre report of the case) that it is possible that the Court may have held that though "fidei-commissary" words were used, yet it might have been a case of usufruct in view of the general provisions of the will, otherwise it is difficult to reconcile that case with the authority of *Voet*.

(*b*) Or, again, that the judgment depends on the words of the Insolvent Ordinance (section 48) and not upon the strict common law rights of *fidei-commissum* or usufruct. A case criticising *Quin's case* is *Nortje* v. *Nortje* (6 Juta, 9); see also *Strydom* v. *Strydom* (11 Juta, 425); *In re Zipp* (Buch. 1873, p. 132); *De Geest's Executor* v. *De Geest's Executor* (4 Juta, 95). The remarks in these cases regarding *Quin's case* are certainly *obiter dicta*, but show that the decision has been much questioned. The 46th section of the Insolvent Ordinance vests all the insolvent's rights first in the Master, and then the 48th section vests them in the trustee, though the words in the two sections are not the same. "Wherever the same is known or found," which occur in section 46, not being inserted in section 48, neither are the words "nor as to which any right of reversion shall then be vested in him." These are not found in section 49 of Ordinance 64. Why were they added? Surely to show that these rights are taken away from the insolvent and vested in the trustee. A man during the lifetime of the testator cannot sell his inheritance under a will. But *Voet* and others hold that a *spes* may be sold—this is a *res*, and the right has a certain tangibility about it. For *Hiddingh* v. *Roubaix* (Buch. 77, p. 36), shows that the fidei-commissary heirs may prove in the insolvent estate of the fiduciary,

and the anomalous position would arise that though their rights are so provable they cannot be sold if the trustee has no right. This is not in the nature of a gambling transaction; and the right can be lawfully sold. *Ex parte Burger* (4 Sheil, 105). The right of *fidei-commissum* cannot descend to heirs, but yet it vests in a way and can be proved. Is it not anomalous that it can not be sold? It is not contingent in the sense that it depends on the caprice of anybody, but it simply depends on the natural course of events and must fructify. *Lange* v. *Liesching* (Foord, p. 55). Surely it was rights in the nature of the *spes successionis* that the Legislature contemplated in section 48.

Mr. Searle, Q.C., for the defendant: The ordinary meaning of "right of reversion vested in him" i- as, *e.g.*, where a man has sold all the life interest to another, he retaining the *nuda proprietas*. But it cannot refer to a contingent claim such as this. As to proving a contingent claim see *Copestake* v. *Alexander* (2 Juta, 137), but there is not a word in the whole Ordinance to provide for a contingent asset. The case of *Van Breda* v. *Master* (7 Juta, 360) is very much in our favour. In *Quin* v. *Baartman* the Court must have held from the whole tenour of the will that though the term usufruct was used yet that it was really a *fidei-commissum*. *Board* v. *Titterton* (13 S.C.R., 164), the trustee sold all *his* rights as trustee not the insolvent's rights. *Ras's Trustees* v. *De Klerok's Executor* (7 Juta, 113) lays down the law as to the purchase of an inheritance. This is a pure *fidei-commissum*, there is no vesting—such rights as chances and *spes* do not vest in the trustees. *Strydom* v. *Strydom's Trustees* (11 Juta, 423). What Mr. Jones actually bought was the chance that something might be vested in the insolvent before the confirmation of account.

The Chief Justice: But how about the acquiescence of the insolvent? At least so far as the one-fifth is concerned.

Mr. Searle: But how can the insolvent be estopped by anything that he has done? Mr. Jones has suffered no prejudice nor was he misled by the insolvent, nor did he buy anything vested in the insolvent but in the trustee. The chance was that the old lady might die before the account was confirmed.

The Chief Justice: Can the trustee acquire any rights which are not transmissible to heirs?

Mr. Innes: See *De Geest's Case* (4 Juta, 95), and the Chief Justice's remarks on page 98); *Quin* v. *Baartman*, and section 49 of the Insolvent Ordinance. All these seem to show that the trustee can. *Quin's case* was one of a *fidei-commissum*, *Breda's* was not, and can thus be reconciled. A fidei-commissary has rights which a bondholder never has. Matthews certainly had no rights which he could transmit to heirs.

C.A.V.

Postea (26th February).

De Villiers, C.J.: The plaintiff purchased from the trustee of the defendant's estate "the right, title, and interest of the insolvent to and in the expectency of the insolvent under the will of John Parkin, dated the 27th of April, 1982." Quite independently of the use of the term "expectancy" the plaintiff's counsel has candidly admitted that the will created a *fidei-commissum*, and that the legacy to the defendant was intended to be conditional upon his surviving his mother, who was the fiduciary legatee. In the absence, therefore, of indications to the contrary in the will, the testator must be held to have intended that the legacy should not vest until the condition has been fulfilled, or in other words, until the death of the mother during the defendant's lifetime. Such is the clear effect of the decisions of this Court in *Van Breda* v. *Master* (7 Juta, 360), and if a different conclusion is to be deduced from the decision in *Quin* v. *Baartman* then it must once for all be said that the latter case can no longer be supported. The Court has, however, on more than one occasion pointed out that the case of *Quin* v. *Baartman* was very briefly reported, and that the grounds of the judgment are somewhat obscure. The defendant has survived his mother, but before her death the account of his estate had been confirmed. He therefore, under the 126th section of the Insolvent Ordinance, was entitled to the land as being property which "reverted, descended or was devised to him in manner other than by virtue of a right of reversion which was vested in him at the date of the sequestration of his estate." In the case of *Quin* v. *Baartman* as well as in the present case, the English law was relied upon as supporting the contention that the insolvent's contingent interests are transmitted to the trustee of his estate, but the language of the 48th section of our own Ordinance is very different from that of the Acts which establish the rule in England. It is said by *Robson* (on Bankruptcy, 7th E.D., p. 479) that "all contingent and executory estates and interests to which the bankrupt is entitled will vest in his trustee," and in support of this view he cites *Higden* v. *Williamson* (3 P.W., 132); There it was certainly held that a contingent interest or possibility in a bankrupt is assignable by the commissioners, and the reasons are thus stated by Lord Chancellor King, "partly because the bankrupt himself might have departed with this contingent interest; also for

that . . . . the word *possibility* is in all the later Statutes touching bankruptcy." In 5 Geo. II., C., 30, the words are "all such effects of which the party was possessed or interested in, or whereby he hath, or may expect any profit, possibility of profit, benefit or advantage whatsoever." Unfortunately for the plaintiff our law has not spread the net wide enough to embrace contingent interests such as that which is now in question, and the judgment of the Court must be for the defendant with costs.

Mr. Justice Buchanan: The rights sold by the trustee to the plaintiff were those conferred upon the trustee by the 48th section of the Insolvent Ordinance, and these again were what were transferred from the insolvent to the Master by the 46th section. These sections enact that the effect in law of sequestration shall be to "divest" the insolvent and to "vest" in the Master, and subsequently in the trustee, the insolvent's present and future "estate." These provisions, I think, require that there must be an estate vested at the time of sequestration. The following words of the 48th section seem to me to confirm this view, for they further confer upon the trustee any right of reversion then vested in the insolvent, so much as to present property. As to future property the section goes on to give the trustee a title to any property which after the date of sequestration and before the confirmation of the account and plan of distribution, may be purchased or acquired by the insolvent, or may revert, descend, or be devised or come to him. This does not include a mere *spes successionis* . . . . or contingency not during that time vested in the insolvent. After the confirmation of the liquidation account the insolvent acquires property for himself, subject of course to the liability of execution, until his rehabilitation is obtained. In this case it is admitted that the insolvent had no vested interest at the date of sequestration, and that the property did not accrue until long after both the confirmation of the account and the insolvent's rehabilitation. All the decisions of this Court, with, it is contended, the exception of the case of *Quin* v. *Baartman*, have clearly been based on the fact that vesting had taken place at the date of sequestration. As to the case of *Quin* v. *Baartman*, the report shows that the arguments of counsel in that case were directed mainly, if not entirely, to the question of vesting, and that the judgment is founded on that issue being affirmatively decided. It is possible that the uncertain terms of the will in that case raise a doubt whether or *not as a fact* a vesting had taken place, and it is that doubt which I think has created the difficulty which has been felt in reconciling that decision with the more recent judgments. Whether or not it was a sound deduction to draw from the will in that case, that there had been a vesting, it is useless now to discuss. Judging from the report that was the deduction actually drawn by the Court, and having thus found on that issue, it followed as a matter of course that the property in question had passed to the trustee. If that is the correct ground of the decision, then *Quin* v. *Baartman* falls into line with all the subsequent cases, and there is no decision on record to the effect that a merely contingent and unvested interest passes by operation of law under the 48th section to the trustee. This judgment now definitely settles that it does not. The provisions of the old Ordinance No. 64 were more against the insolvent than is the present law. His lordship the Chief Justice has shown that the words of the old English statutes were much wider than those used in our Ordinance. Since the adjournment I have referred to the discussion on the 48th section in the old Legislative Council at the time of the alteration of our law, and I find it was expressly intended to make our law more restricted in operation than was the English law at the time. I concur in judgment being given for the defendant with costs.

Mr. Justice Maasdorp concurred.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

GREEN AND BRINTON v. DURAAN AND ANOTHER. } 1897. Feb. 26th.

Contract—Breach—Damages—Tender.

This was an action brought by Messrs. Green & Brinton against Messrs. W. & D. Duraan to recover the sum of £230 as damages for breach of contract.

The plaintiffs' declaration alleged:

1. The plaintiffs carry on a general business together in partnership at the Draai Vlei, in the district of Prieska, under the style or firm of Green & Brinton; the defendants are farmers, and both reside at Kommandant's Kraal, in the district of Britstown.

2. On or about November 30, 1896, a contract of purchase and sale was entered into between the plaintiffs of the one part and the defendants of the other part. In terms of the said contract the defendants sold to the plaintiffs, who purchased from them, a quantity of chaff, estimated by the parties to be about 100 bales. The purchase price agreed upon for the said

chaff was 10s. 6d. per bale of 300 lb. weight, delivered on defendants' farm, but the said defendants were to have the option of delivering the said chaff at the plaintiffs' farm, in which case they were to be entitled to 1s. 6d. per bale additional.

3. Thereafter the plaintiffs were ready and willing to perform their part of the said contract, and on or about the 8th December they applied at defendants' farm for the delivery of the said chaff, and were prepared and offered to pay the purchase price as agreed for the same.

4. The defendants wrongfully refused to carry out their part of the said contract, they declined to make delivery of the said chaff, and they repudiated the said contract.

5. By reason of the defendants' breach of contract as aforesaid, the plaintiffs have suffered damages in the sum of £230.

The plaintiffs claim from the defendants and each of them: (*a*) Payment of the sum of £230 for damages as aforesaid; (*b*) alternative relief; (*c*) costs of suit.

The defendants in their plea alleged:

1. They admit the allegations in the first paragraph of the declaration, but save as is hereinafter set forth, deny those in paragraphs 2, 3, 4, 5.

2. On or about October 28, 1896, and at Kommandant's Kraal, it was agreed between defendants and one Devenish, acting for and on behalf of plaintiffs, that defendants should sell to plaintiffs at 10s. 6d. per bale as much chaff (not exceeding 100 bales) as defendants should have left over after filling their own storehouses, the plaintiffs to supply bags therefor at Kommandant's Kraal as soon as defendants had finished threshing.

3. Thereafter, on or about November 30, defendants gave notice to plaintiffs that the said chaff was lying ready for plaintiffs, and that the bags must be delivered at Kommandant's Kraal on or before December 4, and plaintiffs thereupon supplied two bags, which defendants filled with chaff for plaintiffs.

4. The plaintiffs did not deliver the remainder of the bags by December 4, and thereafter the defendant David Duraan, being at Britstown on December 5, agreed with the plaintiffs that the time within which the said bags should be delivered should be further extended; in ignorance of the above arrangement, the defendant William Duraan, at Kommandant's Kraal, on December 5, sold the said chaff (except the said two bales), to wit forty bales, to one Le Roux at £1 per bale.

5. The defendants are willing, and have tendered, in order to avoid litigation, to pay to the plaintiffs the sum of £40 as damages and costs to date; or, in the alternative, to deliver forty-two bales of chaff to plaintiffs at Kommandant's Kraal, and to pay £10 as damages with costs to date, the plaintiffs to pay for the said chaff at the rate of 10s. 6d. per bale, the defendants repeat the said tender.

Wherefore subject to the above tender the defendants pray that the plaintiffs' claim be dismissed with costs.

The plaintiffs' replication admitted the tender, but was otherwise general.

On these pleadings issue was joined.

Mr. Rose-Innes, Q.C. (with him Mr. McGregor), for the plaintiffs.

Mr. Searle, Q.C. (with him Mr. Roos), for the defendants.

For the plaintiffs were called:

John N. Green said he was a partner in the plaintiff firm, who carried on the business of hotelkeepers and general dealers at Draai Vlei farm in the Prieska district. Towards the end of December plaintiffs ran short of chaff, and sent to defendants a man in their employ named Devenish, to purchase chaff from the defendants, and defendants promised to supply the chaff at 10s. 6d. per bale. Defendants were pressed for a time to be named when the chaff could be delivered, when they said they would write to say when the first two wagon loads would be delivered. There would be twenty-two bales in a load. This was said on November 1, but the promise to write was not kept. Devenish was afterwards sent over to defendants' farm about the chaff. Chaff was much required by witness in consequence of the rinderpest bringing about an increased number of passengers. On the night of November 1 Mr. David Duraan came to witness's house and said plaintiffs should have at least 100 bales, and probably 120 to 130, at any rate witness's firm should have all above what was required for defendants' own use. After supper defendant asked about bags. Witness said he was sorry, but they had no bags. Defendant then told witness he was unable to obtain any. Devenish then said, "Mr. Duraan, you told me that you had forty bags." Defendant then said that the forty bags were owing to him, but he had been disappointed in getting them. Witness then said he expected 100 bags of wool by mule-wagon, and he would let defendant have fifty empty bags, but could spare no more. Defendant said, "You must send them as soon as you can," and witness promised to do so. The bags were afterwards sent to defendant, and they were afterwards returned empty by defendants with a letter regretting that they could not let plaintiffs have the chaff. At that time witness did not know that defendants had sold the chaff to Roux

for £1 a bale. Afterwards the matter was put into the hands of an agent, and a letter of demand was written. He had always bought chaff from farmers in bags, and afterwards returned the bags. In consequence of the breach of contract, plaintiffs were left with absolutely no chaff. Plaintiffs had to telegraph all round for chaff. Witness could obtain no chaff in the locality. Ultimately 100 bales were bought from Mr. John Devenish at Stellenbosch, which cost, delivered at plaintiffs' place, £3 11s. 3d. a bale. The cost of the chaff, if delivered by defendants, would have been 12s. 6d. a bale. In December plaintiffs got from £3 5s. to £5 a bale. The increase in price was because of Government being large purchasers, increase of travellers, and drought.

Cross-examined: Defendant did say the chaff was lying on the tramp floor, and might if left there be damaged by weather. He did not try at Hout Kraal for chaff. He had known bales weigh 370 lb.; the weights varied. Sometimes sand got into the chaff.

John Devenish, of Stellenbosch, farmer, said he had farmed at one time in the Prieska district, about eighteen miles from defendants' farm. He knew defendants' farm well. He sold plaintiffs' chaff of 300 lb. to the bale at 12s. a bale. He had to pay 8s. for carriage of 100 lb. of meal from De Aar to Omdraai Vlei.

Augustus E. Devenish said he was in the employ of plaintiffs as clerk. He corroborated what the witness Green had said as to his visit to defendants to buy chaff. He saw the senior defendant, who offered to sell chaff at 12s. a bale. Witness offered 10s., and eventually the price of 10s. 6d. per bale was fixed. Defendant asked witness what quantity he would take, and said he could supply 130 to 150 bales, but definitely promised to supply 100 bales. This was on the 26th October, and defendant promised to write on the following Wednesday. Plaintiff again went over, when defendant said there would be delay as the wind prevented them going on with tramping. In answer to defendant's request for bags, witness said they would be able to send some.

Cross-examined: Defendant said he must be helped with bags, and witness said he expected bags about Saturday, when they would be sent on to defendants. There was rain and wind about at the time, and the chaff was lying in the open.

Isaac van der Merwe said he was postmaster at Omdraais Vlei. Witness went with Mr. Devenish to defendants' farm just for a trip into the country. He heard defendants talking to the last witness. Mr. David Duraan offered to sell some chaff, and said he expected a very good crop that year, and all over what he would require himself he would sell to plaintiffs. He said he would guarantee from fifty to 100 bags. Witness was also present at the hotel when Mr. David Duraan said he would be able to supply from 120 to 130 bags of chaff. Witness was certain that Mr. Willem Duraan said he had forty bags.

This closed the plaintiffs' case.

For the defence,

Willem Duraan, one of the defendants, said he remembered Mr. Devenish coming to his farm about the 28th October last. Chaff was mentioned, Mr. Devenish asking if witness would have some chaff to spare. Witness replied yes, if there was no damage to his crops. Witness offered the chaff at 12s. if plaintiffs would supply bags. Devenish offered 10s. 6d., and this was accepted, plaintiffs to supply the bags. Witness had not a single bag. Witness generally sold chaff on the terms that purchasers supplied bags. Devenish saw the chaff houses. Witness had never yet weighed a bale of chaff. He said nothing to Devenish as to weight, witness had never sold by weight. Witness afterwards saw Devenish when the chaff house was nearly full, and told him he would send the chaff over on receipt of the bags. There was a fearful wind on. Plaintiffs did not send bags, and the chaff was lying on the tramp floor. Two bags were sent by plaintiffs and were filled by witness; but they could not be sent as the donkey in plaintiffs cart was not able to take them. Witness afterwards sold forty bales of the chaff at £1 to one Le Roux, who brought bags. The chaff was waiting for a week on the floor, and he though about thirty bales were wasted. There was rain and heavy winds about this time.

By the Court: Witness did not send a message to plaintiffs, as he had sent no bags.

Examination continued: Witness expected the bags on the Friday. He thought the bags were not coming, so he sold the chaff.

Cross-examined: Witness finished the last tramp on December 4. He had never measured his chaff house, but he thought it would hold forty bales. When he sold to Devenish he expected to get about 100 bales. Le Roux had been to buy chaff on December 2; the sale was effected on Saturday, December 5.

Re-examined: It rained all night on December 2, and there was a fearful wind. Witness lost about thirty bales of chaff. Witness had never supplied bags in his sales.

David Duraan, the other defendant, son of the last witness, corroborated the evidence given by his father. The weight of bales varied;

sometimes a bale would weigh only 230 lb. Their chaff was not sandy chaff. Defendants had no bags on the farm.

Cross-examined: They finished tramping on December 4. They began in November. They continued tramping almost every day.

F. A. Venter, who resided near the farm of defendants at Beer Vlei, said he had purchased chaff between the 10th and 20th November in that district at 11s. On the 10th December he bought ten bales at 10s. He had bought this month at 15s. Chaff was always sold by the bale at Beer Vlei. About 240 lb. was the average weight of a bale at Beer Vlei.

D. A. Steytler, farmer, in the Philip's Town district, who had a store about forty-eight miles from defendants' farm, said he used to purchase chaff from Beer Vlei. The usual weight of a bale was 250 lb. average. He bought chaff last December from 9s. to 12s. a bale. He bought 100 bales. Witness was now selling at 15s. a bale.

Jacobus Duraan, eldest son of the defendant, said his chaff was sold partly to Le Roux, who paid £1 a bag. That was in the beginning of December, about the same time his father's chaff was sold. Another part—forty bags—was sold to Lillienfeld & Wright at 12s. 6d. to 15s. This was about twenty days before. He knew of no sales of chaff above £1. The average weight of a bale was about 230 lb.

James Higgo, farmer, Beer Vley, said he had bought chaff in December in the district for 10s. 6d. a bale.

Petrus le Roux, farmer in the division of Prieska, said he went to defendants' farm on November 2 to buy chaff. He afterwards bought forty bags of chaff from the defendants at £1, supplying twenty-three of the bags himself. He made about 5s. a bag profit. The average weight of a bag was about 230 lb.

This closed the evidence.

Mr. J. Rose-Innes, Q.C., was heard for the plaintiffs.

Mr. Searle was not called upon.

Judgment was given for plaintiffs for £40, the amount tendered, and costs up to date of tender.

The Chief Justice: In this case the plaintiff sues upon a contract which is of a most vague description. It is a contract for the purchase of so much of defendant's crop of chaff, as he did not require for his own use. Such a contract places the purchaser entirely at the mercy of the seller, and if a person does enter into a contract of this vague description he cannot expect when he comes into court to recover damages upon the basis of the claim in the present case. I am by no means satisfied that if there had been no tender at all plaintiffs would have succeeded in the action. Suppose defendant had required the whole quantity for his own use I do not think plaintiff could have recovered. However, this is not the point to be decided now seeing that the defendant pleads liability to the extent of £40, and the only question is whether the amount tendered is sufficient. The plaintiff has produced an elaborate calculation from which he would seem to show that the actual cost of chaff to him similar to that which he purchased from the defendant was £2 11s. 8d. per bale. This however is based upon the supposition that the defendant was bound to deliver to the plaintiff bales weighing 300 lb. each, but I am perfectly satisfied from the evidence that if the defendant had tendered bales weighing only 230 lb. each they would not have been refused by the plaintiff. Assuming even that the calculation is right the question is would the plaintiff be justified in going into the Stellenbosch market, and there buying chaff which would cost him £2 11s. 8d. if within the immediate neighbourhood he could have got it much cheaper. From the evidence I am satisfied that he could have, at all events, bought in the neighbourhood at the price of £1 13s. 6d. Mr. Le Roux got the chaff at £1. The tender of £40 is on the basis that the plaintiff would have made a profit of about 200 per cent. and it is not shown that he has sustained more than £40 damages. Plaintiff may have shown that he has made bigger profits, but then he sold in driblets, in which case questions of other expenses entailed would come in. Mr. Le Roux only made 5s. a bale profit. The defendant makes a tender of £1 per bale, which, I think, is fair and reasonable. There will, therefore, be judgment for the plaintiff in terms of the tender, with costs up to the date of tender, all costs subsequent to that to be paid by the plaintiff.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. Van Zyl & Buissinné; Defendants' Attorney, P. de Villiers.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

RAM V. ROBERTSON. { 1897. Feb. 27th.

Mr. Molteno applied for provisional sentence on £90 interest due on a mortgage bond for £3,000, at the rate of 6 per cent. from 1st July to 31st December, 1896.

Granted.

REYER V. WIESE.

Mr. Castens applied for provisional sentence on a promissory note for £70 16s., less £8 paid on account.

Granted.

ILLIQUID ROLL.

TOWN COUNCIL OF CAPE TOWN V. MURISON.

Mr. Close applied for judgment under Rule 329 (*d*) for £43 15s., less £10 paid on account, and for costs.

Granted.

TRENTLEY, BIRCH AND CO. V. DE VILLIERS.

Mr. Tredgold applied under Rule 329 (*d*) for judgment for £13 1s. 1d., being costs incurred in an action at law.

Granted.

J. FORREST AND CO. V. A. MAY AND CO.

Mr. Close applied for judgment under Rule 329 (*d*) for the sum of £2 7s. 6d., balance of a debt of £56 16s. 11d.

Granted.

VAN DER BYL AND CO. V. LUCKE.

Mr. Rose applied for judgment under Rule 329 (*d*) for £23 6s. 3d., being the amount of a deficiency which the defendant undertook to pay.

Granted.

ADMISSION.

Mr. Macgregor applied for the admission of Mr. Ernest Hurst Ashpitel as attorney and notary.

The Court granted the application, the oath to be taken at Kimberley before the Registrar of the High Court.

GENERAL MOTIONS.

SCHAAP AND OTHERS V. SOLOMON.

Mr. Macgregor applied for the award in this matter to be made a rule of Court.

The Court granted the application.

IN THE MATTER OF THE PETITION OF EMILE HENRY VAN NOORDEN.

Mr. Tredgold applied for authority to the Registrar of Deeds to issue a certified copy of a mortgage bond dated February 29, 1896, passed by John Goodison in favour of the said Emile Henry van Noorden, the original bond having been lost.

The Court granted the application.

IN THE MATTER OF ROSINA ELIZABETH MULLER.

Mr. Tredgold applied for the appointment of a *curator ad litem* in proceedings to have her declared of unsound mind.

The Court granted the application, the summons to be served on the alleged lunatic as well as the curator, returnable at the Circuit Court, Mossel Bay. The brother, Mr. John Alwyn Muller, was appointed *curator ad litem*.

IN THE MATTER OF THE MINOR JUDD.

Mr. Buchanan applied for authority to the Master to pay out of the amount to the credit of the minor Fanny Judd a sum of £15 per quarter for eight consecutive quarters, to be applied towards her maintenance and education at the educational institution at Worcester known as the Huguenot Seminary.

The Court granted the application.

IN THE MATTER OF THE UNION BOATING COMPANY IN LIQUIDATION.

Mr. J. Rose-Innes, Q.C., presented the formal report of the liquidators on this company and the Port Elizabeth Boating Company becoming amalgamated.

The Court received the report. No order granted.

IN THE MATTER OF THE PORT ELIZABETH BOATING COMPANY IN LIQUIDATION.

Mr. J. Rose-Innes presented the formal report of the liquidators on this company and the Union Boating Company becoming amalgamated.

The Court received the report. No order granted.

IN THE MATTER OF THE MINORS COX.

Mr. Macgregor applied for authority to the Chief Magistrate of East Griqualand to pay out: (1) The sum of £5 out of the moneys to the credit of the minors for their immediate maintenance; (2) the sum of £1 10s. per month for their maintenance and education.

The Court granted the application.

IN THE MATTER OF THE MINOR DOLL.

Mr. Buchanan applied for authority to the Master to pay out of the money to the credit of the minor sufficient to pay for the carrying out of certain drainage works amounting to £44, and also to defray the cost of taking out letters of confirmation to the tutor dative and of this application.

The Court granted the application.

BAILEY V. BAILEY.

Mr. Close appeared for the plaintiff. Defendant in default.

This was an action for divorce instituted by the wife against her husband. The parties were married at S. Mary's Church in Port Elizabeth on July 31, 1878. There were two children of the marriage. The custody of the children was asked.

James Lord, dock labourer, said he knew the plaintiff and defendant very well indeed. He identified the plaintiff. He knew a woman named Anna Henry, with whom defendant was now living. The woman had had children since she had lived with the defendant.

Laura Bailey, the plaintiff, said they had no property on their marriage. The children were respectively seventeen and sixteen years of age. Witness wished to have the custody of them.

The Court granted a decree of divorce as prayed, with custody of the children, defendant to pay costs.

[Plaintiff's Attorney, D. Tennant, jun.]

NOONAN V. NOONAN.

Mr. Graham for plaintiff. Defendant in default.

This was an action for divorce instituted by the husband on the ground of the wife's adultery. There was one child of the marriage.

Reginald D. H. Barry, clerk in charge of the marriage register, proved the marriage.

Robert Philip Noonan, the plaintiff, said he was a sign writer. Until recently he resided at Johannesburg. He was married to Elizabeth Noonan in 1891. They afterwards resided at Cape Town and Mowbray until about October three years afterwards when witness went to Johannesburg. He left his wife with her mother in Mowbray. They had lived moderately happily. Witness supplied his wife with sufficient money for her support. There was one child Kathleen, four and a half years of age. His wife joined him on the 15th December, 1895, and stayed with him two and a half months. Then she returned to Mowbray. Witness afterwards came back to Mowbray, and found that his wife was pregnant His wife left him the beginning of March, 1896, and he came down in April. A child was subsequently born in August. His wife subsequently told him the child was that of Thomas Lindenbaum

Thomas Lindenbaum, cart driver, identified the photo produced. He knew the lady in December, 1895, and had had improper intercourse with her. He had given her certain amounts of money. Witness did not know the husband at the time.

The Court granted decree of divorce, plaintiff to have the custody of the child, defendant to be delared to have forfeited all benefits under the community.

STURK AND CO. V. DIETERLE.

Mr. J. Rose-Innes, Q.C., appeared for the applicant; Mr. Searle, Q.C., for the respondent.

This was an application on behalf of the defendant for leave to file an amended plea in this pending suit.

The Court declined to grant the order, the question of costs to stand over.

IN THE ESTATE OF THE LATE NICHOLAS W. MEYER.

Mr. McLachlan applied for leave to the executors to apply £100 out of money administered by the General Estate and Orphan Chamber in the repair of certain buildings at Salt River.

The Court granted the application on the condition suggested by the Master, that accounts should be rendered to him.

IN THE MATTER OF THE PETITION OF LOUISA PETRONELLA SMOOK.

Mr. Macgregor applied for leave to sign power of attorney to pass transfer of landed property without the assistance of her husband.

The Court granted the application.

IN THE ESTATE OF THE LATE JOHN HOSKING.

Mr. Jones applied for leave to mortgage certain cottages to pay for drainage expenses.

The Court granted the application; the property to be mortgaged for such sum as the Master may direct.

IN THE MATTER OF THE MINOR PENN.

Mr. Benjamin applied for the Court's sanction to sale of erf at Molteno.

The Court granted the application.

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

VILJOEN V. VILJOEN. { 1897. March 1st.

Mr. Macgregor appeared for the plaintiff, and defendant was in default.

This was an action for the restitution of conjugal rights instituted by the husband, a farmer residing at Carnarvon. The parties were married on the 30th July, 1894, at Carnarvon, without community of property. In May, 1895, the defendant left the plaintiff and went to Johannesburg, and refused to return to the plaintiff.

Reginald D. H. Barry, clerk in charge of the marriage register at the Colonial Office, proved the marriage.

Nicolaas Johannes Stephanus Viljoen, the plaintiff, now residing in the district of Victoria West, said he signed the register of marriage produced. The marriage took place on July 30, 1894. They were married at Carnarvon. On October 18, 1894, his wife told him they had better separate. She said she had married him against her will. Witness was not willing to agree to a separation. Subsequently there was so much unpleasantness that plaintiff went away. Witness saw his wife again on his return, when she asked him what he had come back for. Witness replied that he came back to try to make up the quarrel, when defendant went into her room and locked the door, and refused to have anything to do with witness. Witness had not seen his wife since.

The Court granted a decree for the restitution of conjugal rights, defendant to return to her husband on or before March 31, failing which a rule *nisi* to issue calling on defendant to show cause why a decree of divorce should not be granted.

[*Plaintiff's* Attorney, V. A. van der Byl.]

VAN DEN HEEVER V. DU TOIT. { 1897. March 1st, „ 5th

Trespass—Damages—Volenti non fit injuria.

This was an action to compel the removal of a certain fence erected on the plaintiff's farm by the defendant, and to compel the erection by him of another fence, and for damages for trespass.

Mr. J. Rose-Innes, Q.C. (with him Mr. Buchanan), for the plaintiff.

Mr. Searle, Q.C. (with him Mr. Castens), for the defendant.

Plaintiff's declaration was as follows:

1. The plaintiff resides at the farm Slingershoek, and the defendant at the farm Matjiesfontein, both situated in the district of Hanover and the parties are the duly registered owners the said farms respectively.

2. The farm Slingershoek adjoins Matjiesfontein, and the plaintiff annexes hereto a rough sketch showing the boundary line between the two farms, which line is indicated by letters upon the plan.

3. In or about the month of March, 1896, an agreement was entered into between the plaintiff and defendant in terms of which the defendant undertook to construct a fence along the said boundary line from the point A on the plan to the point B, in consideration that the plaintiff should erect a similar fence from A to H. It was specially agreed that the fence should consist of six wires—one wire being barbed—run through iron posts twenty yards apart, the wire used to be No. 7, and the laces to be of No. 9 wire.

4. The plaintiff has duly carried out his part of the said contract, and has duly constructed a fence of the said description along the line A H, but the defendant wrongfully refuses to carry out his part of the contract by constructing a similar fence as aforesaid along the line A B.

5. In or about the month of May, 1896, the defendant wrongfully and unlawfully entered upon the plaintiff's farm and constructed a fence through a portion of the said farm; the position of the fence so wrongfully constructed is marked by the letters C E D on the plan.

6. By reason of the defendant's wrongful trespass as aforesaid, the plaintiff has suffered damage in the sum of £100 sterling. He has requested the defendant to remove the said fence, but the defendant refuses to do so.

The plaintiff claims: (*a*) An order compelling the defendant to erect a fence of the description set out in section 3 hereof along the line marked A B in the plan annexed hereto, or in the alter-

native (*b*) payment of the sum of £30; (*c*) an order compelling the defendant forthwith to remove the fence erected by him along the line C E D on the said plan; (*d*) payment of £100 as damages; (*e*) alternative relief with costs.

For a plea to the declaration the defendant said:

1. He admits the paragraphs 1 and 2, save that he does not admit the correctness of the rough sketch annexed to the declaration, but craves leave to refer to the sketch annexed to this plea, showing the boundaries of the said farms, and of the farm Carolus Poort adjoining them.

2. In or about the month of March, 1896, an agreement was entered into between plaintiff, defendant, and one Petrus Daniel du Toit, owner of Carolus Poort, whereunder it was agreed that the said farms should be fenced as far as their common boundary, but in order to facilitate the said fencing and to save expense, it was agreed that between certain points marked upon the said sketch the line of fence should not follow the actual boundary lines, but that the fencing should be constructed as follows: The defendant should construct a fence between certain points on the plan, the plaintiff between certain other points, and the said P. D. du Toit between other points.

3. Thereafter the defendant duly completed his portion of the said agreement by constructing a fence. He admitted that in so doing he entered upon the plaintiff's farm, but denies that he trespassed, and says he went thereon with plaintiff's knowledge and consent. Save that he admits that the plaintiff has constructed a fence between the points mentioned in paragraph 4 of the declaration, the defendant denies all the allegations in paragraphs 3, 4, 5, and 6. Wherefore he prays that the plaintiff's claim may be dismissed with costs.

The replication was general.

On these pleadings issue was joined.

Johannes Jacobus van den Heever, the plaintiff, said he was the owner of the farm Schlemmer's Hoek, in the district of Hanover, and he was in possession of an agreement between himself and his father by which witness held the farm under certain obligations. On March 30 witness and the defendant came to a verbal agreement as to fencing the boundary between the farms of plaintiff and defendant. It was agreed that witness was to fence from the points A to H on the plan produced, and that defendant was to fence from A B. The fence was to be made in the way specified in the declaration. He got a man named Roux to do his portion, and for this work he had paid. He afterwards had a conversation with John du Toit, of Carolus Poort, as to a suggested exchange, but no lines were decided on. After this witness saw the defendant in the beginning of June. The defendant said he and his brother John had made an exchange of the piece of veld. Witness said he only suggested the exchange, which was provisional upon his father's consent, and witness held the defendant to the line from A to B. At that time Roux was working on the line from A to C. On the 6th of June they had got as far as the point E. Defendant afterwards offered witness a piece of veld in exchange, but witness said then he wanted to keep his own. Then John du Toit proposed to settle the dispute by buying the piece of veld defendant was fencing in, but witness said he could not do so without the help of his father. Then defendant said he would sooner take up the fence and put it on the boundary line than hire the piece of veld. Up to that time, witness had not communicated with his father. No agreement was come to. Afterwards notice was given to the defendant to remove the fence and cease the trespass. The piece of ground fenced in was about eight morgen, and witness valued it very much as a good piece of veld for his sheep. The ground was worth £2 10s. a month.

Cross-examined: Witness did not supervise the erection of the fence at the point E, and was not present when the wire was fixed. Witness never raised any objection to the fence whilst it was being erected. Defendant spoke to witness about a suggested exchange of the triangular pieces of land upon the plan. Defendant, however, would not give a piece equal in size to the piece fenced in.

Re-examined: In March, 1896, witness called at old Mr. Du Toit's house in Hanover. Witness, however, could not remember anything being said about the exchange. Old Mr. Du Toit said on the 4th July that he did not want the exchange. Witness's father did not want the exchange.

By the Court: Defendant first came on to the ground from D to E in June. The men were there a week. Witness allowed them to go on, and said nothing. They were still busy with the fence when he told them they were trespassing.

G. P. van den Heever, farmer, in the district of Hanover, the father of the plaintiff, said that on June 20 his son told him all about the fence. On June 30 the parties met to settle the dispute if possible. Defendant was present, and said that the plaintiff had given him the piece of ground fenced in. Witness objected, as the exchange was not fair.

John Roux said that all he was employed to fence in by the defendant was from A to C. Defendant wanted to fence around the sluit, and

asked plaintiff's permission. Witness advised plaintiff not to consent to this, but to have a screen put below the wire across the sluit, and so follow out the straight line. This conversation took place on April 30. Witness had then begun the work for the defendant. Mr. Du Toit and plaintiff and himself marked the line off.

Cross-examined: He heard plaintiff say defendant might take a detour to get on to the line. Witness was present when they finished the work from E to C. Witness then had further work to do.

Jan Zacharias Booysen, farmer, residing in the district of Hanover, said he was present at the meeting on the 19th June. Jan du Toit was present, and said the question of exchange must be settled; Jan du Toit afterwards said the defendant ought to have stopped the work of fencing until the dispute was settled. Jan du Toit then suggested that plaintiff should sell the piece of land, but defendant said the expense of transfer would be as much as the land was worth. Then something was said as to hiring, but the defendant said he would rather take up the fence and put it on the boundary. Subsequently exchange was suggested, but plaintiff would not accept the piece of land offered by the defendant.

Petrus Jacobus du Plessis, who resides on plaintiff's farm and who was present at the meeting on June 19, said there was no agreement come to at that meeting as to the fence.

This closed the evidence for the plaintiff.

For the defence,

D. J. du Toit, the defendant, said that he went to the spot with the plaintiff in April to settle the line. Plaintiff said they must ride down the line. They did so, and when they got to the sluit, he said they must make some settlement. Afterwards a line was agreed upon, and in May witness began upon the fence on the line D and E. It was finished by the end of May. Whilst the work was going on, plaintiff did not object, and everything was completely finished before any objection was made. The land defendant offered to give up in exchange was better than that of plaintiff. Plaintiff had been using the piece of ground to graze cattle for the last six months.

Cross-examined: Witness was quite willing for plaintiff to take up the fence, and put it down on the line A and B. It was easier to fence over plaintiff's land than to follow the boundary line, where several sluits would have to be crossed. Witness and Jan du Toit met together and fixed the line. Witness claimed the right to use the piece of ground which plaintiff said was his.

Postea (5th March).

The hearing of the case was resumed.

John du Toit, farmer, living at Carolus Poort, in the district of Hanover, deposed that he and his brother had hired the farm from his father, who had a life interest in it. He knew the plaintiff, and met him in March last at Hanover. Plaintiff wanted witness to go with him to his father, in order to arrange some deviation of the boundary line between the two farms. Plaintiff wanted to exchange a small piece of land for another on the farm Carolus Poort. It was arranged that his brother Daniel should give up a corner piece in exchange for a piece to be given by witness. Witness afterwards went upon the ground with two of his brothers and the plaintiff, and a line was marked off. He knew the line fenced off by his brother. It was the same line as was marked off on that day. Witness was now willing that the plaintiff should have a piece of Carolus Poort, the same size as that fenced in by the brother of witness.

Cross-examined: The line C B was a difficult line to fence, and this was the reason why the line C E D was fixed upon. This was because of the great difficulty in fencing over the sluits on the original boundary.

Petrus Daniel du Toit, son of the defendant, a farmer, living at Matjesfontein, said he made the fence now in dispute, up to the point E. The work took three weeks. There were three people employed. During the time the fence was being made the plaintiff came on the spot three times. On the third occasion of plaintiff coming he said the ends would be tied; the fence was all right.

Hendrik van der Merwe, of Modderfontein, who lived last year at Matïesfontein deposed that he worked on the fence with the last witness. He remembered seeing the plaintiff three times while the work was going on. The flags showing the line of fence were already there the first time the plaintiff was there. On the third occasion they had finished planting the poles and were ready to tighten the wire. The plaintiff helped to untie one of the rolls of wire and never said anything. Witness had never heard plaintiff make any objection to the fence.

J. van den Heever, the plaintiff, recalled, stated that it cost him to make the fence £35, including poles and labour. This was on the line C E D G.

This closed the evidence.

After argument, judgment was given for the plaintiff with costs.

The Chief Justice said: This action has a threefold object. First, to recover damages for

an alleged trespass; second to compel the defendant to remove a fence which he has constructed on the plaintiff's land, and thirdly, to compel the defendant to place the fence where he had agreed by his original contract to place it. As to the claim for trespass I am of opinion that the plaintiff is not entitled to succeed, because at the time when the alleged trespass took place the fences were placed upon the plaintiff's land, the plaintiff having provisionally consented to their being there placed, and under the circumstances the rule "*volenti non fit injuria*" would apply. Then as to the two next counts, I think they may be conveniently taken together, viz., the claim to compel the defendant to remove the fence, and to place it where he originally contracted to place it. I think the evidence is perfectly clear that at the time when the fence was put up by the defendant it was on the distinct understanding that the plaintiff would come to terms with the owner of Carolus Poort in regard to the portion of land which the plaintiff was to get from Carolus Poort in exchange for the portion which he gave for Matjesfontein, and I think both parties so understood it. But in point of fact Matjesfontein gave up nothing to the defendant. I think we must take this arrangement to be conditional, that the fence was only to become a permanent fence in case the owners of Carolus Poort and Schlemmer's Hoek came to an agreement as to the exchange of land. When it came to communication with the owners of Carolus Poort it was found that these owners refused to give up as large a portion of land as that given up by Schlemmer's Hoek. When the plaintiff found he could not get from Carolus Poort he said, we must revert to our original agreement, and this fence must be removed. I think this is a position he is entitled to take up. The fence was placed upon his land, and the defendant must have known it was there conditionally. He did it at his own risk, and when plaintiff demands its removal the defendant is bound to remove it. The original agreement was that there was to be a straight line, the plaintiff to fence one portion, the defendant the other. I think the plaintiff is entitled to an order upon the defendant to remove the fence from his land, and to place it where he contracted to place it. At the same time, as a matter of equity I think it is only fair that this judgment should be conditional on the plaintiff paying to the defendant £15, which will compensate the defendant for any additional cost incurred in the deviation. An order will therefore be granted for the defendant to remove the fence from the line B C E D within one month to the place originally agreed upon—the line C D —upon condition that the plaintiff pay the defendant £15, but failing compliance on the part of the defendant with this order we must, of course, give damages to the plaintiff, and the Court will assess the damage at £30, with leave to the plaintiff to use the materials which are upon his land. Defendant to pay the costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorney, Gus. Trollip.]

SUPREME COURT.

Before the Right Hon. Sir J. H. DE VILLIERS P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

IN THE MATTER OF THE MINORS PARKER. { 1897. March 2nd.

Mr. Jones applied for authority for the lease for a lengthy period of certain landed property belonging to the applicants, situate in the division of Wodehouse.

The Chief Justice said that the order would issue on production of a telegram (the matter being one of urgency) from the Resident Magistrate that the transaction is for the benefit of the applicants.

LEFFLER V. HUDSON. { 1897. March 2nd.

Agent—Commission—Broker.

Where a sale of land is completed through the agency of a broker who had been employed by the seller as agent to sell the property, the fact that the intending purchaser had, before such sale, ascertained from others that the land was for sale, does not deprive such broker of his right to a commission.

This was an action brought to recover the sum of £26 5s., due to plaintiff as commission for services rendered as a broker in connection with the sale of a house in Hope-street belonging to the defendant.

The plaintiff's declaration alleged:

1. The parties to this suit reside in Cape Town,

2. The plaintiff is a duly licensed broker carrying on business in Cape Town; the defendant is a landed proprietor

3. In or about the month of May, 1896, the plaintiff was employed by the defendant as broker to sell on behalf of the defendant a certain house, situated in Hope-street, Cape Town, then in the possession of the defendant.

4. In the event of the plaintiff finding a purchaser for the said house to the satisfaction of the defendant, the defendant agreed to pay to the plaintiff a commission of 2½ per cent. as a reward for his services as broker.

5. Thereafter in or about the month of June, 1896, the plaintiff acting as the agent of the defendant as aforesaid obtained an offer from one A. Raphael for the said house at the price of £1,050.

6. The plaintiff duly communicated this offer to the defendant on or about the 29th June, 1896, and on or about the 30th June, 1896, the defendant accepted the offer and sold the said property to the said Raphael for the sum of £1,050 as aforesaid and thereupon the plaintiff says he became entitled to his commission as aforesaid.

7. All things have happened all times elapsed and all conditions been fulfilled to entitle the plaintiff to claim from the defendant the sum of £26 5s. as commission for his services as aforesaid but the defendant wrongfully and unlawfully refuses to pay the said sum of £26 5s or any portion thereof.

Wherefore plaintiff claimed.

(*a*) Judgment in the sum of £26 5s. as aforesaid.

(*b*) Alternative relief.

(*c*) Costs of suit.

The defendant's plea was as follows:

1. The defendant admits paragraphs 1, 2, 3, 4, of the declaration.

2. As regards paragraphs 5, 6, 7, the defendant admits that on or about June 30th, 1896, he sold the said house to the said Raphael for the said sum of £1,050 but he denies all other allegations therein contained.

3. He specially denies that it was through the agency of the plaintiff that the said sale was effected.

4. He says that the said sale was effected through one Mrs. Meyer, who was the tenant of the said house.

Therefore by reason of the premises he prays that the plaintiff's claim may be dismissed with costs.

The replication was general.

On these pleadings issue was joined.

Mr. Graham appeared for the plaintiff,

Mr. Molteno for the defendant,

James Henry Leffler, licensed broker, Cape Town, said the defendant employed him as a broker last May to sell the house in Hope-street which was then occupied by Mrs. Myers. On May 28 witness wrote to defendant, asking if the property was for sale, and asking if defendant would take £1,000 for it. Defendant said he would allow the client of witness to look at the property, but said he would not accept less than £1,100. Afterwards defendant said he would take £1,050 and allow witness 2½ per cent. on the sale of the property. On June 30 Mr. Raphael, of Plein-street, came about the property, and on that day witness wrote to the defendant closing a sale at £1,050. Witness received no reply and wrote again to defendant on June 30. A day or two afterwards defendant called at the office of witness and said, "The property is sold to Mrs. Myers." Witness then wrote demanding his commission, but received no reply. Witness afterwards found that Mr. Raphael had taken possession of the property, and Mrs. Myers had vacated it. Transfer was effected to Mr. Raphael in October.

Cross-examined: Mr. Raphael came to witness about the property.

C. M. Stevens, first clerk to the Civil Commissioner of Cape Town, proved the register of the sale of the property to Mr. Raphael in October.

This close the plaintiff's case.

For the defence,

Benjamin D. Hudson, the defendant, said he was the owner of the property in June, 1896. Some time in May he was approached by the plaintiff as to the sale of the property. Nothing came of these negotiations. Mrs. Myers had been in occupation of the house, as tenant, eight or nine years. Witness offered the house for sale to Mrs. Myers for £1,050, on June 30. She told witness afterwards the house was sold for that amount. Next day witness told plaintiff the house was sold to Mrs. Myers. Afterwards Mrs. Myers told him the *q.q.* was Mr. Raphael. Witness made Mrs. Myers a present of £13.

Cross-examined: Witness made the present shortly after the sale, and before receiving the lawyer's letter. Witness received plaintiff's letter on June 30.

Alfred Raphael, merchant, Cape Town, said he had known Mrs. Myers a long time. She came to his house on June 27 and told witness the house she lived in was for sale for £1,050, and plaintiff had given her the refusal. Witness said he would be glad to buy it. Afterwards, witness bought the property, and made Mrs. Myers a present of £5 for the introduction,

Witness went to Mr. Leffler just because he happened to know him; not because he knew Leffler had the selling of the house. Witness might have asked plaintiff if the house was for sale and instructed plaintiff to write to close the purchase.

By the Court: Witness went to plaintiff as a broker.

Dinah Myers said she had been tenant of the house for many years. Plaintiff gave her the refusal to purchase at £1,050 about the first or second week in June. After seeing Mr. Raphael she told defendant she had a purchaser for the house.

This closed the evidence.

After argument,

Judgment was given for the plaintiff, with costs.

De Villiers, C.J.: It is admitted that the plaintiff had been employed by the defendant to sell the land, and that on the 30th June last, the agency had not been determined. According to the declarations made by the defendant as settler, and by Raphael as purchaser, the sale was on that day effected by the former to the latter. It was not directly effected and the question is through whose agency was it done. It was not done through the agency of Mrs. Myers, the lessee of the property, for all she did was to inform Raphael that the property was for sale. It is true that she had the right of preemption, but she never exercised that right, for the property was transferred directly from the defendant to Raphael. The person through whose agency the sale was effected was the plaintiff. It is true that it was by mere accident that Raphael discovered that the plaintiff was agent for the sale, but after this discovery the communications for the purchase took place with the plaintiff as the defendant's agent. The plaintiff is in my opinion entitled to his commission and the judgment must accordingly be for the plaintiff with costs.

[Plaintiff's Attorney, J. Ayliff; Defendant's Attorneys, Messrs. J. C. Berrangé & Son.]

HEYDENRYCH V. KIRBY. { 1897. March 2nd. June 8th.

This was an action brought by Benjamin Godlieb Heydenrych against Brandon Kirby for an account, payment of portion of profits under certain contracts, delivery of tools, and interest,

The plaintiff's declaration alleged:

1. The parties to this suit reside in Cape Town.

2. During the year 1894 the defendant, who is a contractor, obtained from the Town Council of Cape Town certain contracts for work in connection with the drainage of the city of Cape Town.

3. Thereupon the defendant requested the plaintiff to advance a sum of money to him to enable the defendant to carry out his said contracts.

4. On or about the 2nd July, 1894, an agreement in writing, marked A, was entered into between the plaintiff and defendant, which the plaintiff annexes to this declaration and craves leave to refer thereto.

5. Thereafter the defendant obtained other and further contracts from the Town Council and other persons in aduition to those referred to in the agreement (A), and the plaintiff, at the request of the defendant, advanced the defendant further sums of money to be expended upon the said contracts under the terms and conditions in the said agreement (A).

6. Between the 22nd July, 1894, and February, 1896, the plaintiff has advanced to the defendant the sum of £9,071 11s. 3d. under the said agreement, and the plaintiff has received from the defendant the sum of £9,242 10s. 10d.

7. It became and was the duty of the defendant under the said agreement (A) to render the plaintiff a full and true account, supported by vouchers, of all moneys received and expended by him in connection with the said contracts with the Town Council and others, and of all profits made by him under the said contracts; and to pay over to the plaintiff one-third of the profits as aforesaid, and to deliver and hand over to the plaintiff all tools and plant used in connection with works under the said contracts.

8. The plaintiff further says that the defendant is indebted to him in the sum of £24 0s. 10d., being for interest on certain moneys advanced to the defendant by the plaintiff at the special instance and request of the defendant as will more clearly appear from the account (marked B) annexed to this declaration.

9. All things have happened, all times elapsed, and all conditions fulfilled to entitle the plaintiff to claim from the defendant a full and true account, supported by vouchers of all moneys received and expended by him in connection with the said contracts with the Town Council and others, and of all profits made by him thereunder, and for payment of one-third of the said profits; delivery of the tools and plant referred to in the said agreement (A), or payment of their value, the sum of £200; payment of the sum of £24 0s. 10d. referred to in the last preceding paragraph of this declaration; but the defendant, though

requested so to do, neglects and refuses to render the said account, pay over the said profits, deliver the said tools or their value and pay, the sum of £24 0s. 10d. as aforesaid.

Wherefore the plaintiff prays:

(*a*) That the defendant may be ordered to render to the plaintiff a full and true account, supported by vouchers, of all moneys received and expended by him in connection with the said contracts with the Town Council of Cape Town and others, and of all profits made by him under the said contracts.

(*b*) That the defendant may be ordered to pay him one-third of the said profits made under the said contracts.

(*c*) For an order compelling the defendant to deliver to the plaintiff all tools and plant referred to in agreement A or to pay him the value thereof, the sum of £200.

(*d*) For judgment in the sum of £24 0s. 10d. as aforesaid.

(*e*) Alternative relief.

(*f*) Costs of suit.

The annexure A referred to was as follows:

Memorandum of an agreement made, entered into, and concluded between Brandon Kirby and Benjamin Godlieb Heydenrych.

And the said parties hereto declare: whereas Brandon Kirby has tendered and obtained the contract for excavations for main drainage in Staal Plein, Avenue Terrace, Blyth-street, and across Government Gardens from the Town Council of the city of Cape Town, and whereas the said Brandon Kirby is in need of funds for the purpose of carrying out the above contract and applied to Benjamin Godlieb Heydenrych for such funds not exceeding the sum of two hundred pounds sterling, and whereas the said Benjamin Godlieb Heydenrych has agreed to advance such funds not exceeding two hundred pounds sterling upon condition: (*a*) That the said Brandon Kirby shall pay over to the said Benjamin Godlieb Heydenrych as a consideration for the said loan, one-third (⅓) of the profits derived under the said contract without holding the said Benjamin Godlieb Heydenrych responsible for any losses. (*b*) That the said Brandon Kirby shall at once hand over to the said Benjamin Godlieb Heydenrych, as security for the said advance, each and every one of the above contracts with the said Town Council, and also grant a power-of-attorney to receive all such moneys as may become due and payable under the said contracts by the said Town Council as aforesaid. (*c*) That all tools, &c., used in the carrying on and completing the said contract, shall remain the property of the said Benjamin Godlieb Heydenrych. Now therefore, these presents witnesseth that the parties hereto for themselves, their heirs, executors, administrators, and assigns have contracted, and agreed as follows, to wit:

1. The said Benjamin Godlieb Heydenrych, in consideration of the presents aforesaid, agrees to advance such sum or sums of money as may be required to pay the wages of the labourers engaged on the above works weekly from time to time during the first three weeks in each and every month as the work proceeds, and also such sums as may be required to purchase the necessary tools which on the whole, during the whole period on which such contracts are to be carried out, shall not exceed the sum of two hundred pounds.

2. That the said Brandon Kirby shall cede, assign, transfer and hand over to the said Benjamin Godlieb Heydenrych, each and every one of the said contracts with the Town Council of Cape Town, as security for the advances aforesaid, and furthermore grant his power-of-attorney, irrevocable and *in rem suam*, to enable the said Benjamin Godlieb Heydenrych to recover such amounts as may be due in the fourth week of each and every month, from the payments received from the said Town Council, on the fourth week of every month under the said contracts. That the said Benjamin Godlieb Heydenrych shall be allowed to deduct the sums advanced during every three weeks in each month, from the payments received from the said Town Council on the fourth week of every month under the power-of-attorney aforesaid. That the balance, after aforesaid deductions, shall be kept by the said Benjamin Godlieb Heydenrych, at the call of Brandon Kirby, for division as aforementioned at the completion of the said contract.

That the said Brandon Kirby shall carry out and complete the hereinbefore mentioned contract with the said Town Council of the city of Cape Town in two months.

That all tools, &c., employed on the works under the aforementioned contract shall remain the property of the said Benjamin Godlieb Heydenrych.

The said Benjamin Godlieb Heydenrych shall receive as remuneration and interest for the herein aforenamed advances one-third (⅓) of the profits under the said contracts with the Town Council of the city of Cape Town.

Thus done and contracted at Cape Town this second day of July, 1894.

(Sgd.) BRANDON KIRBY.
„ B. G. HEYDENRYCH.

The following was defendant's plea:

1. Defendant admits paragraphs 1, 2, 3, 4 and 5 of plaintiff's declaration.

2. As to paragraph 6, he begs to refer this Honourable Court to such proofs and vouchers as the plaintiff may produce, as defendant, owing to plaintiff's action, is not in a position to test the correctness of the statement therein contained.

3. As to paragraph 7, defendant begs leave to refer to the agreement founded upon for its terms; he states that the plaintiff received the price for the work performed under the contract on his (defendant's) behalf, and that plaintiff has at no time accounted for the money so received, and he further states that without such account, supported by vouchers, it is impossible for him (defendant) to ascertain the position between himself and plaintiff.

4. As to paragraph 8, defendant denies that he owes the sum of £24 0s. 10d., or any portion thereof as interest to the said plaintiff.

5. As to paragraph 9, defendant specially denies that all things have happened, all times elapsed, and all conditions been fulfilled to entitle the plaintiff to proceed in any action against him. He states that the plaintiff has broken his part of the agreement and has not, though requested so to do, rendered such accounts and vouchers as he should have done showing his dealings with the money received and disbursed on plaintiff's behalf, and in the absence of which it is impossible to determine the relative positions of plaintiff and defendant, or for him to frame any account.

He admits the other allegations in the paragraph, save that he denies that any profits have been made; he admits that the plaintiff is entitled to his tools, but says that until he has completed his share of the contract by handing over accounts of his intromissions with moneys received by him, or the payment of such balance as may be found due on adjustment of accounts plaintiff is not entitled thereto.

And defendant further says that he has tendered delivery of such tools, and hereby again tenders delivery of such tools; he especifically states that a true adjustment of accounts would show a balance due by plaintiff to defendant.

Wherefore defendant prays that the plaintiff's claim may be dismissed with costs.

1. As a claim in reconvention, plaintiff in reconvention (defendant in convention) begs leave to refer to the matters pleaded above, and also to the terms of the agreement annexed to plaintiff's declaration and marked A; he states that defendant in reconvention, as was his duty to do, has at no time, though often requested so to do, furnished him with a true and proper account supported by vouchers of the moneys received from the Town Council of Cape Town and expended by him in connection with the said contract with the said Town Council.

2. Debate of account so furnished.

3. The payment of such sum or sums of money as may be found due to defendant in convention after debate of the said accounts, and upon delivery of the tools now held by plaintiff in convention.

4. Alternative relief.

5. Costs of suit.

For a replication to defendant's plea the plaintiff says as follows:

1. He admits that he received certain payments for work performed by the defendant in terms of the agreement A annexed to the declaration, and says that he has given proper receipts of such payments, and has at all times been ready and willing to render an account, showing all moneys advanced by him to defendant. Otherwise the replication was general.

For a plea in reconvention plaintiff says:

1. He craves leave to refer to the matters already referred to in his pleadings.

2. He says that he has at all times been ready and willing, as the defendant is well aware, to furnish the defendant with the account referred to in his claim in reconvention, and to exhibit to him all vouchers in his possession, and the defendant through his duly authorised agent has inspected the said account and made a copy thereof.

Otherwise the plea denied generally.

The rejoinder of the defendant in convention was general.

The replication of the plaintiff in reconvention admitted that an account had been furnished, but said that the same was incorrect and erroneous, and not such an account as he is by law entitled to demand from plaintiff as the holder of his power-of-attorney.

Otherwise the replication was general.

On these pleadings issue was joined.

Mr. Graham (with him Mr. Close) for the plaintiff.

Mr. MacLachlan for the defendant.

For the plaintiff was called,

B. G. Heydenrych, financial agent, Cape Town, said that he first knew defendant when he was introduced to him by a broker. Defendant was in want of money, and gave him letters of credit for the purpose of buying water-boring machinery. Witness afterwrads advanced money to enable defendant to carry out a contract for the Town Council. Witness used to give the defendant a cheque for pay sheets every week. Witness had no check on this pay-sheet except for cartage. The same payments had been brought up twice, and sometimes three

times. A certain payment of £15 17s. had been brought up three times; and a payment of £10 for an accident was put down twice. The vouchers did not agree with the pay-sheets. Witness advanced defendant altogether £9,061 11s. 3d. Witness had received from the Town Council £9,242 10s. 10d. during the two years. Defendant came to plaintiff's place to go through the vouchers, but was so violent that witness had to call a policeman in to remove him. Witness advanced close upon £300 for tools, and defendant wanted to return him about £30 worth.

Cross-examined: Witness invariably took receipts for moneys paid out. Defendant sometimes kept the pay-sheets back three or four weeks. Sometimes there would be £900 lying at the Town-house. Defendant and his partner borrowed money previous to the contract. Witness was to get one-third of the profits, and his advance was not to exceed £200. Witness thought the contract was a risky one.

At this point, at the suggestion of the Court, it was agreed that the whole matter of accounts be referred to an accountant for report. Mr. Lancaster was appointed by agreement to act as the accountant; the Court appointing him commissioner for the purpose of administering oaths in the inquiry.

Postea (June 8th.)

Mr. Lancaster reported in favour of defendant on all the items in dispute.

After argument,

Acting Chief Justice said: The plaintiff in this action agreed with defendant to do what is called the "financing," to enable him to perform certain contracts with the Town Council of Cape Town. The agreement between plaintiff and defendant was that plaintiff was to advance a sum not exceeding £20[illegible], and in consideration he was to receive one third of the profit, and he (plaintiff) held a power of attorney to receive all moneys; all tools were at the completion of the contract to become the property of the plaintiff. It appears that the way in which business was conducted was that the plaintiff received every week from the defendant a pay-sheet showing what was required to carry on the work. The defendant paid the men according to the pay-sheet: and the plaintiff received all the moneys due under the contract. The plaintiff brought this action into court for an account. But week after week the plaintiff had an account; and the plaintiff had all the moneys paid to him directly. The plaintiff had the pay-sheets supplied to him week after week, and it was easier for him than the other party to keep a full and correct account. As the plaintiff had the handling of the money, it was his duty to keep an account. The disputes as to the accounts have been referred to an accountant, and he has found that the contract did not result in any profit. There was only one item which gave me any doubt at first, and that was the amount for the "up-keep" of the roads, which amount must have been expended after the contract was completed. It is shown, however, that the actual result of the contract was that there was no profit. The further claim was for the tools, which were to remain the plaintiff's property under the contract. The defendant tendered delivery of the tools, which were put down as worth £33 18s. From the plaintiff's own showing, he has a balance of £181 0s. 3d. as regards the amounts received and paid by him. This is not to be considered the profit, because defendant has spent more than this upon the up-keep of the roads. The defendant has shown that there was not a profit. The plaintiff must hand over this £181 0s. 3d., but he is entitled to deduct from it £33 18s. as the value of the tools. Judgment must be entered for defendant on his claim in reconvention for £147 2s. 3d. The defendant, I think, is clearly liable to pay the costs up to the date of filing his plea. As to the costs subsequent to that date, considering that the plaintiff has not succeeded in getting any more than the tools, the plaintiff must pay the costs. Defendant to pay all costs up to the filing of the plea, and the plaintiff all subsequent costs.

Plaintiff's Attorney, V. A. van der Byl; Defendant's Attorney, H. P. du Preez.]

QUEEN V. FIELD. { 1897. March 2nd.

Attorney-General—Remitting case for trial—Preparatory examination—Notice of charge—Summons—Summary prosecution.

Where after a preparatory examination has been taken, the Attorney-General remits a case to a Magistrate's Court for trial, notice should be given to the accused of the nature of the charge to be made, but such notice need not be by way of summons in the form specified in section 68 of Schedule B to Act 20 of 1856, which section applies only to summary prosecutions.

This was an appeal against the decision of the Resident Magistrate of Cape Town, by whom the appellant was convicted of the crime of theft by means of embezzlement in that he appropriated a sum of £58, the property of the members of the Independent Companion Friendly Society, whilst acting as secretary of the said society. The appellant was sentenced to four months' imprisonment with hard labour. The prisoner was brought before the Resident Magistrate on a warrant of arrest for theft by embezzlement, and a preliminary examination was held. The Resident Magistrate committed him for trial on a charge of theft by means of embezzlement. The Attorney-General remitted the case to the Resident Magrstrate under Act 43 of 1885, and the prisoner was brought before the Resident Magistrate for trial, and arraigned under section 29 of Act 3 of 1861, and pleaded not guilty. No summons was issued, but after the remittal the messenger served on the accused the following notice: "You are hereby required to appear at the Resident Magistrate's Court in Burg-street, Cape Town, at ten o'clock in the forenoon, on the 30th December, 1896, to answer the charge of theft by means of embezzlement, for which you were committed for trial on the 9th December, 1896." The charge as set forth in the charge sheet was that of theft by means of embezzlement, in that having in his possession money amounting to £53, the property of the Independent Companion Friendly Society, the said H. J. Field did on divers dates between the 1st July, 1894, and 28th November, 1896, at Cape Town, wrongfully and unlawfully convert the said money to his own use and benefit, and did steal it.—Before the Resident Magistrate the prisoner's agent raised the exception that no copy of the indictment had been served on the prisoner. – The Resident Magistrate over-ruled the exception, found the prisoner guilty, and gave the following reasons: I found there was no reason for allowing the exception of prisoner's agent that prisoner was not served with a copy of the indictment. The notice served on prisoner sets forth that he would be tried for theft by embezzlement, for which he was committed for trial on 9th December, 1896; and the charge to which prisoner pleaded is exactly the same as the charge made against him at the preparatory examination, and, moreover, the prisoner's agent had a complete copy of the whole of the preliminary examination taken a considerable time before the trial. The prisoner was therefore not in any way prejudiced, and had ample notice of the nature of the charge which would be preferred against him. I found the prisoner guilty of the theft of £21 10s., viz., rent received from Jacobs, from the Perseverance Lodge, and from the Vry Zons Lodge. For most of the items receipts are produced, the whole of which prisoner in his evidence at the trial admits to have received. I consider his explanations as to what became of the money most unsatisfactory.

The prisoner now appealed.

Mr. Buchanan for the appellant: This appeal is brought on two grounds: (*a*) On the ground that no summons was issued under section 68, Schedule B, Act 20 of 1856. (*b*) On the merits. The accused was merely served with notice to appear. Section 68, Schedule B, Act 20 of 1856, requires summons to be served on accused. He was thereafter arrested under a warrant, but at no time has summons been served. In a Superior Court a copy of the indictment and notice of trial must be served on the accused even where he has full knowledge of the charge. Much more then ought the accused to be summoned in our Resident Magistrate's Court. By Ordinance 8 of 1852 at the trial of the accused the Resident Magistrate's clerk has to read the charge from the summons, the warrant is simply for the apprehension and contains no charge—so that this part of the procedure cannot be properly carried out unless there is a summons. It has been held in *Regina* v. *Meiring* (1 Sheil, 225), that a summons is not necessary after a *remittal*, but in that case it was not argued that a summons need never issue at all. The summons has the effect of the notice and the indictment, and should set out the charge in the fullest possible terms. The notice which the accused received in this case could not cure the defect if no summons were issued originally. Act 3 of 1861 (section 29) gives the procedure to be adopted when there is a remittal. The summons ought to issue even before a preparatory examination. For suppose the Resident Magistrate gets the accused before him and then exercises his option either to make the matter a summary trial or preliminary examination, if he proceeds with the latter then it has been the practice not to have summons, a happy *ex post facto* way of curing the defect. As to the merits, the evidence that would support a conviction for theft by embezzlement is such as would be required to convict for embezzlement in English law, *Stephens* (Digest of Criminal Law, section 312). The Resident Magistrate has not drawn the distinction between the prisoner's not keeping proper accounts and converting money to the prisoner's own use, he argues that because no proper books were kept therefore there was conversion, the accused rebutted conversion by his evidence,

Mr. Sheil, Assistant Law Adviser, for the Crown: As to the first point taken, it is submitted that Rule 68 only applied to cases of summary prosecution and not to cases which have been remitted by the Attorney-General. See *Regina* v. *Meiring* (1 Shiel, 225.)

As to the merits there were sufficient evidence to justify the conviction. The receipts put in clearly show that the appellant received moneys for which he did not account.

Mr. Buchanan in reply.

The Court dismissed the appeal.

De Villiers, C. J.: Where, after a preparatory examination, a case is remitted by the Attorney-General to a Magistrate's Court for trial, the accused ought to have notice of the nature of the charge to be made against him at such trial. The question is whether such notice should be given by way of summons in the form specified in section 68 of Schedule B to Act 20 of 1856. In my opinion, that section refers only to summary prosecutions and not to cases remitted for trial after preparatory examination. The notice given in the present case was perhaps somewhat meagre, but it was sufficient to indicate to the prisoner the nature of the precise charge which was afterwards made. As to the merits of the case there was sufficient evidence to prove that the prisoner received moneys from others, and appropriated them to his own use, and was therefore guilty of theft by means of embezzlement. The appeal must be dismissed.

Their lordships concurred.

[Appellant's Attorney, J. Ayliff.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

JAMES SEARIGHT AND CO. v. MARCHUSSEN. { 1897. Mar. 3rd.

Ship—Charter party—Freight—Carriage of goods—Norwegian law—Distance freight.

By a charter party, in an ordinary English printed form, made in London between the London broker of the defendant, a Norwegian shipowner, and an English Trading Company it was agreed that the defendant's ship Atlas of Norway, should proceed to Rangoon and there load a cargo of teak and from there proceed to Queenstown or Falmouth for orders, the freight to be paid "by one third in cash on ship's arrival at port of discharge, and the remainder on unloading and right delivery of cargo in cash."

The ship duly proceeded to Rangoon and there loaded a cargo of teak but in the course of her voyage from Rangoon was wrecked on the shores of Table Bay, and became totally lost. The greater part of the cargo having been saved, the plaintiffs as holders of bills of lading for the cargo were willing that the master should tranship the cargo to its destination, but the master refused either to tranship the cargo or to deliver it to the plaintiffs, without payment of distance freight according to Norwegian law.

Held that *the plaintiff was not liable for distance freight as the intention of the parties was to make an English contract and, the payment of freight being expressly dealt with in the charterparty, none was payable on the cargo landed in Cape Town.*

This was an action for delivery of cargo free of freight, and for an order declaring the owners of the wrecked ship Atlas are not entitled to such freight.

The plaintiffs in this case were Thomas Bell and John Alexander Stuart Watson, carrying on business in Cape Town under the style or firm of James Searight & Co.; and the defendant was Jens L. Marchussen, master of the wrecked ship Atlas, and representing the owners of the said ship, at present in Cape Town.

The plaintiffs' declaration alleged:

1. The plaintiffs are merchants carrying on business at Cape Town in partnership, under the style or firm of James Searight & Co. The defendant is the master of the wrecked ship Atlas, and he represents the owners of that vessel.

2. In or about the month of February, 1895, the Atlas, being a Norwegian vessel, was lying in the Thames, and in the said month she was duly chartered under a charter party, executed

ih London by Messrs. H. Clarkson & Co., acting as agents for the owner, one Thomas S. Flack, of the one part, and the Bombay-Burmah Trading Corporation (Limited), through their agents, Messrs. Wallace Bros., of London, of the other part.

3. In terms of the said charter party it was provided: (*a*) That the said ship should proceed to load at Rangoon or Moulmein a full cargo of teak, and so loaded should sail to Queenstown or Falmouth for orders, whence she should proceed for the discharge of cargo to any one or two of certain specified ports, some of the said ports being in England and some on the Continent; (*b*) that freight being payable in British sterling upon the basis of certain scheduled rates set forth in the said charter party should be paid, if in the United Kingdom, by one-third in cash on ship's arrival at port of discharge, and the remainder on unloading and right delivery of the cargo in cash, less certain discount; and if on the Continent, in cash on unloading and right delivery of the cargo at the exchange of the day, less a certain discount; (*c*) that the master should sign bills of lading for the whole or any portion of the cargo at the request of the charterers; and that upon bills of lading being so signed all liability on the part of the charterers or their agents under the charter party or otherwise should cease; (*d*) that in the event of any question of general average arising the same should be settled according to the practice of Lloyds; and that all questions should be settled in accordance with English law.

It is unnecessary to set out the other provisions of the said charter party in this declaration, but the plaintiffs ask leave to refer this Honourable Court to the said document when produced.

4. The said ship duly proceeded to Rangoon, and loaded a full cargo of teak shipped by the charterers and the said Bombay-Burmah Trading Corporation (Limited), for which the defendant as master duly signed bills of lading to the order of the shippers or their assigns, freight and all other conditions being stipulated to be as per charter party.

5. In the course of her voyage from Rangoon the said ship was wrecked on the shores of Table Bay, and became and was totally lost, and was abandoned as such.

6. By far the greater part of the cargo was taken out of the wrecked ship and salved, and the said salved cargo is now lying in the Cape Town Docks under the control of the defendant; its value is the sum of £14,000 or thereabouts.

7. The plaintiffs are holders of bills of lading for all the said cargo, endorsed in blank by the the said Bombay-Burmah Trading Corporation (Limited). They hold the said bills on behalf of the owners of the said cargo, and as such holders they are entitled in all respects to deal with the said cargo while here as the owners thereof.

8. The defendant is bound in law either to ship the said cargo in some other vessel for the purposes of being carried to its destination, or to abandon his voyage and deliver the salved cargo to the owners thereof without payment on their part of any freight in respect of it.

9. The defendant has notified to the plaintiffs that he will not forward the salved cargo to its destination, though the plaintiffs were willing that he should do so; and the plaintiffs contend that the defendant is bound under such circumstances to deliver the said cargo to them to be dealt with as may be advisable, free from any claim or liability for freight.

10. The defendant wrongfully contends that he is entitled to be paid distance freight by the plaintiffs in respect of the salved cargo still under his control; and he refuses to deliver up the said cargo or to part with the custody of it until such distance freight has been paid.

The plaintiffs claim: (*a*) An order declaring the defendant is not entitled to be paid distance freight or any freight at all in respect of the said cargo salved as aforesaid; (*b*) an order compelling him to deliver to the plaintiffs the said cargo under his control, free from the payment of any freight; (*c*) alternative relief; (*d*) costs of suit.

The defendant's plea was as follows:

1. He admits the allegations in paragraphs 1, 2, 4, 5, 6, 7, and 10, but denies that in paragraph 8. As to paragraph 3, he craves leave to refer to the charter party itself for the terms thereof.

2. The said ship Atlas is a Norwegian ship, sailing under the flag of Norway, and owned by one Thomas Falk, a Norwegian subject, residing at Stavanger, in Norway, at the date at which the charter party was entered into; and the law of Norway which governs the question of freight to be paid to the owner, gives by express terms to the master the right to claim *pro rata* freight in case of loss of the vessel during the voyage. The defendant craves leave to refer to section 160 of the Maritime Law of Norway of July 20, 1893, which is still of full legal force and effect, a translation of which is as follows: "Section 160. —If the ship is lost during the voyage or condemned as unfit for repair, the contract of affreightment shall become void, but it shall be incumbent on the master to adopt appropriate measures, on behalf of the owners, in respect of the goods in the manner prescribed by the rules of section 57." In such a case the freight shall be payable to the master *pro rata itineris*, cal-

culated according to the proportion of the distance sailed to the whole voyage, but with allowance for the time "occupied by the voyage and the difficulties and expenses connected therewith, as compared with the remaining part of the voyage. If the parties disagree as to the freight payable, it shall be lawful for any of them to have the amount fixed by a lawful estimate." "The owner shall have the option of renouncing the goods in lieu of payment of the *pro rata* freight should he desire to do so."

3. The defendant is and has always been ready to hand over to the plaintiffs the said cargo upon payment of his *pro rata* or distance freight in respect of the portion of the voyage actually completed, and if the amount payable as such cannot be agreed upon the defendant is and has always been ready and willing that the same should be fixed by a lawful estimate as provided for in the said section 160; but the plaintiffs claim the said cargo should be delivered to them without payment of any distance freight at all.

4. As to paragraph 9, he admits that he has not notified to the plaintiff that he would not forward the said cargo to its destination, and says he was not bound to do so, but he says he was willing to forward the said cargo if the plaintiffs were willing to pay the expense of so doing, and to acknowledge his claim to the said *pro rata* or distance freight, but the plaintiffs have not consented to pay the said expense, and have refused to acknowledge the said claim.

5. He admits the allegations in paragraph 10, save that the contention therein set forth is wrongful, and he submits that the same is not justified in law.

Wherefore he prays that the plaintiffs' claim may be dismissed with costs.

The plaintiffs' replication was general.

On these pleadings issue was joined.

Mr. Innes, Q.C. (with him Mr. Benjamin), for the plaintiffs.

Mr. Searle, Q.C. (with him Mr. Macgregor), for the defendant.

For the plaintiffs were called:

John Alexander Stewart Watson, a member of the plaintiff firm. It was common cause in the case that the barque Atlas was chartered by the Bombay and Burmah Trading Company. The bills of lading put in had been in the plaintiffs' possession. On the 9th October the Atlas went ashore on the Blaauwberg beach, driven there by a heavy south-easter. With small exceptions, the cargo was salved, though it was slightly damaged. The cargo was insured for £16,000. He would say about £14,000 was the value of the salved cargo. Witness's firm had paid McKenzie £7,000 for salvage. The cargo was now lying under the captain's control at the Cape Town Docks. In this matter plaintiffs acted for all concerned. Witness had spoken to the captain on the question of the distance freight, witness taking up the position that it was not payable. The captain declined to give up the cargo unless plaintiffs were prepared to agree to pay distance freight. The captain was not willing to transship the cargo to the port of destination. The plaintiffs had general authority to act for the owners of the ship.

Cross-examined: About 1,100 logs had been sold. The whole cargo consisted of 1,536 logs. Practically the whole cargo was landed on January 15. He did not know that they would have offered to pay distance freight had the captain said he would transship the cargo and take it to the port of destination.

By the Court: The position plaintiffs took up was that distance freight was not payable until delivery of cargo at port of destination, or if the owners saw they could sell the cargo at a good profit they might accept delivery and pay distance freight.

This closed the plaintiffs' case.

For the defence,

Jens L. Marchüssen, the defendant, and captain of the barque Atlas, wrecked in October last. Witness was a Norwegian subject. The ship was a Norwegian ship, and flew the Norwegian flag. After the ship was wrecked Messrs. Searight & Co. were appointed agents. Witness was willing to have the cargo forwarded to England if the distance freight were paid. Witness had no means at his disposal of sending the cargo on. Witness even had to borrow from the agents for ordinary expenses. Witness was a captain in 1867, and had had steamboats for three years or three years and a half. Most of the charter parties were English, and under English law.

Frederick Ayers, secretary of the Colonial Insurance Company, Cape Town, said he was an average adjuster—the only one in Cape Town. "Practice at Lloyds" meant custom adopted where no law prevails. Witness could put in Lloyd's rules. There was difference between the English law and other laws as to the adjustment of general average. Lloyds was not law at all.

This closed the evidence.

Mr. Innes for the plaintiff: There are two questions at issue in this case:

(*a*) What are the powers and duties of the Master in case of emergency? What power has he not founded on contract but on necessity in view of his having to represent all parties?

(*b*) What are the powers and duties arising out of the contract of affreightment? Is the matter to be settled by English law or by the law of the flag? We contend that the English law applies.

The whole question is one of intention. The rule of the applicability of the law of the flag is based on the case of *The August* (L.R., Prob. Division, 1891, page 329). See the case of *Thomson, Watson & Co.* v. *Wieting and Others* (the *Formica* 2 Juta, 197); The *Gaetanoé Maria* (7 Prob. Div., 137); *Dicey* (Conflict of Law, rule 54 and page 540); *Chartered Bank* v. *Netherlands Co.* (10 Q.B.D., 529); *The Industrie* (Prob. Div., 1894, page 58). Every fact in the latter case is in our favour, every one point that induced Lord Esher —to consider the contract a English not a German contract, is present in this contract: and besides, there is here an additional one, stronger in our favour, viz., the special clause in this contract adopting the rule of Lloyds and English law to settle all questions. Is distance freight payable? See *Maude and Pollock* (Merchant Shipping, Vol. I., p. 367); *The Bahia* (Browning & Lushington, Ad. Rep., page 392) shows what is the Master's position in cases of this kind. Common law only allows distance freight to be claimed when it can infer a contract to substitute the new intermediate part for the old: and to release the owner of the ship from carrying the cargo further. Is there anything in the facts to show that there has been a new contract between the parties to accept the cargo here? It is clear from beginning to end of the correspondence that Searight & Co. deny liability for distance freight.

The Master having refused to make any election as to what to do. Searight made no attempt to sell before the 15th. The real question is, does the law of England or of the flag govern? We contend for the former, and that what our declaration claims is correct. See *Mackie, Dunn & Co.* v. *Keith & Co.* ("The Avanti Savoia," 9 Juta, 442).

Mr. Searle for the defendants referred to *Lloyd* v. *Guibert* (L.R., 1 Q.B., 115). The point in that case was whether there could be an abandonment of the ship by the shipowner, the present is not a case of dealing with the power of the Master in case of necessity. See also *Nelson's Selected Cases on Private International Law* (pages 254 and 255); *The Missouri* (42 Ch. Div., 321); *The August* (L.R. (1891) P.D., 329). The particular clause in the present charter party provides that English law and the practice of Lloyd's shall apply only in cases of general average. *Lowndes* (Law of General Average, page 38) treats of the different laws of general average: see also *Carver* (Carriage by Sea, section 207. General average has to be settled at the place where the voyage is terminated, whether in due course or not, hence to avert this and apply Lloyd's and English law they had to agree specially as they have done. We contend that the law of the flag must govern. It lies on plaintiff's going on the principle that the law of England applies, to show that there is something exceptional or out of the way in the Norwegian charter party; there is nothing in our charter party necessarily and exclusively English except the proviso as to "Queen's enemies." *Russell* v. *Nieman* (17 C.B. (N.S.), p. 163); *Scrutton* (Charter Parties and Bills of Lading), at page 12 collating all the previous cases on the point, holds that the law of the flag governs save where there is no express intention to exclude, which cannot be shown to exist here.

Mr. Innes in reply: The authorities on distance freight go beyond mere waiver and required a new contract by voluntary acceptance. *Scrutton* (page 256); *Metcalfe* v. *Britannia Ironworks Co.* (2 Q.B.D., 423), and particularly Lord Bramwell's judgment; *Dakin* v. *Oxley* (15 C.B., N.S., 646); *Vlierboom* v. *Chapman* (3 M. & W., 230), quite apart from our Act 8 of 1879, the Court would apply English law.

De Villiers, C. J.: The first question to be determined is whether the English or the Norwegian law should be applied to the construction of the terms of the charter party relating to the payment of freight. One third of the freight was made payable on the ship's arrival at the port of discharge, viz. Queen's Town or Falmouth, and the remainder on unloading and right delivery of cargo. The Atlas, a Norwegian ship, was wrecked on the shores of Table Bay and the greater part of the cargo, which consisted of teak, was salved. The plaintiffs, as holders of the bills of lading, inquired from the Master whether he would tranship the cargo and convey it to the port of discharge, but the Master refused either to tranship the cargo or to deliver the cargo to the plaintiffs without payment of the freight from Rangoon, where the cargo was shipped, to Table Bay. An arrangement was afterwards made under which the cargo was delivered to the plaintiffs and the distance freight secured subject to the decision of the Court whether such freight was payable or not. It is clear that if the English law is to govern the construction of the charter party distance freight would not be payable. The rules laid down by Lord Ellenborough in 1808, in *Hunter* v. *Prinsep* (10 East, 394) still appear to hold good in England. "If," said he, "the ship be disabled from completing her voyage, the shipowner may

still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the shipowner will not forward them, the freighter is entitled to them without paying anything." The defendant however contends that inasmuch as his ship is a Norwegian ship, the Norwegian law should govern the construction of the terms of the charter party relating to freight. Under that law I take it the shipowner would be entitled to distance freight under circumstances like the present, even although the charter party stipulates for payment of freight on right delivery of the cargo at the port of destination, but although the ship was Norwegian, the charter party was made in England, with English merchants and every stipulation in it is an ordinary stipulation in an English charter party. According to the judgment of the English Court of Appeal in *The Industrie* (P.D. 1894, p. 58), the inference to be drawn from these facts is that the contracting parties meant that the contract was to be construed according to English law. That decision may fairly be taken to embody "the law administered by the High Court of Justice in England" in terms of Act No. 8 of 1879 regarding the question at issue. The judgment of the Court must therefore be for the plaintiffs with costs.

Mr. Justice Buchanan: I concur. There is only one point I would refer to that has not been dealt with by the Chief Justice. I have carefully examined the evidence to see if it could be held that there had been any waiver implied, or constructive, or a new agreement entered into between the parties to make delivery here, upon which a liability to pay freight could be based; but I am unable to discover in the evidence any foundation for such a finding. There seems to me therefore no ground upon which the defendant can be held entitled to recover any portion of his claim.

Mr. Justice Maasdorp concurred.

[*Plaintiff's Attorney*, Messrs. Van Zyl & *Buissinné*; *Defendants'* Attorneys, Messrs. *Fairbridge, Arderne & Lawton.*]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

HEYDENRYCH v. ABAS AND SATEA. { 1897. March 4th.

This was an action brought by Benjamin Godlieb Heydenrych against Hadje Abas and Hadje Satea to recover the sum of £53 as rent of certain cabs and horses belonging to the plaintiff; also for an order for restoration of certain cab, horses, and harness.

The plaintiff's declaration alleged:

1. The plaintiff resides at Cape Town and the defendants, who are married to each other by Malay rites, also reside at Cape Town.

2. The plaintiff is entitled to the possession of a certain cab, No. 7, known as the Grantully Castle, and of three horses, to wit, one grey horse named Charlie, one black horse named Blackstone, and one bay horse named Charlie, together with two sets of harness (one black and one brown, leather plated), which plaintiff let to the defendants, and the defendants took to lease upon the terms mentioned and referred to in a certain agreement dated 15th October, 1895, to which agreement the plaintiff craves leave to refer, and have taken and held as herein inserted.

3. The said agreement was signed by Hadje Abas, the male defendant, for himself, and by the said Hadje Abas as and in the capacity of agent for the defendant Hadje Satea, and the said Hadje Satea employed and authorised the said Abas so to sign and contract on her behalf.

4. By the said agreement it was stipulated and agreed that the lease should be for a period beginning 1st November, 1895, and ending 31st January, 1896, and that the defendants should pay to the plaintiff the sum of £4 per month as and for rent. The said sum was payable at the end of every month.

5. The said agreement was further expressed to be subject to the conditions set forth in certain previous agreements between the same parties, bearing date respectively 2nd June, 1894—which agreement was renewed by one bearing date 31st December, 894—and 31st December, 1894. Under the said agreements of 2nd June, 1894, and 31st December, 1894, it was provided and agreed that should the lessees fail duly and punctually to pay the rent as aforesaid, it should be at the option of the lessor to cancel the said lease forthwith and take possession of

the articles therein mentioned. The remaining portions of the said agreements are not material to this case, and need not here be set out.

6. The agreement of 15th October, 1895, in paragraph 2 mentioned, was tacitly and by mutual consent extended from month to month, and was terminated by a notice in writing bearing date 10th December, 1895, and sent on that date by plaintiff to the defendants, wherein the plaintiff intimated that the lease would be terminated upon the expiry of one month from the date of such notice.

7. The sum of £3, and no more, has been paid by the defendants to the plaintiff as and for rent for the period, and under the agreement in paragraph 6 mentioned. There is still owing by the defendants to the plaintiff by reason of the premises the sum of £53.

8. All things have happened, all conditions been fulfilled, and all things elapsed to entitle the plaintiff to the possession of the articles in paragraph 2 set forth, and to be paid the said sum of £53, yet the defendants refuse to pay any part of the said sum, or to restore the said articles.

The plaintiff claims (*a*) payment of the sum of £53 by the defendants, or by one or other of them; (*b*) that this Honourable Court do order that the defendants, or one or other of them, do restore to the plaintiff the cab, horses, and harness in paragraph 2 of the declaration mentioned, or in default thereof do pay the sum of £75 as and for damages; (*c*) alternative relief and costs of suit.

Memorandum of an agreement for the renewal of certain two leases, dated 2nd June, 1894, and 31st December, 1894, respectively, and renewal of the former, dated 31st December, 1894: We, the undersigned, Benjamin Godlieb Heydenrych (lessor) and Hadje Abas and his wife, Hadje Satea (lessees), to the abovementioned leases and renewals for the letting and hire of certain cab, No. 7, called Grantully Castle, certain grey horse called Charlie, certain black horse called Blackstone, certain bay horse called Charlie, and two sets of harness (one black and one yellow, leather plated), do hereby agree to extend the said lease for a period of three months, commencing on the 1st day of November, 1895, and ending on the 31st January, 1896, under all the conditions and stipulations therein contained, at a monthly rental of £4 sterling per month, payable at the end of each and every month, and that the lessees shall have the option to purchase the said cab horses, and harness at the expiration of this extension, provided they have faithfully performed and carried out the conditions and stipulations above referred to, and punctually paid the monthly rent when due, for the sum of thirty-four pounds twelve shillings and threepence sterling (£34 12s. 3d.).

The plea of the defendant Abas was as follows:

1. Defendant admits the allegations in paragraph 1 of plaintiff's declaration, save that he denies that he is married to the second-named defendant, Hadje Satea.

2. As to paragraph 2 of the declaration defendant denies that plaintiff is entitled to the possession of the cab, horses, and harness, or that defendant took the said cab, horses, and harness on lease as therein stated.

3. With regard to the document purporting to be an agreement of lease, referred to in paragraphs 2 and 3 of the declaration, defendant says that he was fraudulently induced by plaintiff to sign the said document for himself and on behalf of the second-named defendant, Hadje Satea, from whom he had no authority, express or implied, to do so.

4. Defendant says specially that on the 2nd June, 1894, he, together with the said Hadje Satea, purchased from the plaintiff the cab, two of the horses, and one of the sets of harness referred to in paragraph 2 of the declaration for £42, which sum has been duly paid to plaintiff. Subsequently on the 15th October, 1894, defendant purchased the remaining horse and set of harness referred to in the second paragraph for £22, which said sum has not yet been paid, but which defendant now tenders with taxed costs to date.

5. As to the allegations contained in paragraphs 4 and 5 of the declaration defendant craves leave to refer to the document in the declaration mentioned.

6. Defendant denies the allegations contained in paragraphs 6, 7, and 8 of the declaration, save in so far as admitted in paragraph 4 hereof.

Wherefore, subject to the aforesaid tender, defendant prays that plaintiff's claim may be dismissed with costs.

The plea of the defendant Satea was as follows:

1. Defendant admits the allegations in paragraph 1 of plaintiff's declaration, save that she denies that she is married to the first-named defendant, Hadje Abas.

2. Defendant denies the allegations in the second paragraph of the declaration contained.

3. As to the third paragraph of the declaration, defendant says that she has no knowledge of the agreement therein referred to, that she was no party to it, and she denies that Hadje Abas acted with regard to it as her agent, or

that he was in any way employed and authorised by her to contract or sign the agreement on her behalf.

4. Defendant says that she has no knowledge of the allegations contained in paragraphs 4, 5, 6 of plaintiff's declaration, and says that for the reasons set forth in paragraph 3 hereof the said allegations set forth no cause of action against her. She denies that the agreement was by her express or tacit consent extended from month to month, as in paragraph 6 alleged.

5. She denies that she owes, has ever owed, or has paid any money to plaintiff as and for rent, by virtue of the agreement of the 15th October, 1895, mentioned in the seventh paragraph, all the allegations in which she denies.

6. She denies the allegations in paragraph 8 of the declaration contained.

Wherefore defendant prays that plaintiff's claim may be dismissed with costs.

The replication was general. On these pleadings issue was joined.

Mr. McGregor for the plaintiff, and Mr. Buchanan for defendant.

For the plaintiff were called:

B. G. Heydenrych, of Cape Town, who said that on the 2nd June, 1894, he came to an agreement with defendants, and they came to an agreement on 31st December, 1894. On the 15th October, 1895, another agreement was entered into as to the leasing of the cab and two horses. The agreements were thoroughly understood by the defendants. The defendants said they were married according to the Malay rights. Defendants had property in both their names, and they gave him a power to receive the rents of it as security for the rent of the cab and horses. On December 10, 1896, witness demanded payment of the rent in arrear and a return of the cab and horses. The demand was not complied with, and he had not seen the goods since. The cab and horses and harness were worth £57 10s.

Cross-examined: At first witness had no idea of selling the cab and horses, merely renting them to the defendants. Defendants had not had transfer of the houses put in as security.

H. F. Hendrikz, broker and agent, Cape Town, said he introduced the defendants to the plaintiff. The male defendant said he wanted someone to buy a cab and horses for him. Plaintiff agreed to buy the horses, cab, and harness, and let it to defendants under certain conditions. The agreement of June 2, 1894, was read to defendants by witness. They perfectly understood it, and both defendants signed it.

Cross-examined: The agreement was read over in English. The female defendant read it over to her reputed husband, who seemed to understand it.

Mr. G. Combrinck, conveyancer and clerk with Messrs. Sauer & Standen, said the agreements of December 31, 1894, and October 15, 1895, were signed by the male defendant in his presence. He said he understood the contents of the agreements he was signing. Witness explained the agreement of October 15, 1895, to the defendant in the Dutch language.

Cross-examined: Witness was the nephew of plaintiff, and lived in the same house.

This closed the plaintiff's case

For the defence,

Hadji Satea, the female plaintiff, said her husband and herself made contracts together. She knew nothing of the document of December 31, 1894. She signed the agreement of June, 1894. Her husband said he knew of a cab for sale for £30, and he would go to Hendrikz and try and get money to buy it. Mr. Hendrikz knew they had a house. He introduced them to Heydenrych, who bought the cab for £30 and sold it to them at £30 interest, to be paid, principal and interest, in six months at £4 a month. Witness did not understand that on non-payment of rent the agreement was to be cancelled. They paid £4 a month for six months. Her husband sold the cab and two horses for £30. Defendant had paid all that was owing on the first agreement.

Cross-examined: Witness understood English fairly well, but did not know high English words. She understood the agreement was for sale not for hire. Witness knew nothing of the agreement of December 31, 1895. Abas never told witness he had got a third horse.

Hadje Abas, the male defendant, said he could not read nor write. He knew very little English. He remembered signing the agreement of 1st October, 1895. Plaintiff told witness that now he (defendant) was going to Johannesburg that was an agreement to pay the remainder of the money for rent and the £22 for purchase. He understood the agreement of June, 1894, was for sale at £40 with £2 for the document, that was £4 a month for six months and £18 and the cab would be their's. They paid the £4 a month but had not the £18. Then the agreement of December 31, 1894, was signed. Witness asked for a week's time, but plaintiff would not give this. The agreement was not explained to him, and he did not understand that if he did not pay the amounts the cab was to go back. Plaintiff did not give him receipts for interest. He thought he owed nothing for the cab and two horses. As soon as

witness was told it was a matter of hiring he went straight to plaintiff, who told him that if he paid the £18 the cab was his.

After part argument by Mr. Buchanan: Judgment was given by consent for £34 12s., 3d. with interest at 6 per cent. from the 1st January last, and £9 for rent and costs.

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

BARKER V. BARKER. { 1897. March 5th.

Separation deed—Husband and wife—Custody of children—Maintenance.

By a deed of separation between husband and wife, it was agreed that the latter should have the custody of the female children of the marriage, and receive a monthly allowance for their maintenance. It was further agreed that the furniture in the house heretofore occupied by them should belong to the wife, and that the husband should be entitled to resume the custody of the children in case they should not be properly taken care of. The wife went to reside in Johannesburg with her children without the husband's consent.

Held, *in an action brought by the wife, that she was not entitled to recover maintenance for the period of her absence from the Colony.*

This was an appeal from a decision of the Assistant Resident Magistrate, Cape Town, in an action in which the plaintiff (the present respondent) sued her husband for the payment of maintenance for one month in terms of a deed of separation, entered into between the parties, under which the respondent was to allow to appellant the furniture in the house and a sum of £3 per month, and to allow her the custody of the girl children of the marriage, he himself to keep the boys; the deed further gave the husband power to reclaim the custody of the girls on failure by the wife to maintain and educate the children properly.

From the evidence before the Resident Magistrate it appeared that the wife without the consent of the husband removed from the Colony to Johannesburg, taking the children with her, and the husband stated he was unable to go to see them there.

At the trial defendant's agent objected to plaintiff's agent appearing under the power put in on the ground that the document purported to be signed at Cape Town at a date when the plaintiff was in Johannesburg. A second power was then put in which was accepted.

Judgment was given for plaintiff with costs.

The following were the Resident Magistrate's reasons:

I held that the first power was void, as the agent's name and other matter was filled in after execution of the same by plaintiff, but that under the circumstances as detailed in the records, plaintiff's agent could proceed with the case by virtue of the second power.

I held that although the marriage still subsists, the plaintiff was entitled to sue under the deed of separation. I found that there was no evidence of any breach by plaintiff of the provisions of the deed, and that the amount sued for being in arrear could be recovered by her.

Against this decision the appeal was now brought.

Mr. Graham for the appellant: I cannot support the first exception that the power to sue was not dated. As to the power of a wife to sue her husband under a deed of this sort, the wife's right is pretty clear; see section 51 of Act 20 of 1856. But the wife is not entitled to do what she seems to have done, *i.e.*, go to Johannesburg with the girls, without the consent of the husband. Such an agreement could not give her the right to take even the *girls* (to whose custody alone she was entitled) away from the Colony, and thus render it impossible for the father to get access to the children, as he is not a man of means. She obtained no consent from him, and there was nothing at the time of the deed of separation to show that they contemplated living elsewhere than in the colony.

De Villiers, C. J.: It is unnecessary to make any observations regarding the frivolous exceptions taken in the Court below. They have not been relied upon by counsel for the defendant, and I may therefore at once proceed to the real question, whether the plaintiff is entitled to recover any maintenance money from the defendant so long as she keeps the children outside the jurisdiction of this Court. The deed of

separation does not expressly state that the plaintiff shall not remove the girls from the Colony, but it is a fair inference from the provisions of the deed, that she should not have this power without the consent of her husband, the defendant. She was allowed to have the custody of the girls, but he was to have the right to resume the custody if she did not take proper care of them. This right it would be difficult if not impossible for him to exercise if she remained with the children at Johannesburg. Again, the fact that under the deed she is to have the furniture in their house at Woodstock, tends to show that her departure from the Colony was not contemplated by either party. The husband is legally entitled to the custody of the children of the marriage, and where he agrees to part with any of his paternal rights in his wife's favour he must be held to have reserved all those rights which he has not expressly parted with. The appeal must be allowed and judgment entered for the defendant.

[Appellant's Attorney, D. Tennant, jun.]

SMUTS AND CO. v. DUNN AND CO. } 1897. March 5th.

Principal and agent—Attorney—Authority—Credit.

Where a firm of attorneys carry on business in two towns and employ an agent in one of them to conduct the business in their name, a tradesman is not entitled to recover from the firm the price of goods bought by the agent in the name of the firm without proof that the goods were in fact supplied to the firm, or that the agent had authority, express or implied, to pledge his principal's credit for such purchases.

This was an appeal from a decision of the Resident Magistrate, East London.

The plaintiffs (now appellants) sued the defendants for £8 9s., alleging in the summons:

1. The plaintiff is an attorney practising at Aliwal North, and the defendants are merchants carrying on business at East London.

2. The plaintiff prior to November, 1895, acted for and on behalf of one Louis F. Keese, of Lady Grey, in divers matters and lawsuits, and he owed plaintiff a considerable sum for fees and disbursements.

3. In November, 1895, the said Louis F. Keese assigned to defendants the whole of his estate and effects, in consideration whereof the defendants agreed to pay all the debts and liabilities of the said Louis F. Keese, including plaintiff's claim.

4. The defendants denied liability on plaintiff's claim for the full amount, but offered to settle the same for £130, which offer was duly accepted, and of which sum the defendants have paid on account £121 11s., but refuse to pay the balance of £8 9s. as above stated.

The following exception was raised by the defendants:

The defendants, who are the assigns of the said Louis Fred. Keese, except to the summons, and say that they should have been sued in their representative capacity as such assigns and not as a partnership firm.

The point was reserved for consideration.

The defendants then pleaded:

1. The defendants admit paragraphs 1 and 2 of plaintiff's summons and the assignment to them as assignees, but deny the other allegations in the summons.

2. Defendants further say that the estate of the said Louis F. Keese became indebted to the plaintiff in the sum of £130, and the plaintiff was indebted to the said estate in the sum of £8 9s. for goods sold and delivered,

3. The defendants, as assignees of the said estate, set off the said sum of £8 9s. against plaintiff's claim, and on the 5th June last paid the plaintiff the sum of £121 11s., by cheque in settlement of balance and gave him a receipted account for £8 9s.

4. The plaintiff cashed the said cheque and retained the said receipted account, and the accounts were thereby settled.

Judgment was given for defendants with costs.

The facts of the case appear sufficiently from the Resident Magistrate's reasons which were as follows:

The matter in dispute is a sum of £8 9s.; this the defendants claimed as due to the estate of one Keese, and to them under a deed of assignment. Plaintiff is an attorney, practising at Aliwal North, and had a branch business conducted by one Du Toit. There was due to plaintiff by Keese a certain sum for professional services, and after the assignment to defendants, this claim was discussed and plaintiff decided to accept a lump sum of £130 in settlement.

It also appears that there was a contra claim of £8 9s. in Keese's books—this being the subject of the action. The plaintiff appeared to take up a very shifting position during the progress of the case. First he sued defendants as a firm, but in the body of the summons he describes them as assignees of Keese. When the defendants excepted to the form of the summons

p'aintiff argued in support of his proceeding, and yet later on he insisted on the production of the deed of assignment, in order it seemed to prove that the defendants were the assignees. Partly because the parties had evidently admitted their respective capacities, I reserved the point, and further in view of the judgment formally arrived at, the exception was not considered or in fact overruled.

Next it was sought to contend that the amount of £8 9s. had be n included in the sum of £130 agreed to be paid to plaintiff, and lastly, the indebtedness of plaintiff was denied on the ground that Du Toit had no authority to purchase the goods on account of plaintiff, and that they were really required for Du Toit's private use.

The real issue, as I apprehended, was reduced to these two questions:

(*a*) Was there any evidence that the sum of £8 9s. had been included in the £130?

(*b*) Had Du Toit authority, actual or implied, to purchase the goods on account of plaintiff? And was there sufficient evidence to support a finding that they were for the use of the plaintiff's business?

I found in the negative on (*a*) and in the affirmative on (*b*). There seemed nothing unreasonable in such small requirements, for which Du Toit must be presumed to have had authority. Du Toit was not produced and there is evidence that he gave orders to have these goods distinguished from his personal account. I fail to trace any analogy between the decided cases relied on by plaintiff (*Scott* v. *Syster*, 9 J. 53, and *Stiglingh* v. *French*, 9 Juta 393). They decide certain points relating to the appropriation of payments, and the plaintiff appears to have relied upon them to support his action from appropriating the value of defendants' cheque and the detention of the receipted account.

[The plaintiff in his answers to some interrogatories stated that Du Toit acted under general instructions, and had no properly executed power of attorney, and that he had no authority to contract any liability in plaintiff's name.]

Mr. Searle, Q.C., for the appellant.

Mr. Innes, Q.C., for the respondent.

After argument on the facts, the appeal was allowed, with costs.

De Villiers, C.J.: The only question to be decided is whether the plaintiffs are liable for the amount which the defendants claim the right to set off. They would be so liable if the goods had been supplied for the purpose of their business, or if they had expressly or tacitly authorised Du Toit, their agent carrying on business in their name at Lady Grey, to purchase the goods in their name. The burthen of proving either of these facts lies upon the defendants, who claim the right to set off. The Magistrate in giving judgment in their favour relied to some extent upon the fact that the plaintiffs did not produce Du Toit as their witness, but as the defendants alleged that he had the requisite authority they ought to have produced him. In the absence of any proof that the goods ever came into the plaintiff's possession, or that they authorised Du Toit to purchase the goods in their name, I am of opinion that the Magistrate erred in giving judgment for the defendants. The appeal must be allowed with costs in this Court, and judgment entered for the plaintiffs in the Court below.

[Appellant's Attorneys, Messrs. Findlay & Tait; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN.]

ADMISSIONS. { 1897. March 12th.

Mr. Buchanan applied for the admission of Mr. Ernest Walter Abbot as an attorney and notary.

The application was granted, the oaths to be taken before the Registrar of the Eastern Districts Court.

Mr. Searle, Q.C., applied for the admission of Mr. Charles Hermanus Maasdorp as a conveyancer.

The application was granted

Mr. Searle, Q.C., applied for the admission of Mr. Anthony van Ryneveld as a conveyancer.

The application was granted.

Mr. Close applied for the admission of Mr. Walter Rowland Curtis as an attorney and notary.

The application was granted, the oaths to be taken before the Resident Magistrate of Oudtshoorn.

Mr. Close applied for the admission of Mr. Vincent Charles Cloete as an attorney and notary.

The application was granted.

PROVISIONAL ROLL.

STANDARD BANK V. DE VILLIERS.

Mr. Innes, Q.C., applied for the final adjudication of the defendant's estate, the provisional order having been granted on February 23.

Granted.

LIND V. PITOUT.

Mr. Tredgold moved: (1) For judgment for the sum of £30 18s. 9d., being balance of an account for money lent, and (2) for provisional sentence on a mortgage bond for £100, with interest at the rate of 7 per cent. from July 1, 1896.

Granted.

BARTHOLOMEW V. STABLEFORD.

Mr. Buchanan moved for the final adjudication of the defendant's estate, the provisional order having been granted on March 6.

Granted.

CLEGHORN AND HARRIS V. SMITH.

Mr. Tredgold moved for the final adjudication of the defendant's estate, the provisional order having been granted on February 6.

Granted.

VAN DER BYL AND CO. V. POOLE.

Mr. Jones moved for judgment for £45 18s. 5d., being an account for goods sold and delivered, less £25 paid on account since the issue of the summons.

Granted.

GENERAL MOTIONS.

IN THE MATTER OF THE MINORS DE LANGE.

Mr. Innes, Q.C., applied for confirmation of the sale of certain shares in farms in the division of Somerset.

The Court granted an order, so far as the minors' portions were concerned, authorising the sale of one-eighth of the property, the proceeds of the sale to be paid in to the Master.

BROOKES V. BROOKES.

Mr. Jones moved to make absolute a rule *nisi* for divorce.

The application was granted, with costs.

IN THE MATTER OF THE MINOR PAULSEN.

Mr. Joubert moved on behalf of the minor's tutor to be relieved of his trust.

The application was granted, the Master to be authorised to appoint some proper person in the place of the retiring tutor.

IN THE MATTER OF THE MINORS CORNWELL.

Mr. Jones moved for leave to the executors of the estate of George Thomas Cornwell to sell certain property at the corner of St. George's-street and Hout-street, Cape Town, known as Sydney Chambers.

Granted.

MEIER V. MARQUARDT.

Mr. Jones moved to bar the defendant from proceeding with his appeal from the decision of the Resident Magistrate's Court at Upington.

The application was granted, with costs.

IN THE MATTER OF THE MINORS VISAGIE.

Mr. Ward moved for the appointment of the grandfather of the minor Hendrik W. J. Visagie, as curator of their persons and property, in lieu of their father's parental authority and control.

The Court granted a rule *nisi*, returnable on May 1, calling upon the father to show cause why the grandfather should not be appointed as curator of the persons and property of the minors, the rule to operate as an interim interdict to restrain the father from interfering with the minor girls now in the petitioner's custody.

IN THE MATTER OF THE MINOR PARKES.

Mr. Jones moved for authority to the father to enter into an agreement of the lease on the minor's behalf.

Granted.

IN THE ESTATE OF THE LATE RALPH HORACE MURRAY.

Mr. Tredgold moved for leave to the executor to pass a second bond on certain property in Bedford bearing interest at 7 per cent., in favour of Layworth & Co. for £218 15s. 2d.

The order was granted in terms of the application, subject to the prior settlement of the claims of the other creditors, the costs of the application to come out of the estate.

IN THE MATTER OF THE PETITION OF CHARL JACOB VENTER.

Mr. Tredgold moved for authority to subdivide the farm Strydam, in the division of Philip's Town, and for authority to the Registrar of Deeds to substitute

the defined share as mortgaged to petitioner's minor daughter instead of the undefined share, in terms of Act 16 of 1892.

Granted

IN THE ESTATE OF THE LATE CAROLINE SAMEY.

Mr. Benjamin moved to make absolute a rule *nisi* granted under the Titles Registration and Derelict Lands Act, 1881.

Granted

IN THE MATTER OF THE GLOBE DIAMOND-MINING SYNDICATE.

Mr. Innes, Q.C., moved for an order for the winding-up of the syndicate under the Companies Act of 1892.

The Court granted the usual winding-up order, Mr. Porter to be appointed liquidator, and the appointment of Mr. Silberbauer as solicitor was approved of.

IN THE MATTER OF THE ALIWAL NORTH BOARD OF EXECUTORS AND TRUST COMPANY.

Mr. Molteno appeared to present the fourth and final report of the liquidator and the usual liquidation account.

The Court granted the usual order.

IN THE MATTER OF THE MINOR STEMMET.

Mr. Jones moved to confirm the sale of certain land belonging to the minor in the division of Robertson to Johan W. Stemmet, and for leave to the minor's father to sign the necessary power to pass transfer.

The Court granted an order, subject to the payment of the purchase price of the property into the Master's fund.

IN THE MATTER OF JAMES HENRY CARTER.

Mr. Buchanan moved for an order on the Master to accept the death notice of James Henry Carter, and to call a meeting of next of kin and creditors for the purpose of appointing an executor dative to his estate.

The application was granted and the Master authorised to accept the death notice and take the usual steps, the costs to come out of the estate.

IN THE MATTER OF THE MINORS HERBST.

Mr. Buchanan applied for leave to sell certain property, and for the appointment of Mr. J. J. de Villiers to superintend the expenditure of proceeds on certain repairs to the buildings.

The application was granted in terms of the Master's report.

IN THE MATTER OF THE PETITION OF KIRBY BRUNETTE.

Mr. Molteno moved for an order authorising the Master to pay to him, as father and natural guardian of Peter Clemens Brunette, the sum of £100 out of the capital sum of £475, and to grant such further or other relief as their lordships may see fit.

The Court granted the order, subject to security being given by the two major sons to the Master to repay the money in the event of the minor son not attaining full age.

MBAMBONDUNA V. DHWANI.

Mr. Innes, Q.C., moved for leave to proceed under the 190th rule of Court.

After the application had been part heard, th matter was postponed till April 12.

LAWRENCE V. BONNIWELL AND VEALE. { 1897. March 12th.

Lease—Sale—Interdict—Transfer.

B. *let a house to* L. *for two years, undertaking to let* L. *have possession on a given date; but shortly afterwards received an offer from* V. *to purchase the house.*

B. *understanding that* L. *was willing to cancel the lease, sold the house to* V. *and undertook to give him possession on the same date as that on which* L. *was to have entered on occupation.*

B., *however, had acted under a mistaken impression in thinking that* L. *had cancelled the agreement of lease, and L. claimed possession, as did* V. *On application by* L. *a rule* nisi *issued restraining* B *from transferring the house to* V., *save subject to the terms of the lease; and also restraining* V. *from entering into possession. On the return day,*

The Court *made the rule absolute with costs.*

This was the return day of a rule *nisi* granted to operate as an interim interdict restraining the respondent Bonniwell from transferring to the respondent Veale certain house situate at Green Point, unless such transfer be made subject to the terms of an agreement for the lease of the said house to the applicant, and from permitting the respondent Veale from entering into possession thereof.

The applicant in his affidavit alleged that in February, 1897, the respondent Bonniwell let a certain house to applicant for a term of two years from the 1st April, 1897.

That the respondent Bonniwell subsequently sold the house to Veale, and agreed to give possession thereof on the 1st April, 1897.

That applicant had already given notice to the lessee of the house in which he was living at the time, and would be seriously inconvenienced if he could not get possession of the house on the date agreed upon.

That the existence of the lease in no way prejudiced the value of the house, and that in fact applicant had offered to buy the house at the price offered by Veale.

The respondent Bonniwell filed an affidavit, in in which he stated that on the same day on which Lawrence verbally entered into the lease with him, he received an offer from Veale to purchase; that he proceeded to consult with Lawrence, and that he understood that Lawrence waived his rights, and that thereupon he closed with Veale: that he then ascertained that there had been a misunderstanding and had since then endeavoured without effect to arrive at a settlement, but that neither Veale nor Lawrence would give way; and that he had never intimated that he would not give Lawrence possession on the due date.

Mr. Innes, Q.C., applied that the rule be made absolute.

Mr. Benjamin, for the respondent Bonniwell opposed. He cited *Kerr* (on Injunctions, page 428). The applicant's remedy is wrongly conceived. We admit that the Court can grant an interdict to stop an anticipated wrong; but the Court must have clear proof that the anticipated wrong will happen. There is no clear proof that any damage will happen. Moreover the injury apprehended could be repaired by obtaining damages in an action, and therefore the interdict should not be granted *Kerr*: (on Injunctions, page 14). The application for the interdict was unnecessary because respondent clearly informed the applicant that he intended to carry out the agreement. The question is one of costs really.

Mr. Innes in reply: As the question is one of costs the test is, is the application one of necessity? Clearly it is, because the respondent, as he opposes it, evidently does not want to be handicapped by this rule; which is a complete justification for our action.

The rule was made absolute with costs.

The Chief Justice said: The dispute in this case is that Bonniwell had leased his property to Mr. Lawrence, after which he had a conversation with Lawrence, from which he gathered that Lawrence would not insist upon the lease being carried out, and on that understanding he went and sold the property to Veale. It is admitted now that there was a misunderstanding. If Bonniwell had clearly told the applicant that he would give Lawrence possession on the 1st April, Lawrence would have had no right to come into court. The communication was not made by Bonniwell direct to Lawrence or his attorney, but was made through Bonniwell's solicitors. I think, looking at all the correspondence, the applicant was justified in applying to the Court for an interdict. Although it is impossible to help sympathising with Bonniwell, the Court must make the rule absolute, and as he opposes it, it must be made absolute with costs against him.

[Applicant's Attorney, W. E. Moore; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN.]

In re PETER GIBSON. { 1897. March 16th.

Mr. Innes, Q.C., mentioned this matter, which, he said, was of some urgency, and concerned the attachment of a sum of money which there was reason to believe was being dealt with. It appeared that one Peter Gibson was formerly a commercial traveller in the employ of J. Garlick, whose managing clerk, Baptist Hodgsitt, now claimed a sum of £25 12s. 2d. in respect of jewellery and moneys entrusted to Gibson, and further petitioned for the attachment of a sum of £50 recently received from England by James Mercer of this town, on account of Gibson, who is at present in the Transvaal.

The Court granted an order for the attachment of the money *ad fundandam jurisdictionem*, with leave to sue by edictal citation, personal service to be effected, and the order made returnable on May 1.

TURVEY V. BRADFIELD.

Mr. Molteno applied for provisional sentence on two promissory notes, the first dated Queen's Town, 19th October, 1894, for £201 15s. 10d., and the second dated Bloemfontein, 17th July, 1895, for £7.

The application was granted.

WOODHEAD, PLANT AND CO. V. GULLY.

This was a matter in which leave to appeal to the Privy Council was sought in connection with the judgment of the Court in the matter of the ship Oberon heard on March 4 last, judgment being given for the defendant. A sum of £500 and other items were involved.

Mr. Searle, Q.C., appeared for the applicants, and Mr. Innes, Q.C., for the respondents.

Leave to appeal was granted, execution not to be stayed, and security to be given.

IN THE INSOLVENT ESTATE OF ROBERT HAMBLY.

Mr. Buchanan applied, on behalf of J. H. Paley, of East London, for an order declaring the office of trustee in the above estate vacant, and calling upon the Master to call a meeting for the election of a trustee in the place of Thomas Brown, deceased.

The application was granted, the costs to come out of the estate.

In re J. G. DE WET.

This was the petition of M. J. de Wet and W. G. Lombard for the appointment of Frederick Hamilton Jones as *curator ad litem* for J. G. de Wet, of Queen's Town, for the purpose of instituting proceedings against the latter to have him declared of unsound mind.

The order for the appointment of the *curator ad litem* was granted, the summons to be served on the alleged lunatic, as well as on the curator, and to be made returnable at the next sessions of the Circuit Court at Queen's Town.

SUPREME COURT

(IN CHAMBERS).

[Before the Hon. Mr. Justice BUCHANAN.]

BODKIN V. HOSKINS. } 1897. March 26th.

This was an application by the defendant for the discharge of a writ of arrest on a debt of £35, on the ground that the applicant was prepared to confess judgment for that amount.

Mr. Innes, Q.C., appeared for the applicant: the respondent was in court, but was not represented.

The Court made an order for judgment in terms of the confession of judgment, and the applicant was released from arrest.

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and Hon. Mr. Justice BUCHANAN.]

MAGISTRATE'S SENTENCE REVIEWED. } 1897. April 12th.

The Chief Justice said a case had come before him as judge of the week in which a man named Gedult was charged before the Resident Magistrate of Stellenbosch with theft by means of embezzlement. The case was remitted to the Magistrate by the Attorney-General under Act 43 of 1885, and when the case was heard the prisoner pleaded guilty and was sentenced to two years' imprisonment with hard labour. Under Act 43 of 1895, however, the Magistrate had power to sentence the prisoner to one year's imprisonment only, but perhaps he might have been misled by the fact that the prisoner pleaded guilty at the trial. The sentence must, therefore, be reduced to one year.

ADMISSIONS.

Mr. Innes, Q.C., moved for the admission of Mr. Frederick George Gardiner as an advocate.

The application was granted.

Mr. Jones moved for the admission of Daniel P. Blaney as an attorney.

The application was granted.

PROVISIONAL ROLL.

ADAMS V. THE CAPE COLONISATION COMPANY.

Mr. Innes, Q.C., applied for provisional sentence on a promissory note for £300 14s.

The application was granted.

CELLIERS AND CO. V. BAZIER.

Mr. Jones applied for provisional sentence on a mortgage bond for £175, with interest at 7 per cent. from April 1, 1886, less £66 13s. 3d. paid on account, and that the property be declared executable.

The application was granted.

COHEN V. LE DU.

Mr. Close applied for provisional sentence on a mortgage bond for £126 with costs, and asked that the property specially hypothecated be declared executable.

The application was granted.

WHITE, RYAN AND CO. V. GREENFIELD.

Mr. Jones applied for final adjudication of the defendant's estate, the provisional order having been granted on March 24.

The application was granted.

DAVISON BROS. V. JOUBERT.

Mr. Maskew applied for provisional sentence for £25 13s. 4d. with costs, being the balance due on a promissory note.

The application was granted, subject to the production of the certificate of presentation.

MCLEOD V. HENRY FERRINS, JUN.

Mr. Jones applied for the discharge of the provisional order of sequestration.

The application was granted.

STEIN AND CO. V. HEWITSON, JEFFERY AND ANOTHER.

Mr. Jones applied for the discharge of the provisional order of sequestration.

The application was granted.

ALFORD, WILLS AND CO. V. BOSMAN.

Mr. Jones applied for the final adjudication of the defendant's estate, the provisional order having been granted on March 16.

The application was granted.

BERNSTEIN V. COLLING.

Mr. Benjamin applied for provisional sentence on a promissory note for £423, less £50 10s. 5d., with interest from December 1, 1896.

The application was granted.

WATSON AND CO. V. BROADBENT AND CO.

Mr. McGregor applied for provisional sentence for the sum of £400 5s. 11d., with interest, on four promissory notes, less a certain amount received on account.

The application was granted.

BAUMANN AND CO. V. CILLIE.

Mr. Close applied for provisional sentence for £72 16s. 4d. on a promissory note, with interest and costs.

The application was granted.

THE MASTER V. FERREIRA'S EXECUTOR.

Mr. Sheil, Acting Attorney-General, applied for the usual order calling upon the defendant to file an account.

The application was granted.

ILLIQUID ROLL.

WITHINSHAW AND CO. V. LINDSAY.

Mr. Jones applied for judgment under rule 329 for £30 8s. 11d., for goods sold and delivered.

The application was granted.

TABLE BAY HARBOUR BOARD V. THE MASTER OF THE S.S. "GORDON CASTLE."

Mr. Close applied for judgment, under rule 329 (*d*), for £894 7s. and costs, for Graving Dock charges and ordinary dock dues.

The application was granted.

STEPHAN BROS. V. THE ANNANDALE BAKING CO.

Mr. Close applied for judgment, under rule 329 (*d*), for £110 17s., with interest and costs, for goods sold and delivered.

The application was granted.

COMBRINCK AND CO. V. PESCOD.

Mr. Jones applied for judgment for £40 for rent.

The application was granted.

REHABILITATIONS.

Mr. Benjamin applied for the rehabilitation of John Mouncey McDonald, of Johannes Loubser, of Gabriel François Basson, of Pieter Jacob Johannes de Villiers, and of Frederick William Baxter.

The applications were granted.

Mr. McGregor applied for the rehabilitation of Hendrik Albertyn.

The application was granted.

Mr. Joubert applied for the rehabilitation of Johan Jacob Piton.

The application was granted.

Mr. Maskew applied for the rehabilitation of Johannes Lodewyk Steyn.

The application was granted.

Mr. Searle, Q.C., applied for the rehabilitation of Paul Jacobus Albertus du Plessis.

The application was granted.

GENERAL MOTIONS.

ABRAHAMS V. ABRAHAMS.

This was an application by the wife, who said that she had been married thirty-three years and that there were no children of the marriage, for leave to sue *in forma pauperis* for divorce.

The Court referred the matter to counsel, and appointed Mr. Jones to act.

GARLICK V. GIBSON.

Mr. Sheil, Assistant Law Adviser, asked that this case (one for leave to sue by edictal citation) might stand over.

The Court ordered it to stand over till to-day.

IRWIN V. GARLICK.

This was an application by Messrs. Irwin & Meehan for the release from attachment of certain goods in their possession, which were attached *ad fundandam jurisdictionem* in the suit *Garlick* v. *Gilson*.

Mr. Searle, Q.C., for the applicant.

Mr. Sheil, Assistant Law Adviser, for the respondent.

This application also was ordered to stand over till to-day.

IN THE MATTER OF THE PETITION OF HELENA MARIA OPPEL.

Mr. Close applied for leave to sue by edictal citation for restitution of conjugal rights, failing which for divorce.

The Court granted the application, personal service to be effected if possible, failing which one publication in a Bulawayo paper; the order to be made returnable on the last day of the May term.

Leave was also granted to serve the intendit and notice of trial with the citation.

THE CO-OPERATIVE BAKING COMPANY, LIMITED, IN LIQUIDATION UNDER THE COMPANIES' ACT OF 1892.

Mr. Close appeared to present the liquidator's report.

The Court granted the usual order.

IN THE MATTER OF THE PETITION OF WALSH AND WALSH, FORMERLY TRADING AS WALSH BROS.

Mr. Jones applied for the rule *nisi* to be made absolute for transfer in name of petitioners of certain land in the division of Caledon.

The application was granted.

IN THE ESTATE OF THE LATE SIR CHARLES MILLS.

Mr. Searle, Q.C., applied on behalf of the executor dative for authority to the Registrar of Deeds to pass transfer to the estate of certain land in the division of Peddie, marked in the general plan as lot P, measuring 356 morgen 230 square roods, granted to Adolph Ernst Bauer on February 1, 1864.

The Court granted a rule *nisi* calling upon persons having, or pretending to have, any right to the property to appear on August 2 and establish their claim, the rule to be served on the representatives of the late Captain Bauer.

IN THE ESTATE OF THE LATE MACKESO KULU.

Mr. Close applied on behalf of Lutuka Kulu, the only son by his first wife of the late Mackeso Kulu (married according to native custom), for authority to the Registrar of Deeds to enregister in his name and as his property certain land in the Tambookie location, district of Glen Grey, measuring 1,216 morgen and 90 square roods, as per deed of transfer in favour of his father, and dated November 23, 1886.

The Court granted a rule *nisi* calling upon all persons interested to show cause on May 20 why the property should not be transferred to the applicant. Publication of the rule to be made as in the case of *In re Mahonga* (6 Juta, 317).

THE PETITION OF THE OUDTSHOORN TOWN COUNCIL.

Mr. Searle, Q.C., applied for authority to the Registrar of Deeds to pass transfers of the eighth share of the remaining extent of the farm Hartebeest River, and the eighth share of the remaining extent of the farm Grobbelaars River, to petitioner in due course from the various parties who have acquired the right to transfer the eighth of the remaining extent from the estate of the late Cornelis Petrus Rademeyer under the order of the Circuit Court for Oudtshoorn, dated 23rd March, 1886, upon the conditions that petitioner shall be bound to pass transfer of those defined portions of the remainder which was sold by the said Rademeyer and others, or any subsequent proprietor to the original purchasers, or to any persons who may establish their right to receive title of any of the defined portions of the remaining extent of these farms.

The Court granted a rule *nisi* calling upon all persons concerned to show cause, on May 20, why transfer should not be made, the rule to be published in the "Oudtshoorn Courant" in the Dutch and English languages.

GOOSEN V. GOOSEN.

Mr. Jones applied for a decree of divorce, and for the custody of the minor children of the marriage, defendant having failed to comply with the judgment of the Court for restitution of conjugal rights.

The application was granted.

ESTATE OF THE LATE DAVID PIETER KRYNAUW.

Mr. McGregor applied for the rule *nisi* to be made absolute authorising the Registrar of Deeds to cancel a bond for £280 passed by the late D. P. Krynauw on the 26th February, 1858, between Johannes Conrad Wicht, now deceased, the said bond having been satisfied, but lost.

The application was granted.

BEYER V. BEYER.

Mr. Searle, Q.C., applied for a decree of divorce and for custody of the children of the marriage, and for a declaration that the defendant has forfeited all benefits under the community, defendant having failed to comply with the order of the Circuit Court for Prince Alfred for restitution of conjugal rights.

The application was granted.

VILJOEN V VILJOEN.

Mr. McGregor applied for a decree of divorce on behalf of the husband, the defendant having failed to comply with the order of the Supreme Court for the restitution of conjugal rights.

The application was granted.

VAN SITTERT V. VAN SITTERT.

Mr. Searle, Q.C., applied to have one Pieter van Sittert, formerly of Queen's Town, and now an inmate of the Graham's Town Asylum, declared of unsound mind, and for the appointment of a curator of his property.

The Court granted an order declaring the said Van Sittert to be of unsound mind, and appointing Henry William Magor as curator of his property.

REGINA V. MITCHELL. { 1897. April 12th.

Prosecution — Nuisance — Municipal regulations—Act 14 of 1859 - Injured party—Right to prosecute—Private prosecution.

M. *contravened a clause in local municipal regulations by creating a*

nuisance in allowing certain rotten vegetables to remain on his premises exposed in an open yard.

The municipal regulations required that all complaints as to contravention of the regulations should be reported to the Municipal Secretary, who should get instructions from the Municipal Commissioners as to prosecuting the offender; the complainant, however, reported direct to the police and a prosecution followed, and M. *was convicted and fined.*

On appeal *on the grounds that the regulations had not been complied with and that no private prosecution for such an offence could take place,* The Court *dismissed the appeal.*

This was an appeal from a conviction of the appellant by the Assistant Resident Magistrate of Cape Town for a contravention of section 22 of the regulations of the Green and Sea Point Municipality, framed under the provisions of Act 14 of 1859, by creating a nuisance tending to injure the health and affect the comfort of the inhabitants, by neglecting to remove a quantity of rotten vegetables from his premises and allowing the same to lie exposed in his yard at Green Point.

The defendant pleaded not guilty.

The evidence for the prosecution showed that the nuisance existed for about a fortnight, during which time several persons living in the vicinity of the defendant's house complained of the stench and requested the defendant to remove the cause. He neglected, however, to do so. The matter was then reported to the police and the prosecution followed.

The defendant did not tender any evidence, but on the conclusion of the case for the prosecution his agent applied for a dismissal of the case on the grounds:

1. That it had not been proved that section 2 of the regulations had been complied with, and

2. That inasmuch as the prosecution was a private prosecution, no private prosecution for such an offence could take place.

Sections 2 and 22 of the Municipal Regulations are as follows:

2. All complaints or informations of the contravention of the following regulations shall be made to the secretary of the Municipality, who shall forthwith make due entries thereof in a book or books to be kept for that purpose, and shall submit the same to the Commissioners, and shall take instructions from the Commissioners as to whether such complaints shall be prosecuted or not.

22. Any person creating any nuisance which may tend to injure the health or in any way affect the safety, comfort, or rights of the inhabitants, shall be liable upon conviction to a fine not exceeding £10.

The defendant was found guilty, and sentenced to pay a fine of £3. The Magistrate dismissed both the exceptions, holding with regard to the latter that it should have been taken before the plea was recorded.

From this conviction and sentence the present appeal was brought.

Mr. Molteno, in support of the appeal: The regulations are framed under section 23, Act 14, 1859. Clearly the provisions of the regulations were not complied with: particularly as regards section 2. In the municipality the Police Offences Act is in operation. Two sets of regulations are therefore in force: under the one, *i.e.* the Act, the police have a *locus standi* to sue; under the other they have no *locus standi* till they are authorised by the Commissioners after a report by the complainant to the Commissioners, which has not been made yet in this case. They have elected to go on under the latter (*i.e.*, the regulations). The summons should not have charged the defendant with contravening the regulations, it should have charged under the Police Offences Act, No. 27 of 1882 (section 5, sub-section 26). As a fact also the penalty under the Act is £2: under the regulations it is more. The police have never prosecuted in cases of contravention of municipal regulations; the police should have prosecuted under section 5, sub-section 26, Act 27 of 1882.

Mr. Sheil, Assistant Law Adviser, for the Crown: It is clear from the evidence that a serious nuisance injurious to health, or at least to the comfort of persons living in the neighbourhood, did exist on the appellant's premises for a considerable period, viz., from the 7th to the 25th February, consequently there was a clear contravention of the 22nd regulation.

It was, however, contended in the Court below, and the argument has been renewed here, that the wrong procedure was adopted, and that the complaint should, in the first instance, have been made to the secretary of the municipality, for the purpose of submitting it to the Commissioners for them to determine whether they would prosecute or not. It is submitted that this argument cannot prevail: Mr. Fripp, the complainant, suffered sufficient injury within the meaning of Ordinance 40, section 15, to entitle him to prosecute privately. *Hunt* v

Hoare (1 Juta 379), a case in which an exception similar to the exception in the present case was taken, seems to be conclusive on the point.

As to its not being a private prosecution the second exception taken shows that both sides treated it as a private prosecution although it was conducted by the police. See Ordinance 8 of 1852, section 2.

The Chief Justice: Was the certificate of the Attorney-General not necessary?

Mr. Shiel: No, the prosecution was summary: see Act 20 of 1856, Schedule B, Rule 68.

Mr. Molteno in reply: The Municipal Legulations of Stellenbosch are not before the Court, and consequently it is impossible to say how the present case differs from *Hunt* v. *Hoare*.

The second exception was wrongly taken, as the case was clearly a police prosecution.

The Court dismissed the appeal.

The Chief Justice: The 22nd section of the Municipal Regulations provides that any person creating any nuisance tending to injure the health or affect the safety or comfort of the inhabitants shall be liable, upon conviction, to a fine not exceeding £10. Now in the present case there can be no doubt that the appellant did create a nuisance by keeping rotten potatoes in his yard which did affect the safety, or at all events the comfort, of some of the inhabitants, that is, his neighbours. Now the first question is, could one of those neighbours, who was suffering from that discomfort, prosecute? Appellant's counsel contends that under the 2nd regulation it would not be done, because that regulation provides that every complaint or information as to the contravention of the regulations shall be made to the secretary of the Municipality, who shall forthwith make due entries thereof and submit the same to the Commissioners, and take instructions from them as to whether such offender shall be prosecuted. This section only contains directions as to the duties of the secretary, and it may be that the secretary could not prosecute unless he had instructions from the Commissioners to do so. But the fact that the secretary was so debarred from prosecuting does not affect the further question whether any person specially injured by this nuisance had the right to prosecute. Now under Ordinance No. 40, clearly the neighbours have that power. If they specially suffer injury by this nuisance, they would be entitled to prosecute, and inasmuch as the 22nd regulation is general in its terms and subjects the offender to a fine on conviction, I think that the neighbours who were suffering from this discomfort were entitled to prosecute. On this point I need only refer to *Hunt* v. *Hoare*, which has been cited in argument and which is directly in point. But then it is said that the police prosecuted. Upon this point we have the record before us, from which it appears that both parties treated this as a private prosecution. It was common cause, therefore, that it was a private prosecution, although the police took it up. Under these circumstances I think that this appeal ought not to be allowed. It is admitted that the appellant has been guilty of a contravention of the Police Offences Act, and I think that the Magistrate was right in convicting him.

Mr. Justice Buchanan concurred. He read the 2nd section of the regulations as giving instructions to the secretary as to what he should do in certain circumstances. It could not, however, take away from any private individual the rights which that individual already possessed under Ordinance 40, section 15.

[Appellant's Attorney, J. Ayliff.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), and Hon. Mr. Justice BUCHANAN.]

HARTE V. FRAME. } 1897. April 13th.

This was an application by the plaintiff for a decree of civil imprisonment in respect of an unsatisfied judgment of £560, being money due on certain promissory note, balance of account, and interest.

Mr. Close for the plaintiff.

Mr. Jones for the defendant.

The defendant, Alex. K. Frame, was called by Mr. Jones, and stated that two years ago he told the plaintiff that he was allowed by his father's trustees £600 a year, but owing to some of the investments not being remunerative, the last accounts showed an income of £400 a year. He now offered to pay £15 a quarter.

The Chief Justice said that it would take years to pay off an indebtedness of £530 in such instalments.

Witness (continuing) said that the debt formerly carried interest at the rate of 2½ per

cent. per month, but it only carried 6 per cent. per annum at present. He was introduced to the plaintiff two years ago for the purpose of joining him in a general commission and brokerage business. He had a wife and a step-son, and he had also a considerable amount of debts, which he was at present reducing. Last year he received £1,000, which was distributed amongst his creditors.

Cross-examined: His total income was £85 a quarter, and he had formerly received advances out of the capital from which the income was derived. He admitted that he had been treated with very great leniency by the plaintiff. The trustees of his father's estate had refused to make any further advances out of the capital. There was generally a surplus due to him yearly beyond his allowance.

The Court granted a decree of civil imprisonment with costs, the decree to be suspended pending payment to the plaintiff of £25 per quarter until the debt and costs shall be paid off; the first payment to be made on June 15, and leave to be reserved to the plaintiff to apply to the Court at any time for an increase of the quarterly payment.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn; Defendant's Attorneys, Messrs. Findlay & Tait.]

GARLICK v. GIBSON.

Mr. Sheil moved for judgment under Rule 329 (*d*) for £25 12s. 2d.

Judgment was postponed until after the hearing of the following motion.

IRWIN v. GARLICK. (GARLICK v. GIBSON.) } 1897. April 13th.

Attachment—Release—Costs.

This was an application by William Irwin calling upon John Garlick to show cause:

1st. Why the goods attached by virtue of an order of Court dated the 23rd March, 1897, in the suit between Garlick and one Peter Gibson, should not be released from attachment. William Irwin, the applicant, made the following affidavit:

1. That I carry on business in Cape Town as a draper and general importer, under the style or firm of Irwin & Meehan.

2. That in the month of June, 1896, one Peter Gibson requested me to supply him with certain goods to the value of £167 2s. 1d., of a class not kept in stock by me, and which required to be first purchased in England.

3. That I agreed to supply the said Gibson with the said goods on the following terms and conditions;

(*a*) That he should pay the sum of fifty pounds in cash before I would order the goods from England.

(*b*) That the goods were not to become his property, and were not to be delivered to him until the balance of £117 2s. 1d. was paid to me in cash upon arrival of the goods here.

4. That the said Gibson agreed to these terms, and in pursuance thereof paid me the sum of fifty pounds in July, 1896.

5. That the said goods arrived in instalments between the months of October, 1896, and January, 1897, and have been lying at my place of business ever since.

6. That the said goods were not ordered on account of the said Gibson, but were purchased by me on my own account in England.

7. That the said goods are not the property of the said Gibson, but are my property.

8. That the said Gibson has failed to pay for the said goods, and has not communicated with me with regard to the said goods.

9. That I have been informed that the said Gibson was to be found at Elandsfontein, and although I have telegraphed to him there, I have received no communication from him.

10. That as the said Gibson has failed to pay for the goods in terms of his agreement with me, I am desirous of disposing of them.

11. That the said goods were intended for a hawker's up-country line of trade and are quite unsuitable for business in Cape Town, and if sold here will, in my opinion, not realise more than the sum of £100, and that it was for this very reason that the condition was made that the sum of fifty pounds sterling should be paid before the goods were ordered from England.

12. That this Honourable Court has ordered the attachment of the said goods to found jurisdiction in a suit between the said Garlick and the said Gibson, reserving to me, however, all rights I may have on the same for the unpaid purchase price.

13. That in order to establish my rights to such goods and to relieve them from attachment I am now forced to institute these proceedings against the said Garlick.

14. That I have read the petition of the said John Garlick, dated the 18th March, 1897, filed with the Registrar of this Honourable Court—(see extract annexed hereto)—and deny that I ever intimated to the said Garlick that I had in my possession goods and cash belonging to the said Gibson.

15. That I informed the said Garlick and his attorney, Mr. W. T. Buissinné, that the goods in my possession belonged to me, and that they

could only be delivered to the said Gibson upon payment in full of the amount due to me thereon.

The following is an extract from the petition of John Garlick, dated 18th March, 1897, referred to in the above affidavit:

"That your petitioner learnt yesterday from Irwin that his firm had in their possession goods and cash to the respective value of £150 and £50 belonging to the said Gibson."

"That these goods were imported for the said Peter Gibson by the said Irwin & Meehan, and against the imports the said Gibson has deposited the sum of £50."

The following is the order made for attachment of the goods in applicant's possession:—

Having read the applicant's petition and affidavit:

It is ordered that any goods in the hands of Messrs. Irwin & Meehan, belonging to respondent, be attached *ad fundandam jurisdictionem* of this Court in an action by applicant against respondent for recovery of the sum of £25 12s. 2d., reserving, however, to Messrs. Irwin & Meehan all rights they may have on the said goods for unpaid purchase price.

And it is further ordered that applicant be at liberty to sue in the said action by edictal citation, returnable 12th April next, personal service to be effected.

The following affidavit by Baptist Hogsett was filed by the respondent:

1. That I am managing clerk in the employ of the respondent.

2. Prior to the respondent's obtaining an order for the attachment of the goods forming the subject of the present proceedings, he had obtained an order attaching a sum of £50, then said to be in possession of one Mercer of Cape Town, and which the said Mercer had admitted having in his possession. When the money was attached Mercer made a return to the writ to the effect that he had no money belonging to Peter Gibson on hand.

3. That a notice of motion for contempt of Court was thereupon served upon the said Mercer, and in connection with this notice on or about the 17th March, 1897, the applicant William Irwin called at the respondent's place of business, and in my presence and the presence of the respondent stated that he had received £50 from Peter Gibson last year on account of the purchase price of certain goods to be imported by him from England for the said Gibson.

4. The said Irwin also stated that he was perfectly willing to hand the £50 to the said Garlick, but that he wished the money attached, so as to prevent any claim by or trouble with Gibson.

5. He at the same time showed the respondent and me a receipt for the £50 received from Gibson. This receipt was a simple one for the amount paid. It contained no conditions of any kind whatsoever, nor did the said Irwin at that time say anything about the goods being purchased on a suspensive condition.

6. The applicant was most anxious that the respondent should withdraw all proceedings against Mercer, who was that day proceeding to England on business of the said Irwin.

John Garlick, of Cape Town, the respondent, deposed:

1. He is respondent in the above matter.

2. He has read the affidavit of Baptist Hogsett in the above matter, and confirms what is therein stated

3. That he has also read the affidavit of William Irwin, sworn on the 1st of April inst., and in reply thereto says as follows:

That the condition, that the goods were not to become the property of the said Gibson, and were not to be delivered to him until the money due in respect of their cost was paid, was at no time mentioned to deponent.

That the said Irwin informed this deponent that he had Gibson's goods and Gibson's £50, and that he was quite willing that deponent should attach the money, but that he was not prepared to hand it over to the Sheriff under the writ against Mercer unless deponent obtained an order attaching it.

In reply to the 14th paragraph of the said Irwin's affidavit, deponent says that notwithstanding the statement made by the said Irwin, that he, the said Irwin, did say in deponent's presence, and in the presence of Baptist Hogsett and two others, that he had imported the goods in question for Gibson, but that he was not going to part with them until he was paid. and added also that he had also received the £50 from Gibson on account,

The applicant filed the following replying affidavit: That I have read the affidavit of the respondent, sworn on the 5th day of April inst., and also the affidavit of Baptist Hogsett sworn to on the 6th day of April inst., and in reply thereto say as follows:

1. I deny that I ever stated to the said respondent or the said Hogsett, that I had imported goods for Gibson, but I informed both the respondent and Hogsett that I had certain goods in my possession which would become the property of the said Gibson as soon as he the said Gibson paid me for them, and I also added that Gibson had last July paid me £50 on account.

That I informed the respondent that I could not object to his attaching the goods if he could legally do so, provided my claim to them, was in the first instance satisfied in full.

3. That in answer to paragraph 3 of respondent's affidavit. I say that the respondent asked me what credit I had to allow the said Gibson. I replied that as Gibson was a stranger to me he would have to pay me in cash before I delivered the goods to him.

4. That in the presence of Mr. Attorney Buissinné, I informed the respondent that I was willing to give him the goods, provided he paid the balance of my account in full, and also indemnify me against any action Gibson might be advised to take against me. Respondent thereupon stated that he had once before given such a guarantee to one Levin, and that he (respondent) had lost over £200 for his trouble.

5. That respondent informed me that he was going to place Mercer in gaol, and that he would do the same with me. I thereupon informed the respondent that he could act as he pleased—but that I would not give up my goods until the balance was paid.

6. That I am not aware that a notice of motion for contempt of Court was served upon James Mercer, but as the respondent had threatened to arrest Mercer I interested myself on Mercer's behalf, and informed the respondent that the sum of £50 said to be in the possession of Mercer had been paid to me and not Mercer.

7. That at the time of the proceedings against him Mercer, as a friend of Gibson, had been holding my receipt for the £50 aforesaid, and it was through a misconception or some statement made by the said Mercer that the said Garlick made the mistake of applying for the attachment of the said £50 as being in the hands of Mercer.

8. That had it not been absolutely necessary that Mercer should leave by the mail steamer on the 17th March last, the said Mercer could have successfully opposed the proceedings taken against him.

9. That the said Mercer has proceeded to England entirely on his own business and not on mine.

Mr. Searle, Q.C., for the applicant, cited *Harcombe & Rylands* v. *Judelsohn's Trustee* (4 Juta, 225) and *Quirk's Trustees* v. *Assignees of Liddle & Co.* (3 Juta, 322), and contended that if Garlick wished to take execution on these goods he must tender payment to Irwin.

Mr. Sheil for the respondent: The question is, under what terms did Irwin import the goods? If there was a suspensive condition the property in the goods never passed. The pact in this sale was really in the nature of *lex commissoria*. *Voet* (18, 3, 3).

The Chief Justice: Is not this the case where Irwin merely acted as agent, in which case he has his lien?

Mr. Sheil: His remedy then is to sue for the breach of contract.

After further argument a compromise was agreed to in court and judgment was then given.

The Chief Justice said: As to the case of Garlick v. Gibson, I think judgment must be given for the plaintiff, and that judgment must be with costs, including all the costs incurred by Mr. Garlick in the motion, because Gibson is really responsible for all these costs. Judgment must be, therefore, for the plaintiff with costs, including the costs of the application for release of the goods from attachment. In the motion of Irwin v. Garlick, the course agreed upon is the most sensible and the most practical, viz., that the goods attached shall be handed over to the respondent on payment by him to the applicant of the balance of the price of the goods, and the expenses connected with the importation, as well as 7½ per cent. on the price. Then as to the costs of this application. It will be seen that this course is really that which was made by the applicant to the respondent, and I think that the respondent ought to pay the costs in the first instance, he subsequently recovering the costs from Gibson.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Findlay & Tait; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

In re THE CAPE COLONISATION COMPANY. 1897. April 13th, May 1st.

This was an application for an order for the winding up of the Cape Colonisation Company (Limited), having an office in 53, Castle-street, on the petition of ten creditors, representing debts to the amount of £1,972, out of a total liability of £2,164.

Mr. Searle, Q.C., for applicant, referred to Act 25 of 1892, section 216, sub-section 4 (*d*). The company is a limited liability one in England—probably not so out here. Section 218 gives the Court power to stay all proceedings after the presentation of the petition and before making the order. Section 141 stays all other proceedings after order winding up is made.

Postea (May 1st).

Mr. Molteno applied on behalf of the company for an order staying the proceedings in relation to the winding-up thereof on the ground that the directors are making such arrangements as they believe will result in settling the claims against the company, and putting its affairs on a firm basis.

Mr. Searle, Q.C., appeared on behalf of certain creditors to oppose the application.

Mr. Searle also applied for the appointment of Mr. E. R. Syfret as official liquidator of the said company, with full powers under the Companies Act, 1892, and for the sanction of the Court to the attorneys, Messrs. Van Zyl & Buissinné, being appointed to assist the said E. R. Syfret in their professional capacity in the performance of his duties.

Mr. Molteno: It is difficult to see how this matter came before the Court originally; see sections 216 and 218, Act 25 of 1892.

The Chief Justice: It is a company which is not registered in the Colony, even though it may be in England: therefore it is for us an unregistered company, and section 241 of the Act governs.

The Court appointed Mr. E. R. Syfret as provisional liquidator, the liquidator to have power to take charge of the assets of the company, and to sell such of the assets as he may deem it necessary in the interests of the company to sell. All proceedings, however, to be stayed until the 27th inst.

Postea (May 31st.)

Mr. Molteno, on behalf of the Cape Colonisation Company, asked for an order staying the proceedings instituted by certain creditors for the winding up of the affairs of the said company, on the ground that the company will shortly be in a position to satisfy its liabilities, and that certain of the debts have been contracted without authority.

Mr. Searle, Q.C., opposed the application.

The Court ordered proceedings to be stayed until July 12.

[Attorneys for the company, Messrs. Scanlen & Syfret; Attorneys for the applicants for liquidation, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1897. May 1st.

On the motion of Mr. Benjamin, Wilfred Topham Richardson was admitted as an attorney at law; the oaths to be taken before the Chief Magistrate of Pondoland.

PROVISIONAL ROLL.

MOLLER V. DE KOCK.

Mr. Close applied for provisional sentence on a promissory note for £32 10s.

Granted.

SHAW V. OPPERMAN.

Provisional sentence—Documents—Service of copy—Premiums of Insurance.

Mr. Close applied for provisional sentence, with interest and costs, on a mortgage bond for the sum of £150; also for 11s., amount of premium paid on fire policy; and asked that the property be declared executable.

Provisional sentence granted on the bond; property declared executable; no order made as to the premium claimed, there having been no service of copies of the premium receipts.

COMBRINCK V. "GORDON CASTLE."

Mr. Benjamin applied for judgment on an account stated, and approved of by defendant.

Granted.

CUNNINGHAM V. "GORDON CASTLE."

Mr. Graham applied for judgment on an account for £1,580.

Granted.

QUINN V. "GORDON CASTLE."

Mr. Graham applied for judgment on an account for £25.

Granted.

KLINK V. LE DU.

Mr. Maskew applied for judgment on balance of account, £24.

Granted.

REHABILITATION.

Re PAUL PHILIPPIN DE KLERK.

Mr. Buchanan applied for the rehablitation of Paul Philippin de Klerk.—Granted.

Re ADOLF GUSSMAN.

Mr. Benjamin applied for the rehabilitation of Adolf Gussman.—Granted.

Re EDWARD THOMAS PITT.

Mr. Buchanan applied for the rehabilitation of Edward Thomas Pitt.

Granted.

Re JOHAN SAMUEL GOTTLIEB REINECKE.

Mr. Benjamin applied for the rehabilitation of J. S. G. Reinecke.

Granted.

GENERAL MOTIONS.

WOODHEAD, PLANT AND CO. V. THE "GREGORIO."

Mr. Rose-Innes, Q.C., applied for the attachment of the vessel Gregori to found jurisdiction on a claim for the non-delivery of certain bags of chemical manure value £28.

The Court granted the order, vessel to be released on security being given for £60.

THE PETITION OF GEORGE BALE.

Mr. Graham applied for leave to sue *in forma pauperis* in an action against the Green Point and Sea Point Tramway Company for the recovery of damages for personal injuries sustained by petitioner through the alleged negligence of the company's servants.

The Court referred the matter to Mr. Graham for certificate.

THE PETITION OF JOHN A. HOLLAND.

Mr. Close applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for authority to the Registrar of Deeds to accept a certain contract entered into between Frederick C. Bernard and petitioner as sufficient authority to transfer to the latter all interest in the landed property bequeathed to the said Bernard as one of the joint heirs of the estate of his late mother Maria E. Hitzeroth.

The Court granted the application.

IN THE MATTER OF THE MINORS SNYMAN.

Mr. Close applied for authority to the father and natural guardian of the said minors to join with the co-proprietors of certain undivided shares of the farm Riet Vlei, in the district of Oudtshoorn, in selling a portion thereof as a business stand, the ground not being of material value, and being incapable of sub-division amongst the registered owners.

The Court granted the application.

THE PETITION OF PIETER J. TERBLANS.

Mr. McLachlan applied to make absolute the rule *nisi* issued by the Mossel Bay Circuit Court for authority to the Registrar of Deeds to cancel certain mortgage bond passed on July 3, 1869, by petitioner in favour of Jan Hermanus, otherwise Cronje, upon portions of the farm Leeuwin in the district of Mossel Bay, it being alleged that the debt was discharged in 1869, and that the bond cannot be found.

The Court granted the application.

IN THE MATTER OF THE MINOR MARY J. STANTON.

Mr. Buchanan applied for authority to the Master of the Supreme Court to pay over to the tutor testamentary of the said minor an amount paid to her credit in the Guardians' Fund out of the estate of her uncle, the late John E. Stanton, to enable the said tutor to complete an investment for the minor's benefit, which will produce a more satisfactory return than the existing one.

The Court granted the application.

MAHUMA V. MAHUMA.

Mr. Close applied to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties, and for forfeiture by respondent of the benefits arising from the marriage in community of property, by reason of her failure to obey the order for restitution to her husband of his conjugal rights.

The Court granted the application.

THE PETITION OF EDITH K. WEYNACK.

Mr. Buchanan applied for leave to sue by edictal citation in an action against plaintiff's

husband for **restitution of conjugal** rights, failing which for **divorce by reason** of his malicious desertion.

The Court **granted the application**; order returnable **July 12, and publication** once in the "Natal Witness."

THE PETITION OF CATHARINE NOVEMBER.

Mr. Jones **applied for a rule** *nisi* requiring petitioner's husband **to show cause** why she **shall not be admitted to sue** him *in forma pauperis* in an action for **divorce** by reason of his alleged adultery.

The Court granted the application.

In re MINORS VISAGIE. } 1897. May 1st.

Parent—Children—Custody—Cruelty—Curator.

V., who had been repeatedly convicted of assault, was after his wife's death charged with assault with intent to do grievous bodily harm to his wife. Prior to her death his wife removed V.'s *daughter to her father's home, and the Resident Magistrate ordered her father* H. *to retain the custody of the child till after the trial.* V.'s *son, however, remained in* V.'s *custody. On application by* H. *for the removal of the children from the control of* V. *and to be appointed curator of the person and property of the children,* The Court *granted a rule* nisi, *to operate as an interim interdict, and on the return day made the rule absolute.*

This was the return day to a rule granted on **the 12th March, 1897**, operating meanwhile as **an interdict, restraining** Jacobus Hendrik Louw **Visagie** from interfering with his minor **daughter** Johanna Elizabeth Visagie, then in **the custody** of her grandfather, and calling **upon the said** Jacobus Hendrik Louw Visagie to **show cause** why the petitioner (Hendrik W. **Visagie**, grandfather of the minors Visagie) **should not** be appointed curator of the persons **and property** of the minors.

The petitioner alleged that between the years **1884 and 1897**, Jacobus H. L. Visagie, father of **the minors** in question, had been eight times **convicted of more or less gross assaults**, and had **been fined amounts** ranging up to £100.

That he had frequently and brutally ill-treated his wife (now deceased) and his children, thrashing them with a horsewhip or anything that happened to be at hand.

The petition further alleged:

That on or about the 24th August, 1896, his said wife, petitioner's daughter, died, and that three months subsequently to the burial of the said Louisa Jacoba Visagie certain information was lodged with the Resident Magistrate of the district to the effect that the said Jacobus Hendrik Louw Visagie had caused her death through his ill-treatment and the body of the said Louisa Jacoba Visagie was thereupon disinterred, but by reason of the length of time which had elapsed since death, the petitioner believes that no testimony as to the foul play or otherwise was obtainable.

That the said Jacobus Hendrik Louw Visagie was, however, charged with assault with intent to do grievous bodily harm, and the preparatory examination was taken before the Resident Magistrate of Calvinia on the 2nd December, 1896, and the prisoner committed for trial.

That the said Jacobus Hendrik Louw Visagie is at present out on bail, and is to stand his trial on the charge mentioned in the preceding paragraph before the Circuit Court to be held at Malmesbury on the 13th April, 1897.

That on or about the 5th October, 1896, your petitioner's granddaughter, the said Johanna Elizabeth Visagie, was brought to your petitioner by his daughter Elizabeth Maria du Toit, who took said child away at her own entreaties from said Jacobus Hendrik Louw Visagie, because said child had been very badly treated, was almost destitute of clothing, and totally neglected.

That your petitioner has since taken care of and provided for the said child.

That the said Jacobus Hendrik Louw Visagie has tried to take his said daughter away from your petitioner, but as she is to be a witness in the case pending against her father the Resident Magistrate of the district has given your petitioner instructions to keep the said child until the hearing of the case.

That your petitioner's said granddaughter is in constant dread of having to return to her father, and is afraid that he will eventually kill her; she has been grossly ill-treated by him in the past and frequently unmercifully beaten.

That her position at times was so unbearable that she on several occasions left her home and roamed about the veld alone, not daring to return home as long as her father was there.

That your petitioner's grandson, the said Izaak Hendrik Johannes Visagie, is still with his said father, but is being neither properly clothed, fed or attended to, and besides which he is also being ill-treated and castigated with a horsewhip by his said father.

That your petitioner is emphatically of opinion that the said Jacobus Hendrik Louw Visagie is not a fit and proper person to have the custody of his children, and that not only would it be prejudicial to the welfare of the said children to remain with him, but that it would be positively dangerous for them to do so.

That your petitioner is willing and ready to take charge of the said children, and maintain and educate them as if they were his own children.

The petitioner prayed for an order depriving the said Jacobus Hendrik Louw Visagie of all prrental or other authority over his said children, and appointing the petitioner curator of their persons and property.

Among other affidavits was one by John Cowper Stapleton, Resident Magistrate of Calvinia, as follows:

1. That I am acquainted with Jacobus Hendrik Louw Visagie, of this district, and know him to be of a most brutal and cruel disposition; several instances of his cruelty to his wife and children as well as to other persons have been reported to me, and I am strongly of opinion that it is desirable that his children should be removed from his custody as I consider that he abuses his parental authority, and is not a fit and proper person to be entrusted with their custody.

2. That I am also acquainted with abovenamed petitioner and consider him a fit and proper person to be appointed guardian of his grandchildren, Johanna Elizabeth Visagie and Izaak Hendrik Johannes Visagie, and that it would be to the welfare of the said children that he should be so appointed.

Mr. Ward moved that the rule be made absolute.

Respondent appeared in person, and said he wished the custody of the children to be given to his brothers, who were richer than their grandfather, and were able to give them a better education.

Bismarck von Moltke Louw said that respondent's brother Philip was said to be a man fairly well off, and of fair reputation.

The Court made the rule absolute, with leave to respondent to apply for a change of the curator.

[Applicant's Attorney, V. A. van der Byl.]

HINTON V. HINTON.

Mr. J. Rose-Innes, Q.C., applied for leave on behalf of petitioner to sue by edictal citation her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion, and for forfeiture by him of any benefits arising from the marriage between them. The respondent is in Bulawayo.

The Chief Justice said: There is sufficient proof that the parties came out here intending to reside in the Colony; what changed their intention does not appear. There must be personal service under the circumstances. The Court will grant leave to sue by edictal citation, service to be personal, and the order to be returnable on June 12, with special leave for trial on that day.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné].

THACKER V. FOURIE. { 1897. May 1st.

Summons—Previous costs – Security—Foreigner.

F. *sued* T. *in the Circuit Court, Worcester, for damages for malicious arrest, and lost the suit with costs. Thereafter* F. *took out a summons against* T. *in an action for damages, alleging that* T. *had caused judgment to be given against* F. *by false representations.*

T. *applied to the Supreme Court to order* F. *to pay the costs of the previous action before being allowed to proceed with the pending suit; and also to order* F. *to find security as a foreigner.*

The Court *ordered the costs of the previous action to be paid before the pending suit was further proceeded with.*

This was an application on notice of motion by Thomas J. Thacker calling upon Louis J. J. Fourie, the respondent, to show cause:

1. Why he should not be ordered to pay the taxed costs of £90 9s. 8d. awarded to the defendant, now applicant (in a suit heard at the Worcester Circuit Court on 7th October, 1896), before the respondent should be permitted to prosecute any suit based on the summons sued out by him against the appellant in the Supreme Court on 12th April, 1897; also

2. Why the said respondent should not be ordered to find due security for the payment of such costs and judgment as the Supreme Court may give the applicant in the suit on the said summons.

The applicant's affidavit set forth that Fourie was charged at Worcester with contravening section 2 Act, 35 of 1894, and was convicted and fined.

That Fourie appealed in October, 1896, against this judgment to the Circuit Court and lost the appeal.

That at the same Circuit Court in October, 1896, Fourie sued applicant for damages for assault and malicious arrest; that judgment was given against Fourie with costs, which after taxation amounted to £90 9s. 8d.

That Fourie had endeavoured to induce the authorities to charge applicant with the crime of perjury but without success.

That on 26th January, Fourie took out a summons against applicant by way of private prosecution for perjury; that the proceedings were converted into a preliminary examination, at which applicant was admitted to bail in the sum of £10.

That the Attorney-General declined to prosecute, and that the Chief Justice declined, on application made, to grant an order for recommittal of respondent to prison.

That the applicant has now been made a defendant in an action instituted by the respondent for £1,000 damages, alleged to have been sustained by the respondent through false representations by the applicant at the suit in October, 1896.

That respondent has not paid the taxed costs of the applicant in the suit, *Fourie* v. *Thacker* though called upon to do so, and that applicant verily believes he has no landed property in the Colony.

That as regards the said suit the respondent is a foreigner, he having alleged at the Worcester Circuit Court that he had simply come to the Colony from the Free State to buy tobacco and return.

The respondent in his answering affidavit alleged that he was born in Caledon in 1871, and lived in the Colony till 1895, when he went to the Free State; that in June, 1896, he left the Free State with the intention to return to the Colony.

That one Pretorius had asked respondent to buy some tobacco for him, and that deponent purposed to take this tobacco back to the Free State, and then to return to the Colony.

That he was prevented from doing this by the legal proceedings at Worcester, and that thereafter he came to Cape Town, and settled here after obtaining employment, and that he is still residing in Cape Town and that it is his present intention to remain in the Colony and settle here, where his relations are.

Mr. Schreiner, Q.C., for the applicant: Fourie has been a resident of the Free State; we leave the question of domicile to the Court. But the costs of the previous proceeding must be paid before this action can be heard; the summons which has been taken out is a summons for perjury in the previous civil action which was for damages for assault. This action is clearly a case of trying by a roundabout way to get an appeal from the judgment of the Circuit Court after having allowed the time for appeal to pass. The present application is in accordance with all the practice of the Court to endeavour to put a stop to interminable proceeding.

Mr. Innes, Q.C. (with him Mr. Searle, Q.C.), for the respondent: It may be very equitable that where A. and B. litigate and A. loses, he must pay the costs of the case before he again sues B. But is it *law*? For the doctrine only has been laid down in cases where the subsequent case was the same as before, not where the cases are different, except perhaps in suits *in forma pauperis*. *Goldman* v. *Glass* (5 Juta, 76); *David* v. *Abdol Rajiep* (Buch. 77, page 81).

The Chief Justice: Would not the same evidence be required in this case as in the previous one?

Mr. Innes: Very much the same undoubtedly. But the cause of action is different.

The Chief Justice: The measure of damages is the same?

Mr. Innes: No. The perjury caused us to lose our right under that action to recover damages, we were also cast in costs—so that our damages are increased. But the real test is the "cause of action."

The Chief Justice: Would you say we have no power to order security to be given?

Mr. Innes: No—but in cases like this it would be most unusual. Clearly if the perjury caused a wrong judgment to be given the person injured can get damages. The cause of action in the first case was anterior to that case; the cause of action in the pending case arose only out of the last case, it arose after the judgment.

The first part of the application was granted with costs.

The Chief Justice said: An action was brought by Fourie against Thacker in the Worcester Circuit Court for malicious prosecution, and the plaintiff in that case failed, judgment being given against him with costs. Then the plaintiff took proceedings in a criminal prosecution against Thacker for perjury. The Attorney-General refused to prosecute. Then

the plaintiff decided to institute a private prosecution, and before that could be brought to the Supreme Court the consent of a judge was required, and an application was made. I, being the judge of the week, after consulting with my brother judge, who had heard the previous case on circuit and was acquainted with the facts, decided that the criminal proceedings should be put an end to, and accordingly did not grant the leave asked for. Now the plaintiff is bringing a civil action against Thacker. The question is, should that action proceed until the plaintiff has paid his costs in the previous action. In the present case the two actions are so closely connected that I think the Court ought not to allow the plaintiff to proceed with this new action until he has paid the cost incurred by the defendant Thacker in the action for malicious prosecution. The Court has some sympathy for the plaintiff, but Thacker has been put to an expense of £9), and he, a police sergeant or in some such position, may also be a poor man. I think it is only right that before another action is brought he should be recouped his costs or have security for those costs.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorney, D. Tennant, jun.]

SUPREME COURT.

Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.

DU TOIT AND OTHERS v. DOMINGO. { 1897. May 3rd. „ 4th. „ 12th. „ 31st.

Mohammedan Congregation—Imaum.

There is no established rule that an Imaum once appointed for a congregation is entitled to retain his office for life.

In the absence of any express or tacit contract made by an Imaum, before or at the time of his appointment, with the office-bearers or the members of the congregation, that he is to hold the office for life or during good behaviour, it is competent for a clearly ascertained majority of the bona fide *members of the congregation to dispense with his services after due notice to him.*

This was an action brought by Imaum Du Toit and others (office-bearers and members of the mosque at the Paarl) against Hadje Habil Domingo, in his capacity as acting imaum of the mosque, to obtain an order declaring defendant not entitled to continue to act as imaum.

The plaintiff's declaration alleged:—

1. Plaintiffs are members of the Mahommedan congregation belonging to the mosque at the Paarl: the first-named plaintiff is the duly appointed Imaum—the other plaintiffs are office-bearers (to wit, gatiep, belals and marabouts) of the said congregation: the defendant has been acting as imaum undercumstances, hereinafter set forth.

2. In or about 1889 the defendant was appointed temporarily to act as imaum of the said mosque pending the appointment of a permanent imaum to be thereafter elected by the congregation of the said mosque.

3. Thereafter the defendant officiated as acting imaum of the said mosque but in consequence of disputes having arisen, and the majority of the congregation of the said mosque being dissatisfied with defendant on account of his incompetency and misconduct, a meeting of the said congregation was called at the Paarl on or about February 5, 1897, for the purpose of electing a permanent imaum.

4. The said meeting was convened by the gatiep, belal, and marabouts of the said mosque in consequence of the defendant refusing to convene such meeting; due notice of the said meeting and of its objects was given to the defendant and to all members of the congregation, and the same were invited to attend.

5. At the said meeting of the congregation, resolutions were passed to the effect (*a*) that as the congregation was dissatisfied with the acts of defendant and considered him incompetent to perform the functions of imaum, he was deposed from his position of acting imaum; (*b*) that the first-named plaintiff was elected permanent imaum.

6. The said resolutions were duly communicated to the defendant, and the defendant was called upon to deliver up the keys and papers belonging to the said mosque to the first-named plaintiff, but the defendant refused to recognise the said resolutions in any manner.

7. The defendant has never been duly appointed to the permanent post of imaum of the said mosque; he is incompetent to perform the functions of imaum, and the large majority of the congregation are dissatisfied with his conduct and preaching, and object to his continuing to excercise any longer any of the functions of an imaum of the said mosque, and have appointed the first-named plaintiff as imaum.

The plaintiffs claim:

(*a*) An order declaring that defendant is no longer entitled to exercise or perform any functions of imaum in the said mosque for and on behalf of the said congregation, and an interdict restraining him from so doing.

(*b*) An order declaring that the first-named plaintiff has been duly appointed imaum of the said mosque.

(*c*) An order upon defendant to deliver up to the first named plaintiff the keys belonging to said mosque.

(*d*) Alternative relief; and costs of suit.

For a plea to the declaration the defendant said as follows:

1. As to the first paragraph he denies that the first-named plaintiff is the duly appointed imaum of the said congregation, or that he (defendant) is merely an acting imaum, and he says that the second, third, fourth, fifth, sixth and seventh plaintiffs were duly appointed to be officer bearers of the said congregation by the defendant himself.

2. As to the second paragraph he says that in or about the year 1889 he was duly and legally elected and appointed to be the permanent Imaum of the said mosque; from the said date he has continued to act as such Imaum, and he is entitled, according to law, to continue so to act and officiate; subject to the above, he denies the allegations in the said paragraph.

3. As to the third paragraph, he admits that disputes arose with the plaintiffs and certain other members of the congregation, and he admits that the plaintiffs or some of them purported to call a meeting at the Paarl on the date and for the purpose alleged, but he denies all the other allegations in the said paragraph, and he specially denies that the said meeting was legally and properly called.

4. With regard to the fourth and fifth paragraphs of the said declaration, he refers this Honourable Court to such proof of the allegations therein contained as the plaintiffs may produce. He also refers this Honourable Court to the special allegations in the third paragraph hereof, and he says that the said meeting was illegal and void, and that the said resolutions even if carried thereat are not binding upon him.

5. He admits the allegations in the sixth paragraph of the declaration, and he denies all the allegations in the seventh paragraph. He says that having been duly elected and appointed as permanent imaum heis by law entitled to continue to officiate as such, and has been guilty of no misconduct which would entitle the plaintiff or any other person or persons to dismiss him from his said office.

Wherefore he prayed that the plaintiffs' claim might be dismissed with costs.

For a claim in reconvention the said defendant in convention, now plaintiff in reconvention, said:

1. He asks leave to refer this Honourable Court to the matters set forth in the plea in convention.

2. The first-named plaintiff (now defendant in reconvention) had, until recently, been acting as secretary of the said congregation, and as such had obtained possession in his official capacity of the muster roll or list of members of the said congregation.

3. Thereafter the plaintiff in reconvention, as he had a right to do as imaum, deposed the defendant in reconvention from his position as secretary aforesaid.

4. It became and was the duty of the said defendant in reconvention to deliver up to the plaintiff in reconvention the said muster roll or list of members, yet the defendant refuses to do so, and unlawfully retains possession of the same.

The plaintiff in reconvention claimed:

(*a*) An order directing the said defendant, Hadje Keamdien du Toit, to deliver to the plaintiff in reconvention, forthwith, the said muster roll or list of members of the congregation.

(*b*) Alternative relief, and costs.

Replication. 1. The 2nd, 3rd, 4th, 5th, 6th and 7th plaintiffs were appointed, and hold office with and subject to the consent and approval of the congregation; subject to the above, they admit that the said appointments were made by the defendant.

Otherwise the replication was general.

For a plea to the claim in reconvention. The plaintiffs (now defendants in reconvention) said:

1. The first-named defendant in reconvention is the secretary of the said congregation, duly appointed by the whole congregation, and in such capacity has possession of the muster roll or list of members thereof.

2. In or about December, 1896, the plaintiff in reconvention wrongfully and unlawfully attempted to depose the first-named defendant in reconvention from his said office of secretary

3. The defendants in reconvention submit that any appointment of a secretary in place of the first-named defendant must be made by the whole congregation; no such appointment has yet been made, and until such appointment the said defendant is entitled to retain possession of the said muster roll, and they admit that he refuses to deliver the same to the plaintiff in reconvention, but deny that he has ever been requested to deliver the said roll.

Otherwise the plea in reconvention was general, craved leave to refer to the matters set forth in declaration and replication in convention, and found joined on the claim in reconvention.

The defendant's rejoinder in convention was general, as also was the replication in reconvention.

On these pleadings issue was joined.

Mr. Searle, Q.C., (with him Mr. McGregor), for the plaintiff; Mr. Innes, Q.C. (with him Mr. Graham), for the defence.

Jakoef du Toit said he resided at the Paarl. He was one of the plaintiffs, and had been a member of the congregation forty-even years. He was now gatiep, and regularly attended the services. Witness built the church, and advanced the money for the work. Witness did not charge anything for his own services. There was a sum of £74 now due to him. He had never charged any interest for the money. He had a mortgage on the building. Witness contributed money to the building of the mosque, which was completed about the middle of 1888. After the opening ceremony there was a banquet provided, which the bishop and the talief, who had come from Cape Town, attended. In the course of conversation after the banquet the defendant was mentioned as the imaum, and it was understood he would remain imaum until the debt on the church was cleared off. Dissatisfaction had been found with the defendant, and there was a dispute with him as to how he conducted the services. That was at the end of last year. A hadje, (Sahedi) was sent for from Cape Town on one occasion, and he said that defendant had made a mistake in reading the buddj. The defendant used the correct word, but on reading further the hadje said he was again wrong. Later a beggar, or pilgrim, appeared at the Paarl, begging for money to take him back to his own country. The people did not know anything about the man, but the defendant made him conduct the services. Defendant was not in any way competent to conduct services. He could not pronounce the Arabic properly.

The Chief Justice: Can you pronounce the Arabic properly?

Witness: No,

The Chief Justice: Well, how can you tell whether he pronounces it correctly or not?

Witness replied that "another man," who knew Arabic well, had said so.

The Chief Justice: We'll have to get the other man then.

Witness stated that the defendant had created dissatisfaction owing to the manner in which he had conducted the baptisms. The notice of the meeting held in his house was published in "Het Dagblad." Defendant had the key of the mosque and would not unlock the door. There were over thirty persons at the meeting. At that meeting a resolution was passed deposing the defendant as imaum, on account of his not being able to conduct the services properly. A resolution was also passed electing the son of witness imaum. His son had been to Mecca. Witness had attended the church recently; since the defendant had been acting as imaum the congregation had decreased. Sometimes there were only five persons present, and sometimes the defendant was present in the church by himself. There were only twelve to twenty who were satisfied with the defendant. Over thirty were dissatified with him. Defendant had never been paid anything for his services. The majority of the congregation was now willing that there should be another meeting to elect an imaum.

Cross-examined: Witness's son was twenty-six years of age. Defendant taught his son a little before the latter went to Mecca. His son had been back from Mecca about three years. There were seven trustees of the title deed, two were dead, and two others were elected. The majority of four trustees were on the plaintiff's side. In 1889, when the mosque was built, two bishops came down from Cape Town, one of whom was dead. The other was in court. About fifteen of the congregation attended a feast which was held on that occasion. The feast was arranged so as to give the bishops a proper welcome. Witness could not read the Koran. Nothing was said at the feast as to the appointment of an imaum. The bishop asked defendant if he would accept the appointment of imaum, and defendant said he would take the office until a more competent man was found.

Hadje Sahedi Dolly said he was a professor of reading in the Koran, which he taught in Cape Town now. Witness was at Paarl about the end of last year, and attended services at the mosque there, which the defendant conducted. Witness heard the defendant pray. The prayer was very bad. It was wrong, and defendant made many mistakes. That was the first time witness heard the defendant. Defendant said

"Ismillah" instead of "Bismillah." It was the duty of an imaum to read correctly. He had never heard an imaum in Cape Town so bad as defendant.

Cross-examined: Witness taught the plaintiff for several months before the dispute began. Witness condemned the defendant because he did not pronounce the word "Bismillah" properly.

Mollah Effendi said he was the secon l son of the Effendi, who came to Cape Town thirty years ago. Witness had studied Mahommedan theology at Cairo and Constantinople, and had been six years at Mecca. He was thoroughly acquainted with the Koran. He had heard the defendant conduct a service. Defendant was incompetent to be imaum according to their religion. Defendant changed the meaning of what he read altogether; in fact there was no meaning at all to what defendant read. The majority of a congregation can appoint or dismiss an imaum at any time. It was a sin for an imaum to go and preach if he was disliked by a congregation.

Cross-examined: In Mahommedan countries such as Turkey the Government could dismiss or elect an imaum. The laws in Cape Town had grown up in the Colony. He had not much knowledge of the mosques in Cape Town. He had not attended a church in Cape Town for many months, as the priests as a rule were incompetent. Witness thought the defendant pronounced "Bismillah" right. If a man was appointed acting imaum the power of the congregation to dismiss was the same. In Mahommedan countries it was a State religion, whilst in Cape Town it was a voluntary religion.

Abdol Gamiet said that he lived at the Paarl, and had been a member of the congregation there eighteen years. He was marabout and sextoo. He contributed to the building of the mosque, and paid for his sitting. Witness remembered the ceremony of the opening of the church. After the ceremony there was a feast, at which about twelve persons were present. He corroborated the evidence given by the plaintiff Jakoef du Toit. Defendant was never appointed to be the permanent imaum of the church. There was no meeting of the congregation to appoint an imaum.

Cross examined by Mr. Graham: More than half of the congregation were present at the meeting in the church. Only ten or twelve were present at the feast which followed. Nine or ten came from Wellington to the church meeting. He thought there were twenty-two from the Paarl. All Mahommedans of Wellington and the Paarl were entitled to vote if they had contributed something. Witness collected the money, and a book was kept in which the amounts received were written. Witness was against defendant because he caught witness by the neck and put him out of the mosque. Defendant also left the mosque when he ought to have preached. Before that witness was always with the defendant. Other people put witness out, but the defendant stood by at the door whilst it was being done. Defendant was only a temporary imaum. There were two other assistants who helped according to custom. All three were appointed at the meeting to officiate at the church. Defendant was appointed acting imaum, and the other two to assist him.

Rev. Stephanus Jacobus du Toit said he resided at the Paarl. He knew the parties to the disputes. Jakoef du Toit with others came to see witness for advice, as also did the defendant. Witness advised friendly arbitration, and this was at first agreed to. The arbitration, however, fell through, the defendant saying he did not think it right that Christians should arbitrate Witness was present at a meeting at which about thirty were present, Mr. Cloete, R.M., and witness were mentioned as arbitrators.

Cross-examined: So far as witness knew the defendant was the imaum, and any outsider would look upon him as imaum.

Johannes Enoch Neethling, attorney, who lived at the Paarl up to February last, said he knew the parties. Witness had suggested arbitration to settle the disputes, but this fell through. Defendant afterwards said he would go on with the case; if the plaintiff was prepared to throw money away, so was he.

Cross-examined: Witness had lived in the Paarl six years. Defendant was always looked upon as imaum by the congregation.

Masouda, a member of the congregation, said he was a marabout, and had been since the appointment of the first imaum. Witness was not at the feast. Bedat and Kiandien Domingo used to conduct services in addition to the defendant. Witness was present when mistakes in reading were pointed out to the defendant.

Cross-examined: Although the defendant was not appointed imaum he was recognised in the church as imaum, but not outside.

Rejab Smit, a member of the congregation for twenty-one years past, said he paid for his seat at the church. Witness was present at the opening ceremony in 1889. He did not go to the feast, and was not present at any meeting at which defendant was appointed imaum. Witness knew that there was great dissatisfaction amongst the congregation against the defendant. Witness thought a competent man ought to be appointed.

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Cross-examined: Since the dispute arose witness had not attended services in the mosque. He had, however, paid money towards the support of the mosque. Witness had never heard of anybody being appointed imaum at the feast.

Abdol Gatap, one of the belals, remembered the building of the mosque. Witness was present at the opening ceremony, and went to the feast. Defendant was never appointed imaum of the church, but acted as imaum. His work, however, was not good. He thought there were about thirty-four members of the congregation against the defendant. At present there was but a small attendance at the mosque.

Cross-examined: About thirty were present at the opening of the mosque and about twelve at the feast. They made three acting-imaums at the feast. Defendant was called imaum according to custom. Defendant was not up to his work.

Manie Bohearie gave corroborative evidence.

Kiandien du Toit (son of Jakoef du Toit and one of the plaintiffs) said that six years ago he was secretary to the mosque. Witness kept the two books produced. The congregation appointed him secretary. The names of members who had paid subsciptons were in the books. Witness was present at the opening of the church and at the feast held afterwards. What previous witnesses had stated as to what took place at that time was correct. Defendant was never appointed permanent imaum. Witness had got a certificate from Mecca.

Cross-examined: Witness was twenty-six years of age. Witness went to Mecca when he was twenty-two years old. Defendant taught witness the first chapter of the Koran, and the schoolmaster at Mecca had said witness had been taught well. Witness stayed four or five months in Mecca. Defendant was not a truthful man.

Postea (May 4th).

(BEFORE THE FULL BENCH.)

D. F. Berrangé, attorney of the Supreme Court, acting for the plaintiff, said he attended certain meetings in connection with the mosque at the Paarl. The list produced contained the names of the thirty-four persons present at a meeting. There were some Indians present, but they did not vote.

Cross-examined: Each person present was asked if he were a member of the mosque, and the reply in each case was in the affirmative. Witness had no roll by which to check the members. There might have been one person only about fifteen years of age.

Taliep Samardien, an imaum in Cape Town, now retired, said witness knew the defendant, and heard him preach about three years ago. Witness had heard defendant read. He could not read the Koran well. Witness heard him make important mistakes. The majority of a congregation had the right to dismiss an imaum, and he knew of a case in Cape Town.

Cross-examined: Witness went to the Paarl three years ago, but did not go specially to hear defendant preach. Defendant could not pronounce Bismillah probably. According to the Prophet, a man who made mistakes like that was not fit to be an imaum.

Imaum Hadje Ibraham Abdol Gali said an imaum was appointed in the mosque in the face of the congregation. That was how he was appointed. If there was any objection it should be made at the meeting of the congregation. The congregation had the power to depose an imaum if there were good grounds for their objection. Witness heard the defendant preach about four years ago. Defendant made serious mistakes in the conduct of the service. There was no law in the Colony as there was in a Mahommedan country. All the congregation could do here was to express their dissatisfaction.

Cross-examined: Witness used to line at the Paarl, but he left because one of his relatives died in Cape Town. When he was made imaum there were about sixty in the congregation. It was not proper for an imaum, nor for a man who wished to be made an imaum, to be made captain of a ladies' singing club.

Abdol Ragiem, member of the congregation at the Paarl, said he was a marabout elected by the congregation. He corroborated the evidence of previous witnesses as to the conduct of the defendant in roughly pushing away some of the members of the congregation.

Kiandien du Toit (recalled) stated that the photograph produced represented him amongst others. The picture was taken two years ago. At that time he was captain of a feast club. Witness was not the only imaum that was photographed. (The photograph represented the witness in the centre of a group of Malay girls.) Witness was not imaum at the time the photograph was taken.

This closed the plaintiffs' evidence.

For the defence,

Abdol Ragman said he was a belal of the congregation, and had belonged to the church about nineteen years. The defendant had carried on the services as imaum. Imaum Ibrahim resigned because he said the congregation was not large enough. After the resignation defendant and two others conducted the services; but defendant always took the leading part.

There were two bishops present at the opening of the mosque. One of them—the Indian bishop—was now dead. After the ceremony there was a feast at the defendant's house. Witness, as marabout, announced the feast. This was on the instruction of the trustee. There were about forty-five or fifty people present at the feast. The whole congregation said they were satisfied that defendant should be elected imaum, and defendant accepted the office. Defendant was formally declared to be elected imaum. From that time defendant conducted the services, and was recognised as the head of the congregation. Defendant told the congregation that if they broke the Mahommedan law by not attending at church at stated times he would refuse to greet them. The people were annoyed at this. Witness found no fault with defendant's pronunciation of the Koran.

Cross-examined: Witness attended services before the mosque was built. That was when they were held in a hired house. Witness was not present when Ibrahim was appointed imaum. The brother of defendant had conducted services twice, but this was only on the instructions received from the defendant. Witness knew there was a considerable debt on the church. Jakoef du Toit received £75 subscriptions from a little club that was formed, then he built the whole church. It was not said at the feast, "We can't appoint an imaum yet because there is such a big debt on the church." The whole congregation of the Paarl was about fifty or sixty.

Re-examined: There was a difference between the Friday service and those held on other days. On the Friday the imaum must read the prayers.

Imaum Mohammed Talliep, bishop, said he had been in Mauritius and also in Bombay. He had been a bishop twenty-four years. He knew the congregation at the Paarl. He went down to the Paarl on the opening of the mosque. This was on the invitation of the defendant and his brother. Witness went, and after the ceremony all the congregation were invited to the feast. There were about fifty at the mosque, and they all went to the house. Bedat spoke to witness, and said they must get an imaum. Witness asked if they had anyone who was fit to be imaum. Bedat replied that they had got a man who had conducted the business for three years, and who was fit to be imaum. Then witness asked the people if they consented to defendant being imaum, and they all shouted, "Yes; we like him." Defendant accepted the office. The Arab Bishop Gasant, who was dead, said "Make him an imaum." Then defendant was formally made imaum, and was congratulated by all the congregation. Witness had been to the Paarl several times, and always found defendant acting as imaum and the people satisfied. Defendant read Arabic correctly. (Witness here repeated a prayer in Arabic, and said defendant was competent to give that prayer, and also said that the school-children could say it as well as he could.) The people had to go to church, or say their prayers, five times a day, otherwise their evidence would not be taken. It was laid down that the imaum was not to greet people who did not attend church and say their prayers regularly. The congregation could not turn an imaum away unless he had done something wrong.

Cross-examined: The imaum appointed the gatieps and belals. The learned people—trustees—appointed the imaum, and they could do so; but generally the congregation agreed with the man named. Witness never heard that there was a debt on the church. There was no law compelling the imaum to shake hands with all the congregation. Witness was imaum at the Indian mosque, where about 200 Indians and fifty Malays attended as congregation. He got about £20 a month and presents.

Habil Gamadien, belal of the church, said he was appointed belal by the defendant. He was at the church when Ibrahim was imaum. He was born at the Paarl. Before there was an imaum defendant conducted the services. He remembered the opening ceremony and the election of defendant as imaum. Witness was satisfied that defendant could properly conduct the services. There were between fifty and sixty in the congregation. Defendant now had between thirty and forty in his congregation. Plaintiff had some, but they were principally outsiders.

Cross-examined: Witness never heard anything said as to the church being in debt. Defendant always used to conduct the services with the exception of two or three times. Several people used to read the prayers.

Mahomet Samadien, marabout at the church, said he was born at the Paarl, and had been a member of the congregation many years. He corroborated the evidence of Abdol Ragman.

Abdol Bazier, gatiep at the Paarl, said he was a marabout at the time of the opening ceremony. He corroborated the evidence of Abdol Ragman.

Abdol Latief said he was one of the trustees when the transfer of the land on which the church was built was passed. He was not one of the original trustees, but he was elected by the congregation. There were about fifty people present at the feast. He was perfectly satisfied

with the defendant, and corroborated generally the evidence of preceding witnesses for the defence.

Keyandien Domingo, brother of the defendant, said he owned properiy at the Paarl. He was one of the original trustees. He was a gatiep, and was the man who fetched the bishop. He corroborated the evidence of Abdol Ragman. His brother was properly appointed imaum. Witness had only officiated in the pulpit two or three times. His brother always officiated.

Ibrahim Anta Moordien Gamalien, Abdol Gakiem, Saidien Mahati Samodien, Emaldien Jamaldien, Abdol Kariem, Osman Gamat, and Gamal Sahedien also gave corroborative evidence.

Habil Domingo, the derendant, said that after Ibrahim left he (witness) and two others took over the work of the church. Witness was one of the trustees under the original deed. There were three tables at the feast, but some had to stand. He had heard what had been said by previous witnesses as to the appointment of himself as imaum, and, this was all correct. Witness had performed all the duties of imaum, could read the Koran properly, and had been in Mecca two years. It was true that witness had scolded the people for not coming to church, and told them they only came when there was a feast. Subsequently he refused to greet some of the congregation who did not make proper attendance at church. Witness read the Koran better now than he did eight years ago.

Cross-examined: The brother of witness assisted with the service, but had only been two or three times in the pulpit. He was not paid. He had enough to live upon. Sometimes he got present when there were marriages. The reason he had come there was for their lordships to decide what was his right duty, but he did not see why he should be rejected without sufficient reason. About twenty people came to church now. There were between forty and fifty altogether. He thought he had a majority of the actual members of the church.

Postea (May 12th)

Mr. Searle, Q.C.: The question in this case is whether the congregation has a right to manage its own affairs. The three grounds on which plaintiff asks for relief are, viz.: (1) Defendant was never properly appointed; (2) he is not a competent man for the post; (3) the majority of the congregation are not satisfied with him. As to the first ground, the congregation were never called together in the mosque, which is the usual practice. Defendant has never received any remuneration for his services, and he contributes to the church funds like any other member of the congregation; this is inconsistent with the position of imaum. Moreover, during the last year other members of the congregation occasionally conducted the services; this shows that the appointment was informal. There was not a sufficient number of the congregation present at the feast. As to the argument that the trustees are the persons to manage this matter, that is the Indian idea, but it was set aside by the Court in the case of *Hessen* v *Daout* (6 Juta, p. 372). Plaintiff's position is that he paid for the building of the church; part of the amount has been paid off by the congregation and he has taken a bond for the balance. This he is willing to cancel if a person satisfactory to the congregation is appointed imaum. As to the competency of defendant, the congregation has been diminishing gradually for some time on this account; he makes a number of mistakes in offering prayer and when learned men came to criticise his method he pushed forward another man to conduct the service. According to the Muschat prayers are valueless if not properly pronounced. A large part of the congregation has left the mosque and taken a house. By the rules of the mosque the imaum must be chosen by the congregation and approved by the Gama. A majority can dismiss without cause shown: *Hessen* v. *Daout*. Judgment in that case was founded on principles laid down in *Cooper* v. *Gordon* (38 L.J., Ch., p. 489). Defendant is not elected for life; that view is contrary to all decisions of this Court; the only authority for it is judgment of Bell, J. in *Jan* v. *Ismael* (S. 5, p. 102). Watermeyer J. did not agree. *Muschat-ul-Masabah* (Ch. 27, part 1). In *Berhardien* v. *Intillah* (6 Sh. p. 47), the Court ordered an election to be held.

Mr. Innes, Q.C., for the defendant: The imaum is appointed for life and can only be dismissed for good cause. Judgment of Bell J., in *Jan* v. *Ismael*. In making a selection, great weight should be given to wishes of deceased imaum: *Berhardien* v. *Intillah* (6 Sh., p. 47); underlying that *dictum* is the principle of the permanency of the office.

Trustees have the right of dismissal, acting in accordance with the wishes of the congregation (*He sen* v. *Daout*). There is no such office as that of acting imaum except when there is a permanent imaum who is temporarily disabled from officiating. There could not be an acting imaum for eight years. There is no difference between defendant's appointment and that of a permanent imaum. He was always known as the imaum.

De Villiers, C. J.: The real question is whether there is no limit as to the numbers of the congregation. Supposing it were reduced to one must the imaum be left with that one? It re-

duces itself to a contract. The imaum is subject to the congregation. What is the congregation but the majority?

Mr. Innes: If that is so, the congregation must be fixed upon. Who constitute the congregation?

The Court has never gone so far as to fix a poll upon an unwilling congregation and we do not want a poll. In *Salie and Others* v. *Sahibo* (6 Sh., p. 58) the Court refused to order the imaum to call a meeting of the congregation for such purposes as election of an imaum. The congregation have ratified the election, and therefore defendant is in same position as if the meeting had been properly called and an election had been duly made.

De Villiers, C. J.: Mr. Searle, should not the trustees be parties to the suit?

Mr. Searle: A great part of the claim is not against the trustees; only that which asks for delivery of the keys. There is no claim for ejectment. We ask for a declaration of right as to the office. Defendant should have excepted. There is a doubt raised now as to who are trustees. All the original trustees who are living within the jurisdiction are upon the record, except one, and he has resigned.

De Villiers, C.J.: It is quite impossible to lay down any general rule as to the tenure of the office of imaum in Mohammedan congregations in this colony. There is certainly no established rule that an imaum once appointed is entitled to retain the office for life. The *dictum* of Bell, C. J. in *Jan* v. *Ismael* (5 Searle, 102) to that effect is not supported by the judgment of his colleague in that case or by subsequent decisions of this Court. The terms upon which an imaum holds his office must depend upon the contract made by him with the congregation, or with the office bearers, before or at the time of his appointment. If there was no express contract, all the circumstances under which the appointment took place must be considered in order to ascertain what tacit agreement as to the tenure of his office was arrived at. In the absence of any proof that an appointment was intended to be for life, or during good behaviour, the effect of previous decisions is to regard the office as terminable at the clearly expressed desire of a majority of the *bona fide* members of the congregation. In the present case the defendant's appointment took place under circumstances which negative any contract that he should hold the office for life, without regard to the wishes of the congregation. A new mosque was consecrated at the Paarl, and after the ceremony an adjournment was made to the private residence of the defendant, for the entertainment of members of the congregation and strangers at a feast. No notice was given that an imaum would be appointed at the feast. Just before the meal began, a Bishop from Cape Town stated that as the congregation now had a mosque they should also have an Imaum and with general approval the defendant was appointed. The church was heavily in debt and he was to have no salary for his services. There are other indications to shew that the appointment was provisional. The congregation has now for seven years acquiesced in the defendant's appointment, but such acquiescence does not, in my opinion, debar them from displacing him, after due notice, if they are no longer satisfied with his ministration. Before a definite decision can be given the Court must be satisfied that a clear majority of *bona fide* members really desire a change. The Court will therefore appoint Mr. Advocate Jones as Commissioner to take the votes of the members as to (*a*) whether they object to the defendant as Imaum, and (*b*) if they do object whom they wish to be Imaum. He will exercise a wide discretion in deciding who are members. Regular payment of church fees will be an important consideration, but it will not be conclusive in the case of persons as to whom there is clear proof that they have been constant worshippers in the mosque. Nor will persons from Wellington or Stellenbosch be excluded if they have been recognised by the Imaum and the Paarl members as members of the congregation. Only persons who have attained majority should be allowed to vote. The meeting will take place at the Paarl on the 22nd day of May at 10.30, in the Town Hall, with power to adjourn to some other more convenient place. Formal judgment will be given, without further argument, after the Commissioner has handed in his report. The question of costs will stand over.

Postea (May 31st) the Chief Justice said:

The Court has already laid down the principles upon which this case should be decided and it now only remains to apply those principles. The Commissioner, Mr. Advocate Jones, has made his report to the Court. He reports:—"The attorneys of both parties were present. Discrimination between the *bona fide* members and those who are not entitled to rank as such was attended with a great deal of difficulty owing to the conflicting and directly contradictory nature of the evidence given before me, on oath, by the partisans of the plaintiff on the one hand and those of the defendant on the other. Ninety persons claimed to be entitled to vote. Of these I accepted 61. Of those rejected, 3 were refused on the ground of insufficient evidence as to

and twenty-six on account of general disqualification. To the accepted members the two questions embodied in the order of the Court were put with the result that thirty-two declared themselves in favour of retaining the defendant as Imaum whilst the remaining twenty-nine wished Keamdien du Toit to be appointed. Amongst those whose votes I recorded for defendant was one member who actually lived in Cape Town but who had for the last three years come down to the Paarl once a fortnight and attended service there; also five members living at Stellenbosch and one at Riebeek West. Amongst those who voted for Keamdien du Toit were four members living at Wellington,

	For Domingo	For Du Toit	
Thus of the Paarl residents there were	25	25	
Thus of those outside the Paarl were	7	4	
	32	29	61

Now it is not necessary for this Court to give a casting vote. Even if the Paarl vote above were taken the plaintiffs have failed to prove their case and moreover of the eleven outside members admitted to vote four were against and seven for the defendant. The judgment must therefore be in favour of the defendant with cos's, including the costs of the commission, as the commission was the only thing that could be done. As to the claim in reconvention absolution from the instance will be given.

[Plaintiff's Attorneys, Messrs. J. C. Berrange & Son; Defendant's Attorney. C. C. Silberbauer.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

SMIT V. SMIT'S EXECUTRIX. { 1897. May 5th.

Legacy—Vested interest — Insolvency Mandate—Estoppel - Sale by trustee.

It being doubtful whether a legatee's interest in the legacy of a certain farm was vested or not, the trustee of his insolvent estate obtained his consent to the sale of such interest and, upon the faith of such consent, the sale took place and the price was paid by the purchaser to the trustee, and by him distributed among the insolvent's creditors.

Held, *in an action brought by the insolvent, after his rehabilitation and after the interest had clearly vested, to recover the farm or its value from the purchaser, that, whether the consent given by the plaintiff be regarded as a mandate or as creating an estoppel, he was not entitled to be relieved against the consequences of his own act.*

This was an action brought by Willem Jacobus Smit against Helena Susanna Smit (born Loubser), in her capacity as executrix testamentary of the estate of the late Frans Albertus Smit.

The plaintiff's declaration alleged:

1. The plaintiff resides at Fraserburg, and the defendant at Stofkraal in the division of Fraserburg.

2. The plaintiff is a son of the late Frans Albertus Smit, and of his predeceased wife Renske Smit, born Van der Westhuizen, who were married to each other in community of property.

3. The defendant is the duly appointed executrix testamentary of the estate of the said late Frans Albertus Smit, and is sued in her capacity as such.

4. By a codicil dated the 21st day of August, 1869, made to their mutual last will and testament dated the 28th day of January, 1868, pursuant to the reservatory clause therein contained the said late Frans Albertus Smit and the said late Renske Smit (born Van der Westhuizen), declared that our place Stofkraal is hereby bequeathed to the survivor of us for 1,000 rixdollars with the understanding, however, that the survivor shall not be able to sell or mortgage the place while after the death of the survivor the said place shall become the property of both our sons Willem Jacobus Smit (F. A. son) and Jacobus Hendrik Smit (F. A. son) for a sum of 12,000 rixdollars, the plaintiff craves leave to refer to the terms of the said will and testament.

5. Thereafter on the 1st day of September, 1869, the said late Renske Smit died, leaving the said will and testament and the said codicil thereto of full force and effect, and the said late Frans A. Smit adiated and accepted benefits thereunder, and on the 17th day of April, 1896, the said Frans Smit also died.

6. By the terms of the said codicil referred to in paragraph 4 of this declaration the plaintiff says he is entitled to claim from the defendant the transfer of one half part or share in the place or farm called Stofkraal, situated in the district of Fraserburg, and registered in the name of the said late Frans Smit upon payment made of or a security given for the sum of £450 sterling by the plaintiff to the defendant, in her said capacity, which said sum the plaintiff has tendered and hereby again tenders to pay or secure upon the defendant passing transfer to him of the said share in the said farm.

7. All things have happened, all times have lapsed and all conditions have been fulfilled to entitle the plaintiff to claim transfer of half part or share of the said place or farm called Stofkraal, the plaintiff tendering the sum of £450 as aforesaid, but the defendant wrongfully and unlawfully refuses to transfer the half of the said place or farm Stofkraal.

Wherefore plaintiff prays:

(a) For an order compelling the defendant in her said capacity to transfer to him half of the said place or farm in terms of the said codicil, upon the plaintiff paying or securing the said sum of £450.

(b) Alternative relief and costs of suit.

The defendant's plea was as follows:

1. She admits the allegations in par. 1, 2, 3 and 5.

2. As to par. 4, she craves leave to refer to the will and codicil, when produced for the terms thereof, and says specially that under the said will the survivor and children of the first dying, were appointed sole and universal heirs of the first dying, of all property movable and immovable, the survivor to educate and maintain the children and to pay to them at their majority, marriage or other approved condition, such sums as the survivor should according to the position of the joint estate find to be due to them.

3. In or about 23rd November, 1877, the estate of the plaintiff was surrendered as insolvent, and all the right or expectancy of the plaintiff, in and to the farm Stofkraal was duly sold by public auction on or about April 20th, 1878, as an asset in his estate by the Trustee thereof and was purchased by the said late Frans A. Smit for the sum of £206, which sum was duly paid and was thereafter distributed as an asset of plaintiff's estate and the estate of the late Frans Smit is now entitled by virtue of the said sale and purchase to a half share in the said farm.

4. The final liquidation and distribution account in the said estate was thereafter duly confirmed and the insolvent has been rehabilitated, but there remains a large deficiency in his estate.

5. The sale of the rights aforementioned of the plaintiff was made with his full knowledge and consent and he has acquiesced in the same, and on or about May 3rd, 1878, he acknowledged in writing that he had no further right to the said share.

6. She admits that the farm is still registered in the name of the late Frans A. Smit, and that plaintiff has tendered to pay or secure the said sum of £450 as alleged in paragraph 6 of the declaration upon the defendant passing transfer to him of the half share in the farm, but she denies he is entitled to claim the said transfer.

7. She denies the allegations in paragraph 7, save that she admits that she refuses to transfer such share; and prays that claim be dismissed with costs.

The plaintiff's replication was as follows:—

1. He admits the allegations of fact in paragraph 3 of the said plea; denies that the estate of the late F. A. Smit is entitled to a half share in the said farm, and says that at the date of the said sale, on the 20th April, 1878, he had no vested interest in the said farm under the said will capable of being sold by the said trustee.

2. With reference to paragraph 4, he says that the final liquidation and distribution account was confirmed on the 20th November, 1878, and specially that no right or interest in the said farm under the said will vested in him (the plaintiff) until the 17th April, 1896.

3. He denies the allegations in paragraph 5, and says that at the date referred to therein he was entirely ignorant of his rights under the said will; that he signed the said documents in ignorance of his rights and in ignorance of its contents, and that the said writing was obtained from him by means of misrepresentation and fraud after his estate had been declared insolvent and a trustee thereto appointed.

Otherwise the replication was general.

On these pleadings issue was joined.

Mr. Graham for the plaintiff.

Mr. Searle, Q.C. (with him Mr. Close) for the defendant.

The following evidence was given for the plaintiff:

Willem Jacobus Smit, the plaintiff, said he resided at Fraserburg. He was the son of Frans Albertus Smit. Witness surrendered his estate previous to his father's death, and a sale

of his estate was held. Witness objected to the trustee selling his expectancy under his father's will, asking how this could be sold when he could get nothing until the decease of his parents. Witness had since been rehabilitated. Witness signed the document produced, which made over his expectancy, in ignorance. At the date of the sale witness knew what were his full rights under the will and knew that his rights could not vest until the death of his parents. The value of the whole farm was £3,000. This was a fair value at the present time. Three days after his father's death he first heard the document read. The defendant was not present. Witness claimed that he was entitled under the will to the transfer of one half of the farm.

Cross-examined: He did not know that his right under the will was advertised for sale by public auction. Witness was present at the sale, when his father bought the share of witness for £206. He would deny that the document was explained to him before he signed it.

Jacobus Hendrik Smit knew the last witness, who was his brother-in-law. After the insolvency of the last witness he signed a document which was not read over to him. Witness was present at the time. Willem wanted to read it, but they would not allow him to read it. Plaintiff afterwards signed it.

Cross-examined: Plaintiff was at first unwilling to sign the document. Mr. Hemming induced him to sign the document, saying it was a paper that was forgotten in the sale. Hemming said it was not necessary that plaintiff should read the document.

This closed the case for the plaintiff.

For the defence,

Robert Campbell Hemming, now of Johannesburg, but formerly in partnership with Mr. Smith at Fraserburg, said he knew the plaintiff. Mr. Smith, partner of the witness, was trustee in the estate of the plaintiff. The document produced was in the handwriting of witness, and was signed nearly twenty years ago. Plaintiff was not coerced into signing the document, and witness was quite sure that plaintiff was not persuaded to sign anything he did not understand.

Cross-examined: Witness could not remember how he came to write the document.

This closed the evidence.

Mr. Graham: No right was vested in the plaintiff at the date of the insolvency; *Jones* v. *Mathews* (7 Sheil 86) clearly settles this point in the case. Under this codicil a direct bequest to the survivor is made. If either child had died, his children would not have succeeded. Till the death of the survivor no right to this farm was to vest. The intention is the main point. As to acquiescing—even if the Court disbelieves plaintiff as to the fraud alleged by him, yet if this is a *fidei commissum* the document relied on to prove acquiescence does not alter the state of affairs at all even if the plaintiff knew his rights for there is no consideration for the document.

The Chief Justice: The purchaser buys a doubtful right. Before paying, he gets a document signed by the plaintiff to secure himself, then pays. That is consideration—and sufficient consideration.

Mr. Graham: But the purchaser had *already* bought and was therefore already bound. If the plaintiff was ignorant of his rights he is not bound even if there were no fraud.

Mr. Searle not called on.

De Villiers, C.J.: The terms of the codicil in question are in many respects similar to those which the Court had to construe in *Strydom's case* and I do not wish to add anything to the remarks then made. Assuming, however, that the insolvent had no vested interest in the legacy before and at the time of his insolvency, the question still remains whether he can now, after his rehabilitation, claim the farm or its value from the executrix of the purchaser. Shortly after the auction sale of the farm to the insolvent's father, the insolvent signed a document acknowledging that all his interest in the farm had been publicly sold with his full concurrence. It was in consequence of this concurrence that the sale was effected, and without his signature to the document his father would not have paid the purchase price to the trustee. Can he now claim the value from his father's estate on the ground that his right to the legacy did not vest until after the confirmation of the account of his insolvent estate? If a person stands by knowing that an article belonging to him is being sold to a third party and does not object to the sale, he is held to have authorised the sale. *A fortiori* if he consents to the sale he cannot afterwards recover the article or its value from the purchaser who has paid the purchase price to the seller. It is true that in the present case the only consideration received by the insolvent is that the fund for distribution to his creditors has been increased by reason of the sale of his interest, but it is the detriment to the purchaser which constitutes the real consideration. He has paid the money without any possibility of again recovering it from the creditors and the payment was made upon the faith of the plaintiff's consent to the sale. Whether that

consent be regarded as an implied mandate or as creating an estoppel, the plaintiff cannot be allowed to evade the consequences of his own act. To adopt the language of the Roman law, *detrimitur ne in suum factum veniat.*

Judgment must be given for the defendant.

Their lordships concurred.

[Plaintiff's Attorney, S Mostert; Defendant's Attorney's, Messrs. Tredgold, McIntyre & Bisset.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN and Hon. Mr. Justice MAASDORP.]

CRUYWAGEN V. GIRD. 1897. May 5th. „ 6th. „ 7th.

This was an action brought to recover the balance due under a building contract.

The plaintiff's declaration alleged:

1. The plaintiff is a builder and contractor, residing at Bottelary, in the division of Stellenbosch; the defendant, now a widow, resides at Prospect Hill, in the division of Malmesbury.

2. On 18th January, 1896, the plaintiff contracted and agreed, at the special instance and request of the defendant, to do certain work and supply certain materials in and about certain buildings at Prospect Hill aforesaid in accordance with the specification, copy whereof signed by the plaintiff is annexed marked A, and embodies the contract between the parties.

3. In consideration of the performance of the said work and supply of the said materials by the plaintiff, the defendant agreed to pay to him the sum of £800.

4. Thereafter, on the 22nd February, 1896, the contract aforesaid was in certain respects modified, and the defendant agreed to pay the sum of £850 sterling in lieu of the sum of £800 sterling aforesaid, as will more fully appear by reference to the agreement in writing signed by the parties, copy whereof is annexed marked B.

5. The plaintiff duly performed and completed the said work, and supplied the said materials in terms of the said contract so modified, and the defendant at different times paid to him sums amounting to £400 sterling in respect of the sum of £850 sterling aforesaid, and has taken possession of the building aforesaid from the plaintiff and remains in possession thereof, but wrongfully and unlawfully after lawful demand refuses to pay the balance of £450 sterling or any part thereof.

Wherefore plaintiff prays for judgment for the sum of £450 sterling, or for alternative relief with costs.

The defendant's plea set forth:

1. She admits allegations in the first four paragraphs of the declaration.

2. As to the 5th paragraph, she denies that the plaintiff duly performed and completed the said work or supplied the said materials in terms of the contract.

3. She says that the work was performed in an unskilful, negligent, improper, and unworkmanlike manner, and not according to the contract, and was left unfinished by the plaintiff.

4. The defendant has called upon the plaintiff forthwith to complete the said work according to the said contrrct and remedy the defects therein, as set forth in the report of an architect which has been duly supplied to the plaintiff.

5. Upon the said work being duly completed and the defects remedied, the defendant is and always has been ready and willing to pay plaintiff the balance of £450, being the price according to the said contract.

6. The defendant admits that she is in possession of the said buildings, and says that she has always remained in possession thereof whilst the plaintiff was engaged in work thereon as was agreed between herself and the plaintiff.

7. She admits that she has paid to the plaintiff the sum of £400, and that she refuses to pay to the plaintiff the balance until he has completed the said work in terms of the said contract; save as above set forth she denies the allegations in paragraph 5.

Wherefore she prays that the plaintiff's claim may be dismissed with costs.

The plaintiff's replication was as follows:

1. The plaintiff admits that after the completion of the work, and after the defendant took possession of the buildings, a report of an architect was brought to his notice raising certain objections to the work and materials, but he says that when the defendant took possession she expressed herself as satisfied with the work.

Otherwise the replication was general.

On these pleadings issue was joined.

Mr. Innes, Q.C. (with him Mr. Schreiner, Q.C.), for the plaintiff.

Mr. Searle, Q.C. (with him Mr. Maskew), for the defendant.

The following evidence for the plaintiff was taken:

William Black, architect, practising in Cape Town for the last three and a half years, said he had examined the building about which there was this dispute. There were seven bedrooms in the house, dining-room, breakfast-room, and altogether it was a large homestead. Witness made the plan produced after the building was completed. Witness had seen the report of Mr. Vixseboxse, which, he thought, was somewhat exaggerated. As to the beam filling, it was not absolutely necessary, and was not done unless specified. It would cost about £7 to do this. There was not a sufficient number of down pipes, two more were required. As to mantelpieces these could be obtained from £1 upwards. Witness had seen country houses of similar quality and plastered in no better style. The plastering was better than in the older parts of the house. The painting seemed to consist of three coats. The débris outside should be removed. This would cost about £8. There was a defective piece of timber in the roof, but this had been made strong enough by another piece of timber being bolted over it. The valley rafter was nailed to the main rafter. This was not a good job, but it could be remedied for a few shillings. One of the sheets of iron on the roof had been slightly punctured. Two others were discoloured, probably by salt water. The punctured sheet could be replaced by another one for about 5s. 6d. The floor of the loft would bear 1 cwt. to the square foot, but there would be a deflection of about one-fifth of an inch. Ninety-eight tons could be stored in the loft.

Postea (May 6th).

[BEFORE THE FULL BENCH.]

William Black, architect, continuing his evidence under cross-examination, said that all the windows he saw were painted. The plastering was pretty fair. There was no plastering on the inside of the gables. The prices he had quoted were prices that would have to be paid to local tradesmen. He inspected the whole of the house. Some of the windows would not fit properly.

Re-examined: All the woodwork was of excellent quality. He had been connected with the construction of eighty-three houses during the last three years. The homestead could not be put up for anything like £850 if Cape Town building regulations were adopted.

Johannes Jacobus Cruywagen, the plaintiff, said he was a builder who had had experience. Some time ago he built the public school at Ceres. In January, 1896, witness went to Prospect Hill, where he found the place had been burnt so that only the walls were left standing. Defendant showed witness over the building, and discussed things generally with witness. Defendant pointed out where doors and windows were to be placed, and also where others were to be closed up. Nothing was said as to grates or mantelpieces. Defendant said ceiling would be too expensive, and that she would paper the rooms herself, as she could then choose her own paper. Defendant asked witness to send in a tender for the work. She said she expected other tenders. Witness sent in the written tender produced, which was accepted. Afterwards witness saw the second son of defendant, and from a conversation he had he sent in an amended tender and came to an understanding. Witness afterwards saw Mrs. Gird before he began to work. Defendant agreed to pay £50 for extras. Defendant said she thought the front stoep could remain as it was. Then it was decided that the front stoep should be new, and this was an extra. Other extras, including the changing of a flat roof to a pitch roof, brought the contract up to £850. Defendant said it would be needless expense to draw up documents, and she would just give the work to a man whom she could trust to do it properly. The plaster was in proportion of two parts sand to one part lime. Some of the sand supplied by defendant was more dust than sand. There were nine men on the work. Witness lived near the job whilst it was on, and was there every day, working himself and giving his personal supervision. This continued for about five months. Witness had actually paid out for labour and material £776 10s. 8d., without reckoning a penny for his own work or time. Generally he calculated his own time as worth 15s. to £1 a day. While the work was going on the defendant occupied two rooms in the lean-to building. The kitchen was made use of without asking permission, and this before the walls were dry or the floor properly laid. The carting was all done by the defendant. Witness agreed to alter the kitchen stove for £5, but he did not now claim this extra. He had not been paid this amount, nor had he been paid another £5 for other extras. Harry Gird made no objection to the work, which he inspected daily. He did, however, suggest certain minor alterations. In February, 1896, defendant paid witness £200, another £200 in April, 1896, and this was all witness received until an order of Court was made. About the middle of July defendant told witness that her son Harry had been over the place with Mr.

Vixseboxse and Mr. De Korte, and they found some faults with the work. At that time the son Willie said the money would be deposited for witness. Witness was afterwards told by Mr. De Korte that the money could not be paid until a satisfactory report had been received from the architect. Defendant on being asked said that nothing had been left undone that should have been done by witness. The son Harry said the roof leaked, but this was because the gutters were blocked with rubbish. Afterwards Mr. De Korte said he could not pay any money because of Mr. Vixseboxse's report, which Mr. De Korte said was framed as black as it could possibly be. Witness said if he could settle it without going to Court he would allow £25, but no settlement was arrived at.

[Before Hon. Mr. Justice BUCHANAN and Hon. Mr. Justice MAASDORP.]

Johannes Jacobus Cruywagen, cross-examined by Mr. Searle, Q.C., said what he said as to the plaster consisting of two parts sand and one part lime referred to the outside plaster. The inside plaster was natural clay. The windows and doors might be machine-made, but they fitted all right. All the carpentry work was done under the direct superintendence of witness. He could find no leak, and if the place leaked now, he could not explain it. Witness took away two or three bags of lime, but no planks. It was before the report that defendant told him she did not know why Mr. De Korte did not pay. Witness did not employ a plumber. Witness told his men not to use two or three damaged sheets of corrugated iron. One of the rafters had a knot in it, but this was put right with tie-pieces. Witness made no plan.

Re-examined: Posts are sometimes put in the strongest roof. Witness never made a plan to build by. Witness tested the rafter that had been spliced, and found it quite strong enough.

Christian Henry Dreyer, brother-in-law of plaintiff, living about half an hour from Prospect Hill, said plaintiff used to reside with him whilst he was building at Prospect Hill. He was at the farm with plaintiff when he heard defendant say she was astonished Mr. De Korte did not pay up. She also said she was satisfied with the work.

Arendse Cupido, mason, Stellenbosch, said he was a competent mason, as also was his brother Willem. They were both engaged on defendant's house. The work they put in was good. They were paid by the day. The external plaster was good, two parts sand, one lime. The lime was good; the sand was not always good. The new work was better than the old.

Cross-examined: The inside plastering was good, but it was eight parts sand, two clay, and two lime.

Willem Cupido, elder brother of the last witness, gave corroborative evidence.

Joseph Gabriel, painter, who did most of the work, said it was up to the usual Stellenbosch standard. Three coats of paint were put on. The skirtings were stained and finished. Witness had since done the papering of the house for Mr. Harry Gird.

This closed the plaintiff's case.

For the defence,

Johannes Albertus Vixseboxse, architect, Cape Town, said he had practised in the Colony and also in the Free State and the Transvaal. He had had considerable experience. He adhered to the report he had made as to the building at Prospect Hill. The roof of the place was not safe. The floor of the loft was not fit to bear any considerable weight. There should be four or five more down pipes. Doors and shutters did not hang properly. Some of the shutters had warped, and some were not properly fixed. Doors and shutters were of very cheap class. Most decidedly three coats of paint had not been put on. He thought the plastering outside was about one part lime to nine or ten of sand. It would cost between £300 and £400 to put the building right.

Cross-examined: Witness had had experience of all sorts of work, both high-class and rough country work. He arrived at the £300 or £400 through guessing, which he based upon his experience. He had not gone into details. It would cost £ 00 to put the roof right, and £50 to put the plastering right. The balance would be made up in carpenter's work and painting. No scientific analysis was made of the plaster. Witness put the plaster into a tumbler and dissolved it, and judged the proportions of the sand and lime by his eye. He put down the proportions as nine of sand to one of lime. Externally, the painting consisted of one coat, and as far as he could see there was only one coat anywhere. The plaster was coarse because the sand was too rough. The walls were fit to receive paper. The floor of the loft was just like a wire mattress.

Postea (May 7th).

[Before the Hon. Mr. Justice BUCHANAN and Hon. Mr. Justice MAASDORP.]

E. Seeliger, architect, said that he had examined the building, and considered that it would cost £300 to £350 to put it in the condition which he was told it ought to have been in.

In cross-examination by Mr. Innes, witness mentioned the various sums which would have to be expended in repair, totalling £26, but said that was only patchwork.

Anthony Benning, builder, said the building in question looked like amateur's work. The roof was not strong enough, and unsafe. He considered that the place would not last more than six or seven years as a habitable building. The floor was unfit for a forage store. It was only safe when there was nothing on it. There was a beam within three inches of the chimney flue. Altogether he had not seen worse work of the kind. To make the building fit for a forage store it would cost £270 to £300. The flooring and joists would cost £120.

Cross-examined by Mr. Innes: He had ignored the specifications altogether when criticising the building. He would not have built the place for less than £1,300 or £1,400, and he was sorry for the man who took the work at £850.

Adolphus William Ackerman, architect, Cape Town, said the character of the work of the building in question was very poor indeed—absolute jerry building. The roof was unsafe. As for the floor of the forage store, he thought it would hold about half a cwt. per square foot. The skirting boards were fixed with nails which would have been more appropriate in the rafters, and the rafters *vice versa*.

Cross-examined by Mr. Innes: The house should have been built exactly as the old house was. The old house had stood sixty years; the present one would not stand ten years. In one place he remembered the specifications not having been complied with. There was 1-inch flooring specified, and only ¾-inch was put in. It was a common thing in the trade to supply ¾-boards when 1 inch was specified.

Re-examined: The house leaked all over. If new doors and windows were put in, the cost of making a good job of the house, £600; without windows and doors, £450. To build a house of the size of the one in question would cost £1,500.

Mrs. Emily Elizabeth Gird said she had entered into an arrangement with defendant to build the house. Since the house had been built it had leaked dreadfully. She had not said that she was satisfied with the work, but she had said that she wanted the work well done.

Cross-examined: She had promised to give Cruywagen £200 on account whilst at Stellenbosch, and afterwards she said she would write to Mr. De Korte, her agent, to tell him to put £250 to his credit. But she kept finding different defects in the place. In October she had told Cruywagen she was pretty well satisfied. Now she was very dissatisfied. She had never been willing to settle the dispute for £50 or £60.

Harry Charles Gird, son of the defendant, said he had been in Johannesburg at the time the contract was entered into. He came down before the building was finished. He had removed the rubbish from inside the house. He had never heard Cruywagen complain of the quality of the sand or of want of bricks for the w.c. steps. During the last rains eighteen different leaks were found, in addition to the windows. In a heavy wind there were rooms in which a candle could not be lighted.

Cross-examined: The gutters leaked considerably, so that the rain-water tanks received scarcely any of the water. In three sheets of corrugated iron seven screws had been driven, and not one had touched the rafter.

William Gird, son of Mrs. Gird, said that Cruywagen had not complained of the quality of the sand or lack of bricks. He corroborated his brother's evidence.

After argument,

The Court gave judgment for £400 (of which £200 has already been paid) with costs, including costs of the two previous applications.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn; Defendant's Attorney, J. C. de Korte.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

BAM BROS. AND CO. V. PERKINS. { 1897. May 6th.

Mr. Graham applied for final sequestration of defendant's estate.

Granted.

ILLIQUID ROLL.

SOUTH AFRICAN MILLING COMPANY V. MARAIS.

Mr. Close applied, under rule 329, for provisional judgment on a sum of £69 19s. 6d. for goods sold and delivered, with costs.

Granted.

GENERAL MOTIONS.

IN THE INSOLVENT ESTATE OF GEORGE M. EDMEADES.

Mr. Molteno applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for transfer to the trustees of the said estate of certain three-eighth shares of Lot No. 1 of the farm Wynand's River, in the district of Oudtshoorn, purchased in 1880 from the estate of Philip A. du Prees, of which transfer cannot be obtained, as the representatives have left the Colony and their whereabouts are unknown.

The Court granted the application.

IN THE ESTATE OF WILLIAM HEATHERSHAW.

Mr. Graham applied for authority to the Sheriff to pay over to the General Estate and Orphan Chamber the balance arising from the sale in execution of portions of Lots Nos. 41 and 42, being ground situated in the village of Wellington, in reduction of a mortgage bond on the same taken over by the Chamber to liquidate the insolvent estate of William H. Lategan, from which estate the said Heathershaw bought the land, the mortgage bond to secure the balance of the purchase price being lost or mislaid.

The Court granted rule *nisi* as prayed, rule to be returnable on May 14, and to be personally served and published once in a newspaper circulating in the district of Wellington.

THE PETITION OF MARY ANN MORGAN.

Mr. Macgregor applied for authority to petitioner to sell and transfer, without the assistance of her husband, who left the Colony in 1885 as a seaman and has not since been heard of, certain land near Port Elizabeth, purchased with funds accruing to petitioner out of her father's estate, and to apply the proceeds in payment of taxes and costs, and the balance in aid of her maintenance and support.

The Court granted the application.

THE CO-OPERATIVE BAKING COMPANY.

Mr. Close applied for an order in terms of the report of the official liquidator.

The Court appointed Mr. C. C. Silberbauer as attorney for the liquidator, with the remuneration of 5 per cent. commission, the liquidator to have power to call up the remaining 10s. per share unpaid, and fixed the 31st instant as the last day for filing claims.

Ex parte VAN DER BYL.—*In re* SCHOLTZ.

Mr. J. Ross-Innes, Q.C., applied for an interdict restraining the sale of certain property pending an action upon a will.

The Court granted a rule *nisi* calling on the respondent to show cause on the 13th May why the interdict shall not be granted, pending an action to have the will set aside; rule to be served on Messrs. J. H. Hofmeyr, A. B. de Villiers, and the respondent.

BELL V. BELL.

This was an action brought by the wife against her husband for restitution of conjugal rights, failing which, for divorce. The parties were married in community of property on January 9, 1891, at Burghersdorp.

Mr. Benjamin appeared for the plaintiff.

Florence Kate Bell said she was married on January 9, 1891, to John Louis Bell. There were no children of the marriage. Witness lived with her husband until September, 1891, when she went to England with his consent. He promised to send witness £7 a month, but he sent her no money. Witness wrote to her husband several times but received no reply. Witness afterwards returned to South Africa in 1893, and went to Johannesburg, where she heard her husband was. Afterwards she wrote to her husband, who was in Burghersdorp, asking for an allowance, but received no reply. Then her solicitors wrote to defendant, whereupon he sent a letter stating that he was not willing to cohabitate with plaintiff, nor to make her any allowance. Plaintiff was willing to return to her husband.

The Court granted a decree for the restitution of conjugal rights, defendant to return to cohabitation on or before May 31, failing which, calling upon defendant to show cause why a decree of divorce should not be pronounced.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

KING V. COLONIAL GOVERNMENT. { 189. May 10th. „ 11th.

Carriers — Onus — Delivery — Railway Department.

This was an action for £340 damages, for non-delivery of four wagons, instituted by King Bros., of Durbanville, against Sir James Sivewright, in his capacity as Commissioner of Public Works, and as such representing the Colonial Government.

The declaration alleged that on the 17th May, 1896, the defendant, by his servants or agents employed by him in and about the business of a common carrier by rail, duly received from the plaintiffs at the Malmesbury Station and undertook and agreed safely to carry and convey and to deliver to the plaintiffs, or to such person or persons as they might appoint, at the station at Mafeking sixteen wagons, the property of the plaintiffs.

The said wagons were received by the defendant upon certain railway trucks, numbered 6,004, 1,943, 2,325, 2,365 3,765, and 3,071, upon which the said wagons were duly loaded for carriage and conveyance as aforesaid.

Thereafter, on the 12th May, 1896, the plaintiffs duly instructed the stationmaster at Mafeking, the defendant's servant or agent, to receive such instructions, to deliver the said wagons to Musson Bros., of Mafeking, who had purchased the said wagons from the plaintiffs.

The defendant by his servants and agents duly delivered ten of the said wagons to Musson Bros., and the latter also further received from one Julius Weil two more of the said wagons, which had been carried and conveyed to Mafeking on the truck No. 3,765, but which were, by mistake on the part of the defendant's servants, in the first place, wrongfully and unlawfully delivered to the said Julius Weil, but the plaintiffs or the said Musson Bros. did not, and have not at any time, received delivery of the remaining wagons, four in number, which had been loaded as aforesaid upon the trucks Nos. 1,943 and 2,365, the said wagons being of the value of £310, and the cost of carriage to Mafeking being £25 8s. 10d.

By reason of the failure and neglect of the defendant, after lawful demand duly to deliver the aforesaid four wagons to the plaintiffs or to the said Musson Bros., the plaintiffs have sustained, if the wagons be now delivered to them, damages in the sum of £100 over and above the cost of carriage aforesaid, inasmuch as they have lost their profitable contract of sale of the same to the said Musson Bros., and inasmuch as the wagons have now fallen in value.

If the said wagons are not delivered to the plaintiffs they have sustained damages in the sum of £340, being measured by the value of the said wagons, with interest thereon from the time when they should have been delivered.

The plaintiffs claimed:

(*a*) An order compelling the defendant to deliver to the plaintiffs at Mafeking the four wagons aforesaid in good order and condition.

(*b*) Judgment for £100 as and for damages; or in the alternative to (*a*) and (*b*),

(*c*) Judgment for £310 damages and costs.

The defendant in his plea admitted the receipt of the wagons, and of the instructions to deliver them to Musson Bros., of Mafeking, and specially pleaded due delivery of the same.

He alleged that the plaintiffs had failed, and refused to pay the carriage on the said four wagons, amounting to £25 8s. 10d., which amount he claimed in reconvention.

The replication was general. In their plea to the claim in reconvention the plaintiffs admitted their refusal to pay the carriage on the missing wagons. Issue was joined on these pleadings.

Mr. Innes, Q.C (with him Mr. Schreiner, Q.C.), appeared for the plaintiffs.

Mr. Sheil (with him Mr. Bisset), for the Government.

For the plaintiffs the following evidence was given:

John King, member of the firm of King Bros., Durbanville: On 1st May last year they undertook to supply Musson Bros., of Mafeking, with sixteen wagons, the cost of which was to be £77 10s., although he afterwards made a reduction of £2 10s. per wagon. They were what were called the Koeberg wagons; they were second-hand wagons. His firm had been supplying a large number of wagons to Weil, of Mafeking, and about the beginning of May he had a telegram that everything at Mafeking was "mixed up," and that delivery of the wagons could not be obtained. Accordingly on 5th May he went off for Mafeking himself. At that time the sixteen wagons for Musson Bros. were at Malmesbury. A large number of wagons were at that time being despatched to the North, and he noticed at Mafeking that there were about 150 yards along the

railway line strewn with pieces of wagons. There were heaps of different sections of wagons lying about in heaps, and great confusion prevailed. His wagons were sent up in sections. As his wagons did not arrive at Mafeking he, on 12th May, came as far south as Beaufort West in quest of them, and before leaving Mafeking he gave the stationmaster written instructions as to the disposal of the wagons should they arrive in his absence. He found no trace of the wagons, and returned to Mafeking on Sunday, 17th May. Musson Bros. had cattle waiting for the wagons, and were greatly inconvenienced by the delay. Witness was informed by the stationmaster that no wagons had arrived, but on the Sunday evening, on going round the station himself, he discovered a truck, of which he had the number, which contained a portion of his wagons. Witness did not see any railway official present to see the putting of the wagons together or to see that delivery was given. The railway staff at Mafeking was not adequate. There was only one official that he knew to be an official, but he had so much to do that he was always "all over the place." The ten wagons were put together on Tuesday, 19th, and delivery was made on the 20th. None of the wagons bore marks; of that he was positive.

By Mr. Justice Buchanan: He was certain that there were not four of the wagons marked.

Mr. Innes said that it was contended by the defendants that four of the ten wagons bore the marks of the trucks they had arrived in. That was one of the important points of the case.

Witness said that on the 27th it was pointed out to him that four of the ten wagons were marked.

By the Chief Justice: On the 20th there were no marks, but the marks were there on the 27th. The wagons were then in the possession of Musson, but were standing on railway ground.

Witness gave details of wiring to ascertain the whereabouts of the missing wagons, which efforts were, however, fruitless. On 24th May, witness began to keep a note of all the wagons that arrived bearing goods for his customers. On 24th May, he observed that one of his trucks had arrived, and on speaking to the stationmaster on the subject, that official made a thorough examination of his books, and then said that witness's trucks had arrived, some on 14th May and others later. On the 27th, witness found four of his wagons, marked with the number of trucks, two, 2,365, and two, 1,943, standing where the ten already referred to had been. Four of the ten had been sent up-country. He was certain that the four wagons were not marked before the 27th of the month. Afterwards he transferred to Musson two wagons which had gone to Weil.

By the Chief Justice: It was possible that the four marked wagons were not part of the first ten. Four more might have been despatched by Musson, and the four marked wagons might have taken their place.

Witness could not now dispose of the wagons at Mafeking. Owing to the great demand for wagons then for the Mashonaland expedition the prices then were high. He calculated that his loss would at least be £60 per wagon. Witness put in a formal claim for the four missing wagons.

Cross-examined by Mr. Sheil: Witness said that the marks were put on the wagons in question to cover somebody's negligence. On a previous occasion he had trouble with the Railway Department there, wagons having been delivered to Weil, when they were consigned to one Gerrons. Weil at once returned the wagons when the mistake was made known to his firm.

By Mr. Innes: The Railway Department did not know they had delivered the wagons to the wrong person.

By the Chief Justice: By his books witness could show how all the wagons despatched from Malmesbury were disposed of, and these books showed that there were four wagons short.

Alfred Musson said that he last year was carrying on business at Mafeking as commission and forwarding agent. He had a partner, and the name of the firm was Musson Brothers. He purchased sixteen wagons from King, and for three weeks had six teams of mules waiting for six of the wagons. They were for the Chartered Company. He corroborated as to receiving the ten wagons which came off four trucks. Subsequently he received two wagons from King, which had gone to Weil. The ten wagons were off-loaded by railway servants, by a large gang of "boys." He was told that the missing trucks had arrived on 14th. Witness was present when the wagons were off-loaded and while they were put together. Witness did not see marks on any of the wagons. The wagons were placed in front of his office, and he every morning ran his eye along them to see if the ten, and other s that he had, were all there. The ten remained intact there. On 26th May he received two more wagons from King. The price was £75 for the ten and £150 for the two. Mills afterwards drew his attention to marks on four of the ten wagons, and the stationmaster said that the four other wagons must have been received. Witness ridiculed the idea that he had received the four other wagons.

Mr. Innes: It will be found that none of Mr. King's wagons was consigned to himself, to order, but consigned as "oats" to Mr. Weil.

Witness said there was a "boom" on at the time, and the railway staff was quite inadequate for the work.

The Chief Justice: I was at Mafeking in May last year, and I saw for myself the condition of things. The confusion was very great.

Witness said the usual green ticket, attached to trucks with vehicles, was not attached to any of the trucks. Mr. Musson was formerly in the Railway Department at Cape Town, and knew that goods were not given out without receipts. At Mafeking no receipts were taken, except perhaps for donkeys and mules.

Cross-examined by Mr. Sheil: Witness never saw railway officials marking articles as they were loaded. There were no marks visible. He engaged Gerrons to put the wagons together and charged for the ten.

Joseph Gerrons, coach and wagon builder at Mafeking, said that in May last year there was a great rush of traffic at Mafeking Station, and the staff was perfectly inadequate to cope with it. Six wagons, on one occasion, consigned to him were delivered to Mr. Weil. He remembered Mr. Musson giving him instructions to put together sixteen wagons coming from King. Witness then watched every lot of trucks that came in, looking for the wagons. He and King on the Sunday evening discovered the wagons in trucks standing at the station, and witness afterwards, with his foremen, put them together. There were ten wagons, and there were no marks whatever on either of them. Witness, a week later, heard that four of the ten wagons were numbered. He did not put any more wagons together for Mr. Musson at that time.

Cross-examined by Mr. Sheil: His duties were more supervisory than active, but he could say that none of the wagons bore marks when put together. He never saw Mills put wagons together.

The Chief Justice: Is your case that Mills put the wagons together?

Mr. Sheil: It is that he put two together.

By the Chief Justice: Witness had never seen Mills put a wagon together. Witness got paid 5s. for putting each wagon together. His books showed that he on 19th May received £2 10s. for putting the ten wagons together. It required some skill for placing the different sections of a wagon together, especially when a large number of wagons arrived together.

Mr. Innes intimated that with the exception of Mr. Garrons's foreman that concluded his case.

J. Goodman, stationmaster at Wynberg, stated that he was stationmaster at Mafeking in May of last year. He rememberedon the 13th and afterwards trucks arriving with sixteen wagons for Musson. In off-loading wagons the truck number and the consignee's name were placed on wagons and machinery. Witness saw that this marking was done on the wagons being off-loaded. He saw that most of the wagons off-loaded on Sunday (17th) were so marked. He remembered that later King came and said that four wagons were missing, and he took King's word for it, and wired about the trucks. On the following Sunday he went over his books, and found that the trucks with the wagons had arrived. The wagons were afterwards found, one loaded up and three empty. Witness had seen Mills putting wagons together, so far, at least, as to enable said wagons to be removed from the neighbourhood of the crane.

Cross-examined by Mr. Innes: There was a good deal of work at Mafeking in May of last year, but no confusion. If there was confusion, it was not caused by the Railway Department, but by the public. Witness admitted that invoices were for the two trucks said to be missing, and they did not show that anyone had signed for their receipt. Another invoice which set forth that the contents of the truck were "Colonial oats" and consigned to Mr. Julius Weil, contained part of defendant's wagons.

Mr. Innes here pointed out that the Railway Department's "truck-book," which should show when the trucks arrived and when they were despatched, had not been forthcoming. Plaintiffs had made repeated applications for the book since 22nd April, and the latest information they had had was that the book had been sent to Palapye.

Witness could not explain how it was that the two trucks, which he contended contained the two missing wagons, had not been signed for. Whoever off-loaded them should have signed for them. The green tickets referred to, which were now produced, he admitted were receipts for the vehicles having left Malmesbury. He (Goodman) was quite positive that the sixteen wagons were off-loaded on Sunday the 17th. He could not say the exact hour, but it was during the day.

Mr. Innes: But it was only on Sunday evening that Mr. King and Mr. Gerrons found the wagons in the trucks at the station.

Witness: I am positive that they were off-loaded on that Sunday.

The Chief Justice: Was it customary for you to off-load goods on Sundays?

Witness: I was at Mafeking for nine months and I never could avoid working on Sundays, the pressure was so great.

Mr. Innes: In the confusion you admit, and in the great press of work, is it not possible you have made a mistake? Do you not off-load on the Monday?

Witness adhered to his statement that the off-loading took place on Sunday, 17th.

Mr. Innes: Well, here are the invoices which state that one wagon arrived on the 17th and another on the 18th. How do you explain that?

Witness said he could not explain it.

Mr. Innes: Did you not begin to off-load on the Sunday and conclude with what trucks there were on the Monday.

Witness: No, we finished the work right off.

Mr. Innes: But Mr. King says he saw some of his wagons in the trucks on the Sunday evening, and Mr. Gerrons supports him. Do you think, for instance, that Mr. Gerrons is not telling the truth?

Witness: I believe he is telling the truth so far as he can remember.

Mr. Innes: Is it not more likely that you, who were off-loading wagons daily, are making the mistake about these particular wagons?

Witness: I may be, but I think not.

Postea (May 11th).

J. Goodman's cross-examination by Mr. Innes was resumed. Witness gave verbal instructions to the foreman and checkers to have the off-loaded goods marked with the marks on the trucks. He could not remember the date, but it was befor the "boom" set in. In the case of Gerrons's wagons which went to Weil by mistake, they had not been marked for the reason that Weil's people off-loaded the wagons, and took them themselves. Witness was aware that after a time King marked his wagons as they arrived at the station. It was true that Weil had a separate siding to himself, although the trucks marked "oats," which contained plaintiff's wagons, did not go there. The oats were off-loaded at the department's station. Witness saw the trucks of oats off-loaded.

Mr. Innes: All of them?

Witness: Three or four of them.

Mr. Innes: But there were seven trucks.

Witness said he saw the oats from three or four trucks off-loaded and placed in other trucks.

Mr. Innes: Do you adhere to your statement of yesterday about the off-loading of the sixteen wagons taking place on the Sunday?

Witness: I am not quite certain as to one truck. *I think* that one truck may have arrived on the Monday.

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Mr. Innes: Then you do not adhere to your statement that the off-loading began and was finished on the one day?

Witness: As far as I remember it was done the same day.

Mr. Innes: And yet you say that one truck may have arrived on the Monday?

Witness: I think it is possible that one arrived on the Monday.

Mr. Innes: You did not say that yesterday.

Witness: I believe that one truck came on the Monday, as far as I can remember. Of course I am only speaking from memory.

Mr. Innes: Yes, of course.

Witness: And I am quite certain that the trucks in dispute were there on Friday and Saturday.

Mr. Innes: You think that from what you saw in the truck-book. Why are you so sure that the special trucks were there?

Witness: Because they were on hand.

Mr. Innes: That is, because your books say so.

Witness: No, they were there.

Mr. Innes: But the only reason you have for saying so is because the extracts from your books say they came in on Friday or Saturday, and therefore, you declare, when the books say they were in, that the trucks must have been in.

Witness: I do not say must have been. I say they were there.

Mr. Innes: But there were a lot of other trucks?

Witness: Yes, a great many.

Mr. Innes: Where is this truck-book which should have been produced, and which would have shown when the trucks came in?

Witness: It was at Mafeking when I left.

Mr. Innes: When was that?

Witness: I left on November 28.

Herbert Mills, at present foreman checker at Kimberley, said that in May last he was foreman checker at Mafeking. He remembered a certain consignment of wagons arriving, one of fourteen wagons and the other of two wagons. The fact that the trucks were loaded with oats as well drew his special attention to the wagons. The wagons were off-loaded on Sunday, May 17. He could remember, as on that day he off-loaded between sixty and eighty wagons. He could remember truck No. 1,913 for the reason that a servant of Weil's received twenty bags of oats, and the next day another man came for the remaining fifty, and he thinking that the consignment was twenty bags short, refused to take the delivery of the thirty. The stationmaster ordered him and others to place the marks of the trucks on the wagons when they were off-loaded. There was no other method of identification than the truck mark. He heard about the

wagons being missing, and on Sunday, 24th, he went to Musson's place and found the four trucks there. They bore blue pencil marks (the numbers of the trucks) which marks were made by him. The two invoices might be without signature, showing that they had arrived, but invoices did not always arrive with the goods. Sometimes a week elapsed before the invoice was received; sometimes longer, and they had to be wired for.

Cross-examined by Mr. Innes: Witness said he could not swear that Musson received the sixteen wagons. He could not swear that he received more than ten. Witness did not keep account of the wagons that arrived or went to Musson. Often there were no receipts got for the goods—wagons, and the like. The Railway Department did not worry Musson and others about receipts. Witness distinctly remembered taking two wagons out of truck 1,943 because of the dispute about the oats.

Mr. Innes: But how would the dispute about oats make you remember the number of a truck?

Witness: The dispute was about the truck.

Mr. Innes: No, no. You said the dispute was about the number of bags of oats.

Witness: But from that truck.

Mr. Innes: Did you take a note of the number?

Witness: No.

Mr. Innes: Could you give me the number of any other truck that you worked on at the time?

Witness: No.

Mr. Innes: Then a day elapsed between the first man and the second coming for the oats, and you have said that you off-loaded the truck on the Sunday, so that when the second man came and the dispute arose the truck would be gone?

Witness: The truck was still standing there Of course I am speaking from memory.

Mr. Innes: But you distinctly remember the number of the truck?

Witness: Yes.

Mr. Innes: But you can only recall that one truck?

Witness: Yes.

Mr. Innes: Tell us about the dispute that so impressed the number of the truck upon you.

Witness: It was on the Friday that one man got twenty bags of grain, and on the Sunday another man came who would not take my word that the first twenty had been delivered, and he refused to take the remaining thirty.

Mr. Innes: When did you off-load the wagons from this truck?

Witness: On the Sunday.

Mr. Innes: Then after you unloaded the grain did you replace the tarpaulins?

Witness: No.

Mr. Innes: And the wagons were left quite open in the truck?

Witness: Yes, they were left quite open.

Mr. Innes: Could any one see the wagons in the truck in walking through the station grounds?

Witness: Quite easily.

Mr. Innes: Then when Mr. King and Mr. Gerrons on Sunday evening went through the trucks looking for wagons, they could easily have seen the wagons in this particular truck?

Witness replied that he thought so. He could not remember the hour when he unloaded the wagons, but he knew that he put them together and then placed them on the veld near his house. He did not mention to anyone that he unloaded two wagons from that truck.

Mr. Innes: Did you tell King and Gerrons at the Cape Town Railway-station on Saturday night that you knew Musson had got only ten wagons?

Witness: No.

Mr. Innes: And that you knew where the other four wagons were?

Witness: I don't remember.

Mr. Innes: But it was only on Saturday night.

Witness: I did not say that.

Mr. Innes: What did you talk about on Saturday night?

Witness: Various subjects—Cape Town, and so forth.

Mr. Innes: But you don't remember saying that Musson did not get the sixteen wagons, and that if you went against the Railway Department you would give it to them straight?

Witness: I don't remember talking much about the wagons.

Mr. Innes: You remember the number of a truck as far back as May of last year, and you don't remember what you said about it on Saturday night?

Witness: I don't exactly remember the conversation.

Mr. Innes: But do you remember anything you said about the wagons on Saturday night

Witness: No, I don't remember.

This closed the evidence.

(The Court intimated that the onus lay on the defendant to prove delivery.)

Mr. Sheil: The issue is considerably narrowed by the acknowledgment of the plaintiffs, that they have received all the wagons out of this consignment but four. The onus, of course, is on us as carriers to prove delivery, but unless Mills has committed perjury due delivery was made,

King's case in the box is quite different to that on the pleadings: he now almost makes a case of fraud in this transaction, whereas there is no suggestion of this in the correspondence or pleadings. If he rests his case on fraud, he should have pleaded it, and proved it to the hilt. He has done neither.

Mr. Innes was not called upon.

Judgment was given for payment of the value of the four wagons at £77 10s. each, or £310, with interest from the date of the summons.

The Chief Justice said: In this case it is admitted that the plaintiff delivered sixteen wagons to the Railway Department at Malmesbury for conveyance to Mafeking to the plaintiff's order. It is admitted that the wagons were placed on trucks belonging to the Government, and it is admitted also that in the first instance only ten wagons were delivered to plaintiff, and of the six others which had been ordered there were two recovered, found in the possession of Weil. The action is for the value of the remaining four wagons which arrived, according to the books of the department, on the 14th and 15th of May. It has been very properly remarked by counsel for the defendant that in a matter of this kind the documents themselves are of the first importance. But the documents which he relies upon are the correspondence which took place after the event. I don't know if these documents are of any very great importance. But the document which is of importance is wanting, and that is the truck-book. Had that book been produced it should have clearly shown when the trucks which contained the wagons arrived at Mafeking. That might have to some extent corroborated what had been said on behalf of the Government; but, unfortunately, that truck-book is not produced. It is in the possession of the Government, but it has gone astray in some unaccountable manner. It has been sent, it is said, to Zimbabye, or some such far-off place; for what reason it is not said. There is no explanation given why this truck-book should have been sent to such an out of the way place when it was wanted in this Court in order to elucidate the evidence as to the date or dates of the arrival of the trucks. Now, I must say at once that I consider the evidence of the stationmaster is perfectly honest; he has not, I believe, concealed anything, nor has he said anything which he knew to be untrue. But we must remember *that at the time* there was enormous traffic *going to Mafeking*, and the stationmaster was *under-supplied* with assistants. The stationmaster *did not* wish to blame the department too much, but it was quite clear that at the time there was not a sufficient number of hands; and further, that business was carried on there in a very loose manner was also very clear from the evidence. As I said before, the wagons were made deliverable to the plaintiff or to order. An order was given by the plaintiff to the Railway Department to deliver the wagons to Musson, and it is important to read the terms in which that letter was couched. It is: "To the Stationmaster, Mafeking.—I have certain wagons on the road, and as I am leaving this evening, so as to facilitate delivery as much as possible, I shall be much obliged if you will deliver these wagons to Musson Bros., who will pay carriage and sign for delivery." Signature for delivery was to be given by Musson. That is the universal practice, and has always existed in regard to smaller parcels, and I think that it is all the more necessary that it should be adhered to with such bulky articles as wagons when sent for delivery. The defendants received the wagons, and they can only discharge their obligation by proving that there was a delivery either to the plaintiff or to the person authorised, and the person authorised was Musson. It was undoubtedly the duty of the department to have seen that Musson's signature for delivery was obtained. But no signature was forthcoming. It was said that the department was at the time heavily pressed, that there was a great amount of traffic going to Mafeking, but the plaintiff cannot suffer on that account. He is entitled to clear proof that these wagons were delivered to Musson, and that has not been forthcoming. There is a great deal of conflicting evidence as to what took place about the marking of the four wagons, and I believe the evidence given on behalf of the plaintiffs that they never saw the marks on the four wagons. There are three witnesses who swear positively that had these four wagons been marked by Mills, who swore he marked them, that they must have seen the marks. Certainly Mr. Gerrons, the wagon-maker, who was present, and assisted in putting together the wagons, must have seen these marks had they been there. But they all positively deny that there were any marks of this kind on the wagons. Another fact is proved that whether the wagons were marked or not, out of the sixteen Musson only received ten. He ultimately got twelve, no doubt, two having been misdelivered to Weil. But as to the remaining four they have to the present time not been proved to have been delivered to Musson. Under these circumstances it is quite clear that the plaintiff

has established his case for damages. I think the price which was to have been paid by Musson to King is a fair test of the damages sustained. If the wagons had been duly delivered to Musson undoubtedly £2 10s. would have been deducted in respect of each wagon delivered. Seeing that there was no delivery of the four wagons we must take the test and measure of damages to be the full value, £77 10s., which makes the amount £310, which amount I think the defendants should pay, with interest from the date of the summons.

Mr. Justice Buchanan and Mr. Justice Maasdorp concurred.

[Plaintiffs' Attorneys, Messrs. Walker & Jacobsohn; Defendants' Attorneys, Messrs. Reid & Nephew.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

CAPE DIVISIONAL COUNCIL v. LANGFORD. { 1897. May 11th.

Divisional Council—Road—Negligent construction—Damages.

At a distance of sixteen feet from the side of a divisional road was a hole which served as an entrance to a culvert for conveying water underneath the road to the other side of the road.

The road was protected by two large stones with just sufficient space between them to allow a horse to pass through.

The plaintiff was riding along the road, when his horse swerved and then backed a considerable distance until it passed between the stones and fell into the hole.

Held, *reversing the judgment of the Magistrate's Court, that the accident was one which could not have been reasonably foreseen, and that there was not sufficient proof of negligence on the part of the Divisional Council in the maintenance of the road.*

This was an appeal from the judgment of the Resident Magistrate, Cape Town, in an action in which the present respondent, plaintiff in the Court below, sued the Cape Divisional Council for damages for negligence.

In the action before the Resident Magistrate, John Howard Langford, the plaintiff, claimed the sum of £20, as and for damages alleging:

1. That he (the said plaintiff) was riding on the Victoria-road near Oude Kraal on 13th December last.

2. That owing to the negligence and default of the defendant Council in not covering up a certain pit, or not placing sufficient protection in front thereof, as it was the duty of the said Council to do, the said horse while backing did without negligence on the part of the plaintiff fall into the said pit and sustain certain injuries.

3. That in consequence of the defendant Council's negligence and default aforesaid, the saddle belonging to the said plaintiff was so injured as to be almost worthless and the plaintiff has sustained damages and injury to his horse and saddle, and has become liable for attendance and forage for the said horse, while deprived of the use of the same to the extent of £20.

4. That due notice was given to the defendant Council on or about the 14th day of December, 1896, of the said accident and the claim for damages, which said sum of £20 the defendant now refuses and neglects to pay.

The evidence given in the Resident Magistrate's Court was to the following effect:

John Howard Langford stated: I am plaintiff, on 13th December last, I was riding on Victoria-road. I was going in direction of Oude Kraal, and was on left side of the road. I had purchased a horse in August last, it was not restless. I had it under proper control. The horse stopped still, after it had gone some distance and commenced to back. It backed for about 15 feet. I did not stop the horse, as I considered there was no occasion to stop it. It was backing towards mountain-side. The next thing I found, horse had got with hind quarters into a pit and fell down, I on top. The pit is 12 feet 4 inches in depth, horse fell to bottom, I on top, one side of pit was partially protected by two stones about two feet in length between pit and road. The stones were noticeable. When my horse went into the pit it missed the stones altogether. (Photo of pit put in.) I looked back when the horse backed, but I could not notice there was a pit. The road is wider at this part than at others. There appeared to be a kind of outspan. On opposite side of road there is a dangerous precipice, and it is advisable to keep as close as

possible to mountain side. I got out of hole by scrambling out. It took two hours to get the horse out. It had to be got out with ropes, I am a fair rider. I have ridden for the last eighteen months. On 4th I instructed my attorneys to make a claim against the Divisional Council and my horse was offered for inspection. I value the horse at £16. I am prepared to take £7 now for the horse, saddle and bridle; horse has not been out of stable for two months. I have had to pay for forage all the time. I claim £20 damages. I put in letter, A from the Divisional Council. The accident occurred at four p m. There was nothing passing at the time. If the horse had backed towards the sea I could have prevented the accident. If I had known the pit was in the road I could have dismounted. I did all in my power to urge the horse forward. I struck my heels into him. I could not see the stones when I looked back from the position I was in. The horse backed in sideways after passing the stones. I called in a veterinary surgeon on 29th January, he paid two visits. As I was riding the horse stopped of its own accord, it was lazy.

For the defence.

Cornelius M. Lind, stated: I am secretary of the Divisional Council. I know the spot in question. The road in question has been constructed by the Government. The culvert in question was made by Mr. Bain, Government Engineer, and stones were placed there for protection. The road is proclaimed a divisional road, but there is no particular width for vehicular traffic. The width is 20 feet and is gravelled to that extent. On account of formation of mountain the culvert had to be placed where it is to interrupt water. The biggest stone is fully 3 feet high; the distance from the boundary of the gravelled road to where the hole is is 14 to 16 feet; where the spot is is out of the road. I wrote asking where horse could be seen for inspection, but received no answer. I wrote again on 22nd December last, but got no reply. On 16th January, I heard where horse could be seen.

Cross-examined: I don't admit that it was the duty of the Council to protect the road. The Council is only liable as regards the road itself. There is no defined area proclaimed for the Victoria-road. There is no notice to the public that the road is 20 feet. They can see by the gravel.

Johannes Combrink stated: I am Field-cornet, Oude Kraal. I know the spot in question. I examined it next morning. This spot is outside the road. It belongs to Breda. I occupy the property adjoining, I have been there twenty-two years. The divisional road is 20 feet wide and slopes on each side. The guard stones are 10 feet from boundary of road. The guard stones are clearly visible. All culverts on road are marked in the same way. I consider stones sufficient precaution; one is 3 feet high. I would not consider horse safe to ride if jibbing. The road was the same width when it belonged to the Government. The width of the road can be seen by cuttings.

The Resident Magistrate gave judgment for plaintiff for £15 and costs.

Against this decision the appeal was now brought.

Mr. Innes, Q.C., for the appellants: The point is whether the accident was caused by the negligence of the defendants. The onus is on plaintiff. The spot where the accident happened was clearly not on the part of the road used for vehicular traffic. If the Council made excavations *near* the road it would have had to protect them, but the Divisional Council gave all adequate protection there; and it was plaintiff's negligence that caused the accident. The culvert was right away off the road and proper guard stones, 3 feet high, were placed there. The road was built by a recognised road engineer for the Government, which gives *prima facie* proof there was no negligence in its construction.

Mr. Graham for the respondent:

The Resident Magistrate's finding was one of fact.

The Chief Justice: Is there no limit to the Divisional Council's liability to protect persons outside the road area?

Mr. Graham: Yes, but it must be a reasonable limit—not such a short one as this. The plaintiff acted reasonably in the matter.

The appeal was sustained.

De Villiers, C.J.: It was proved by the evidence given in the Court below that the road in question was originally constructed by the Government, and is now maintained by the defendants. The road, as constructed and taken over by the defendants, was eighteen feet wide, which, for the ordinary purposes of traffic, seems to have been quite sufficient. At a distance of sixteen feet from the road, on the mountain side, there was an entrance to a culvert to convey water from that side underneath the road to the sea. The opening was protected by two large stones on the side nearest the road. On the day of the accident the plaintiff rode along the road, and for some reason or another the horse swerved from the road, and then backed a considerable distance until it managed to pass between the two stones and fall into the opening, The question is whether the damage to the horse was occasioned by the

negligence of the defendants. If there had not been some space between the two stones the accident would not have occurred, but the test as to whether there was negligence, must after all be whether such an accident as occurred could reasonably have been foreseen. The hole was sixteen feet from the road, and there was a peculiar conjunction of circumstances, an unskilful rider, a backing horse, and a space between the stones just sufficient to allow a backing horse to tumble into the hole, which led up to the accident. The Government engineer, in constructing the road, seems not to have anticipated the possibility of such an accident, and the defendants in maintaining the road could not, in my opinion, have reasonably anticipated it. It may be a hardship for the plaintiff that he cannot recover damages from the defendants, but it would be an unwarrantable extension of the liability of public bodies to hold that the defendants are responsible for the accident. The appeal must, therefore, be allowed with costs.

Mr. Justice Buchanan concurred, saying he could not find that there was any negligence on the part of the Divisional Council, which was the foundation of the case.

[Appellants' Attorney, W. F. Moore; Respondent's Attorney, D. Tennant, jun.]

PIRIE V. PIRIE.

This was an action for restitution of conjugal rights, failing which for divorce.

Mr. Close appeared for the plaintiff, and applied for an extension of the return day, publication of the citation in the "Gazette" not having been made as directed.

The Court extended the return day to 1st August, and specially granted leave for the publication to be made in the "Gazette" alone if personal service could not be effected.

PECK V. PHILIP AND CO. { 1897. May 11th.

Interpleader suit—Alleged sale—Execution.

This was an appeal from the decision of the Resident Magistrate, Wynberg, in an interpleader suit, in which the present appellant, Avaldien Peck, was claimant, and the present respondent was one of the defendants.

It appeared from the evidence in the Resident Magistrate's Court that the creditors of one Omar Amoed had taken out writs of execution against him; that among others Philip & Co. seized in execution certain goods in a shop at Claremont, as the property of Amoed, but that Avaldien Peck, father-in-law of Amoed, claimed these goods as his property, alleging that he had bought them from Amoed, by a written agreement of sale in November.

Mr. Karie, agent for the claimant, stated that Amoed and Avaldien came to his office in November, and drew up the document of sale put in: that no money passed, but that an acknowledgment of debt for the amount was given.

The Resident Magistrate dismissed the claim for the following reasons:

It appeared to me upon hearing the evidence given by Mr. Karie, who drew up the acknowledgment of sale from Amoed to Avaldien Peck, and from the surrounding circumstances that the so-called sale was made by Amoed with the intention of defeating his creditors, who were not consulted on the matter, and whose claims for payment of the shop goods made over to Peck had not been settled.

As I considered the transaction of the so-called sale from Amoed to Peck, who is his father-in-law, to be a fraud upon the creditors of Amoed, I considered I was justified in declaring the goods attached to be executable in the judgment given against Amoed.

Against this decision the appeal was now made.

Mr. Graham for the appellant:

The appeal was dismissed.

The Chief Justice said: The Magistrate, taking all the circumstances of the case into consideration, held that there was no *bona fide* sale, and I am of opinion that he was right. I am extremely doubtful that any sale was effected; at any rate, there was ample justification for the Magistrate to hold that there was no sale.

[Appellant's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

SNYMAN V. VAN HEERDEN. { 1897. May 13th.

Mr. Buchanan, for plaintiff, asked for provisional sentence for the sum of £260 due on a agreement of sale. Plaintiff sold defendant

4,000 morgen for £400, payable on the 1st January, 1896, and on 1st January, 1897. The second instalment had not been paid, and that was sued for.

Provisional judgment was given.

COLONIAL GOVERNMENT V. VAN RENSBURG.

Provisional sentence was asked on mortgage bond for £344 16s.

Mr. Sheil applied.

Application was granted.

COLONIAL GOVERNMENT V. VISAGIE AND OTHERS.

Provisional sentence was asked for by Mr. Sheil on mortgage bond for £334, less £200 paid on account.

Application was granted.

GARLICK V. BROIDO. { 1897. May 13th. " 14th. Aug. 2nd.

Superannuated judgment — Provisional sentence—Law of the South African Republic—Writ of execution.

Where to a claim for provisional sentence on a judgment obtained in a Landdrost's Court in the South African Republic in 1889 the defence was raised that the judgment had become superannuated and should be revived before provisional sentence could be granted on it, the Court held that the onus of proving the law of the South African Republic lay on the defendant.

Provisional sentence was refused on a judgment of a Landdrost's Court of the South African Republic granted eight years previously, no writ of execution having been taken out within a year of the date of the judgment.

Motion for provisional sentence for the sum of £174 13s. 2d., being the amount of a judgment obtained by the plaintiff against the defendant in a Landdrost's Court in the South African Republic in 1889.

Mr. Searle, Q.C., moved.

Mr. Molteno, for defendant: The judgment was granted eight years ago, and is superannuated. In a Landdrost's Court judgment given is valid for a year only: *Van der Linden* (p. 384). It is a lower Court. In this colony a judgment of Resident Magistrate's Court becomes superannuated after one year. Plaintiff should have had judgment revived before suing on it.

Mr. Searle, for plaintiff: There is no evidence of Transvaal law before the Court.

De Villiers, C.J.: We know that the law of the South African Republic is Roman-Dutch law. Besides, ought this Court to give judgment on a Transvaal judgment which, if it had been a judgment of the Colony, should have been revived?

Mr. Searle: Defendant is domiciled in the Colony now, and it is difficult to know how judgment is to be revived in the Transvaal. If we sued here on the original debt defendant would set up the Transvaal judgment in defence.

The Court held that the onus of proving the law of the Transvaal was upon defendant, and gave leave for Mr. Advocate Wessels to be called as a witness on that law.

Postea (May 14th).

Mr. Searle, Q.C., said that with reference to this case (part heard yesterday) Mr. Advocate Wessels, of the Transvaal, had been seen with respect to the law obtaining in the Transvaal, and had said that he was not prepared to give an opinion on the subject without inquiry. He suggested that the case stand over for evidence as to the law.

This was acceded to.

Postea (August 2nd).

Affidavits were now read by Mr. Searle, Q.C., showing that the law of the Transvaal as laid down previously by Law No 1 of 1874, Art. 40, and now by Law No. 11 of 1892, Art. 62, was that a judgment should be renewed within a year unless a writ of execution were taken out; but a writ of execution once taken out remained of force and could be executed at any time. Affidavits of Mr. Melass and his attorney, Mr. Lindsay, stated also that a writ had been taken out in 1889 and forwarded to Klerksdorp to be executed there, the impression being that Broido had property there. There was however no property there, so the writ had not been executed and since that time had been lost or mislaid. If the proof of the issue of the writ was not considered sufficient, he asked for further time to produce additional evidence.

Mr. McGregor objected to further time being granted. No proper liquid proof of the debt had been given; the writ itself should have been produced. No evidence was now admissible except that which had reference to the law of the South African Republic.

The Acting Chief Justice said: This is an application for provisional sentence on a judg-

ment obtained by the plaintiff in the Landdrost's Court at Johannesburg on May 31, 1889, more than eight years ago. When the case first came before the Court objection was taken on behalf of the defendant that the judgment was superannuated. Leave was then given to allow the matter to stand over *sine die* to enable expert evidence to be obtained regarding the law of the Transvaal as to superannuation. Mr. Searle had now brought the matter again into Court for the plaintiff. He has produced affidavits showing that by the law of the Transvaal a judgment becomes superannuated in the Landdrost's Court on the expiration of one year, unless during that time a writ of execution has been taken out. The question remains, was a writ of execution taken out? No direct evidence has been produced to show that a writ of execution had been taken out in the Landdrost's court, none of those persons who had signed the affidavits alleged having seen the writ, and in the absence of any reliable evidence the law of the Transvaal was that the judgment was superannuated, and consequently could not be revived in this Court. Provisional sentence must be refused with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. Sauer & Standen.]

ILLIQUID ROLL.

FLETCHER'S RETAIL V. SHORT.

Mr. Gardiner asked for judgment, under rule 329 (*d*), on account of £3 5s.

Application was granted.

REHABILITATIONS.

Rehabilitation was granted in the cases of Jan Hendrik Lategan and Petrus Mattheus Luyt.

GENERAL MOTIONS.

DELPONTE V. DELPONTE. { 1897. May 13th.

The application by wife for £50 to be provided by her husband to enable her to institute an action for divorce against him. Plaintiff alleged adultery, but did not mention persons with whom or occasions on which adultery was committed.

Mr. McLachlan moved.

Mr. Searle, for defendant: It is usual in cases of this kind to give some evidence of *bona fides*. Adultery is alleged with twelve persons, but no names are given, and the reasons given for concealing the names are wholly insufficient.

The Chief Justice said: It is quite clear that matters have come to such a pass between the parties that an action will have to be instituted, and the amount asked for is very moderate. But I must warn counsel that in the declaration there must be a clearer indication as to the times at which the various adulteries were committed. The application will be granted.

Re ESTATE OF THE LATE JOHANNES A. GAERTNER.

Mr. McGregor applied for an interdict restraining the transfer of a certain piece of ground at Hermanuspetrusfontein, in the division of Caledon, known as erf No. 33, to the purchaser thereof pending the prosecution of an action instituted by Abel Allenzensky against the executrix of the said estate, for transfer of the land in question by virtue of a contract of purchase entered into between him and the said Gaertner.

Rule *nisi* granted calling upon the executors and Klein to show cause why the transfer should not be restrained pending the termination of the action.

Mr. McGregor asked for leave to join Klein as a defendant; summons had only been served on Mrs. Bourchier.

The Court considered that Klein could not be joined without leave and granted leave to amend the summons so as to include him and serve the amended summons upon him. Notice to be served upon the Registrar of Deeds.

GROBBELAAR V. GOUS.

Mr. Buchanan made application for a further extension of the return day of the edictal citation in the suit instituted by the plaintiff against the defendant for the recovery of amounts due upon certain promissory notes, and for instructions as to the service of the process therein.

The date was extended to August 1.

WOLSTONE V. WOLSTONE.

Mr. McLachlan applied to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of the respondent's failure to obey the order granted by the Oudtshoorn Circuit Court, requiring him to restore to his wife her conjugal rights.

The Chief Justice said: There is a technical difficulty in this case. The return is according to the citation to be on the 13th May, but the notice does not say in what Court it is to be made. The notice is headed "In the Circuit Court of Oudtshoorn." No order can be made

now by this Court. But as I have been informed by the judge who presided in the Circuit Court, that the order made was that the rule should be returned in the Supreme Court, and that it is by an oversight that that does not appear in the published order, the Court will allow an amendment by inserting the words "In the Supreme Court" and making the rule returnable on the 12th July. Only one publication will be necessary, and that in the "Gold-fields News."

Re INSOLVENT ESTATE OF LEVI. } 1897. May 13th.

Insolvency — Compromise—Creditors — Second meeting.

Application for discharge of a provisional order of sequestration, no meetings in the estate having been held, on the ground that creditors had accepted a compromise, ordered to stand over until after the second meeting had been held, in case all the creditors had not consented to the compromise.

This was an application by the insolvent to be allowed to withdraw the petition on which the order of sequestration of his estate had been made.

The applicant's petition stated: That on the 20th April last, your petitioner gave notice in the "Government Gazette" of his intention to surrender his estate as insolvent.

The schedules filed show the outstanding debts to amount to

Good	£264	7	1
Bad	58	18	6
And Cash in Bank	38	5	11
Stock-in-Trade	456	16	4
While the liabilities amounted to the sum of	874	5	6

That on the 3rd of May last your petitioner's estate was placed under sequestration by order of this Honourable Court.

That your petitioner has approached his creditors with a view of effecting a compromise with them, and they have all agreed to accept the sum of seven shillings and sixpence in the £, to be paid in cash on the 14th instant in settlement in full of all claims and demands they have against me, and that the aforesaid order of this Honourable Court be superseded. Your petitioner annexes hereto their consent papers, marked A and B, and craves to refer your lordships thereto.

That it would be greatly to the benefit of the said creditors if the said order of Court be superseded and they accept the sum of 7s. 6d. as aforesaid, for if I have to wait until the third meeting of my creditors, the costs of sequestration would not admit of a composition of 7s. 6d. in the £ being offered.

Wherefore your petitioner humbly prays, that your lordships may be pleased to order that the Order of this Honourable Court, granted on the 3rd of May last, by which my estate was placed under sequestration be superseded.

The following agreement was signed by creditors:

We, the undersigned eight creditors of Isaac Levi, a shopkeeper, of Oudtshoorn, whose estate was sequestrated by order of the Honourable the Supreme Court on the 3rd of May, 1897, do hereby agree to accept a composition of 7s. 6d. in the £, to be paid on the 14th of May, 1897, in cash, in settlement in full of our claims and demands against him, on condition that all creditors agree thereto and share equally, and we further agree that the said order of Court be superseded, as it will be greatly to our benefit to accept the said composition.

Oudtshoorn, 10th May, 1897.

L. Field & Co.
A. P. Valenski.
p.p. Cleghorn & Harris, J. Mawns.
H. G. Hicks & Co.
T. Smith.
M. Taylor.
M. T. Roliden.
p.p. J. Garlick, R. Hossett.

Mr. Graham for applicant.

The Chief Justice: Is there any precedent for an application of this nature?

Mr. Graham: *Van Zyl's Judicial Practice* (p. 590). We have not proceeded under Ordinance 6 of 1843, section 106, in order to save expense. Only the first meeting of creditors has been held as yet.

The Chief Justice: It is not clear that all the creditors have consented. The insolvent may believe that to be the case, but fresh creditors may still come forward. The matter had better stand over until the second meeting has been held.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

WHITE V. ADAMS. { 1897. May 13th.

Ownership—*Vindicatio*—Alluvial digging—Claim—Diamond—Trespass.

The plaintiff being the holder of a claim in an alluvial digging having temporarily left it, another digger took out a licence for the claim and found a valuable diamond in it, but

thereafter the Inspector of Claims decided that the plaintiff was entitled to the claim upon payment of the licence as renewal.

In an action brought by the plaintiff against the digger who found the diamond and a person who bought it without knowledge of the trespass, to recover the diamond or its value, the High Court gave judgment against the purchaser.

Held, on appeal, *reversing the judgment of the High Court, that the ownership of the diamond was not vested in the plaintiff and that he was therefore not entitled to recover it from a* bona-fide *purchaser.*

This was an appeal from a judgment of the High Court of Griqualand West in an action in which Henry Adams, the present respondent, sued Reginald White and Samuel Madella for return of a certain diamond and damages.

In the suit in the High Court the following was the plaintiff's declaration:

1. All the parties reside at Barkly West, in the district of Barkly West. The plaintiff is a diamond digger; the first-named defendant is a diamond buyer, and the second-named defendant is a diamond digger and the interpreter of the Resident Magistrate's Court for the said district.

2. On or about the 4th September, 1896, the plaintiff was the duly registered holder of a certain claim in the alluvial diamond diggings at Klipdrift, in the aforesaid district, and as such was solely entitled to win diamonds from the said claim and to all diamonds won therefrom.

3. The plaintiff continued to be so registered and entitled as aforesaid at the times hereinafter referred to.

4. On or about the said 4th September the second-named defendant, by himself, his servants and agents, wrongfully and unlawfully trespassed upon the plaintiff's said claim and proceeded to dig for diamonds therein, and on or about the same day discovered a certain diamond therein, weighing about 28 carats, which he converted to his own use, and refused to deliver up to the plaintiff though requested so to do.

5. The plaintiff claims the said diamond as his property, and says the same is worth £150.

6. Thereafter, on or about the 7th September, 1896, the second-named defendant wrongfully and unlawfully sold and delivered the said diamond to the first-named defendant, who still retains possession thereof, and claims it as his property, though frequently requested by the plaintiff to deliver the same to him as the rightful owner thereof.

7. At the time of the said sale and delivery both the defendants knew that the said diamond was claimed by the plaintiff as his property.

8. The plaintiff has suffered damage in the sum of £50 by reason of the said wrongful detention of his said property.

Wherefore the plaintiff claims:

(*a*) That the first-named defendant may be ordered to forthwith restore to the plaintiff the said diamond, or, in the alternative, that both the defendants may be ordered to pay him the value thereof, £150, the one paying the other to be absolved.

(*b*) £50 as damages aforesaid, from both the defendants, the one paying the other to be absolved.

(*c*) General relief.

(*d*) Costs of suit.

The following was the plea of defendant White:

1. The defendant White admits paragraph 1 of the declaration, and says that he is a duly licensed diamond buyer, and that the second-named defendant is a duly licensed diamond digger.

2. The allegations of fact in paragraphs 2, 3, and 4 are matters not within his knowledge, and he does not admit the same, but begs to refer this Honourable Court to such proof as the plaintiff may adduce in support thereof; but as to the conclusions of law, albeit he admits that a duly registered holder of a claim in an alluvial diamond digging is, while in possession of his claim, solely entitled to find and win diamonds therefrom, yet he denies that such holder is in law the owner of any diamond in the soil of such claim until he has found and won the same, and says that such holder cannot vindicate as his property any of the diamonds which may be found and won by any other person from such claim while in possession thereof.

3. With further reference to paragraph 4, he denies that in law the second-named defendant wrongfully and unlawfully trespassed upon the plaintiff's claim, even if the facts be otherwise as therein alleged, for that the said second-named defendant was before and on the said 4th day of September in lawful possession of the said claim under a legal licence granted to him by the Colonial Government, and remained in such possession thereafter, until dispossessed by a decision of the Inspector of

the Alluvial Diamond Diggings in which such claim is situated, given under authority of section 6 of Act No 18 of 1886, by which decision the said claim was awarded to the plaintiff, but which decision the defendant says could not and did not confer upon the plaintiff in law the ownership of any diamond which the second-named defendant may have won while in possession as aforesaid of the said claim.

4. The said defendant further says that on the morning of the 7th September, 1896, the second-named defendant, being a licensed diamond digger as aforesaid, sold to him, being a duly licensed diamond buyer as aforesaid, a certain diamond, the property of the seller, weighing about 28 carats, for the price of £70 cash; and he says that the said sale was a *bona fide* and lawful transaction, effected at a time when he, the first-named defendant, had no knowledge or notice of any claim by the plaintiff in respect of the diamond so sold to him by the second-named defendant.

5. He admits that on the same day, to wit, the 7th September, 1896, but after the said diamond had been purchased by and delivered to him, the plaintiff, by his agent, notified to him, the first-named defendant, that he claimed the said diamond; and he admits that he retains the said diamond in his possession as his property, and refuses to deliver it to the plaintiff, and says that the plaintiff has no right to claim to vindicate or recover the said diamond or its value from him, the first-named defendant.

6. Save as aforesaid, he denies the allegations in paragraphs 5, 6, 7, and 8 of the declaration.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

The following was the plea of defendant Madella:

1. The defendant Madella admits paragraph 1 of the declaration, and says that he is a diamond digger, duly licensed by the Colonial Government, and that the first-named defendant is a duly licensed diamond buyer.

2. On the 3rd day of September, 1896, the defendant Madella, duly licensed as aforesaid, pegged out a claim on the spot known as Canteen Kopje, in Barkly West, being a proclaimed alluvial digging, and when he so pegged out the said claim he acted in good faith, not knowing that the plaintiff had in fact theretofore worked the claim, which on the said day was not marked out by pegs to indicate that the claim was held by the plaintiff, who is another duly licensed diamond digger.

3. The said defendant, by his son Isaac Madella, worked the claim so pegged out by him as aforesaid, and his said son on his behalf did on the 4th day of September, 1896, by industry and labour, find and win in the said claim a certain diamond, weighing about 28 carats, which thereupon became and was the property of the said defendant, to whom the said diamond was delivered by his said son.

4. On the 5th day of September the plaintiff gave notice to the defendant's said son that he laid claim to the aforesaid claim, and to the diamond found and won therein as aforesaid, and his said son conveyed such notice to the said defendant.

5. On the 7th day of September the said defendant sold and delivered the said diamond for £70 cash to the defendant White, as he, the defendant Madella, lawfully might do, and did not give notice to the defendant White of the claim advanced as aforesaid by the plaintiff.

6. The defendant Madella justifies his aforesaid sale of the said diamond in that it was as aforesaid found and won by him, through and by his son, while he, the said defendant, was holding the said claim in good faith under lawful licence, and that he had a good title thereto by lawful possession of the claim and by finding and winning the said diamond as the fruit of his labours and industry, and such title or any other to the said diamond the plaintiff neither has nor ever had, nor has the plaintiff any right to have this action to recover the value of the said diamond for the said defendant.

7. Thereafter, on or about the 11th day of September, the Inspector of Claims, acting under and by virtue of the authority conferred upon him by section 6 of Act No. 18 of 1886, decided, after inquiry, that the aforesaid claim must be awarded to the plaintiff, but the said Inspector neither did nor could confer upon the plaintiff any right or title to or in respect of the said diamond so found and won by the defendant Madella as aforesaid.

8. The said defendant admits that he refuses to pay to the plaintiff the value of the said diamond.

9. Save as aforesaid, he denies the allegations in paragraphs 2, 3, 4, 5, 6, 7 and 8 of the declaration.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

The replication was general.

The following evidence was led for the plaintiff:

Henry Adams stated: Plaintiff, diamond digger, Barkly West, diggings at Canteen Kopje, where I held one claim last September. I took licence for it on 28th May, 1896, and it was still running in September. I paid the

licence monthly. When I took it out I pegged off the claim. I worked the claim personally about a month, and found no diamonds whatever. I then took out another licence, and went to work in the bed of river lower down. My original claim was worked by my brother for less than a fortnight, found nothing and stopped work, and then I left Hendrik Ramabotta and adjoining digger in charge. On 5th September I got information and went over to the claim, where I found Isaac Madella, son of defendant It was early, and work had not yet begun. I told him to stop work there, as claim was mine. He refused, and asked me where my pegs were. I said, "They were in a few days ago." He replied that he had found no pegs, and so had pegged it off. I saw his pegs in the ground, but no sign of my own. I had seen my pegs in the ground in August. His pegs stood on exactly the same spot as mine had done. Claims are 30 feet by 60 feet, and there was nothing in the nature of the ground to guide the peggers to the exact spots where my pegs had stood. On the 5th September I caused my agent, Donovan, to write a letter to Isaac Madella. (Copy produced, No. 1.) Subsequently I got an interdict.

Cross-examined by counsel for White: I think I paid the licence for September a few days after it was due, I think on the 5th or 6th, and after I heard that Madella was working in my claim. It was after I had seen Madella working that I went and renewed my claim licence. I had taken out another licence on another claim. I left the claim afterwards pegged off by Madella because the water gave out. In June I dug at three separate places on the licence I had taken out in June—for the other side of the river. In July and August I was working on this side of the river, and required no licence. My brother worked the Canteen Kopje licence in June for me. My brother found no diamonds on that claim. I told Ramabotta to look after the claim, and see that no one used it. He is my next neighbour, and another native is so on the other side. I gave Ramabotta leave to use it as a depositing site, and to sink a well. I never abandoned, but have sold the claim for £5—that was in September.

Cross-examined by counsel for Madella: I know Jacob and Andries. They were in my employ at Canteen Kopje, and also went down the river with me. I did not tell them I was leaving because I could find no diamonds. I left Jacob to finish washing the loose ground. If he says that when he left my pegs were not in, it is false. Hendrik Ramabotta went to Colesberg, I have since heard, but his partner was in charge.

William Franklin stated: Inspector of Claims, Barkly West, produce register. Plaintiff took out licence 28th May, for Klipdrift diggings, of which Canteen Kopje is a portion, and it was continued until 28th September. In my capacity as inspector under Act 18 of 1886, section 6, held investigation as to the ownership of this particular claim with two assessors. As a result we awarded the claim to Adams, the present plaintiff.

Cross-examined by counsel for Madella (Mr. Ward): Sam Madella has also a licence for Klipdrift diggings. He took out one on 1st September for a month. Adams renewed his on 5th September, *i.e.*, from 28th August—28th September.

Per Cur.: When a person takes out a licence he can go and dig in any place in the diggings not pre-occupied. Natives steal pegs for fuel, and it is very difficult to catch them. The law (Act 19 of 1883, section 28) gives a month's grace for payment of licence, so that payment on 5th September would be within the time for renewal.

Hendrik Ramabotta stated: Digger at Klipdrift. Know plaintiff and the two Madellas. In June last was working next claim to plaintiff at Canteen Kopje; and I have been working my same claim ever since. I remember plaintiff leaving his claim. He left it in my charge, and gave me instructions about it. I had permission to enter upon the claim to sink a well. This was for my benefit, but it would belong to Adams when he returned. When plaintiff left his four pegs were in. I went to Colesberg. I think, in August. I was away three weeks, and returned the same month. I then went to another claim. When I left for Colesberg plaintiff's pegs were still in. On my return I did not see the pegs; they had been removed. When I was at Colesberg I left people in charge of my claim, viz., my three partners. The plaintiff's pegs were removed from his claim during August. In beginning of September I saw Isaac Madella on plaintiff's claim—it was a Friday, before breakfast. He began to work there with convicts. I told him it was Adams's claim. He said, "No; Adams is not paying for this one; he is working another claim lower down," and he continued working. Adams had sunk a shaft, and Madella was working in it. When I spoke to Isaac Madella, I knew nothing about a diamond having been found.

Cross-examined by Ward: I did dig a well, I found water easily. Adams knew this. I saw Adams's brother there. I was in charge of claim when Adams left. I know August Psama, who worked next to Adams's claim. I was not there when the diamond was found. I was at my other claim, which is some distance away

At about twelve noon I was told that the convicts had found something. It was not *after* that that I went and spoke to Madella. I did not speak to him after I heard of the find; it was not my diamond.

Nol Malope stated: Digger. Klipdrift. Know plaintiff and Madellas. Was partner of last witness in claim next to plaintiff's. Recollected plaintiff working there. He left to go lower down river, leaving his claim in last witness's charge. I was present. We were allowed to go upon that claim to sink a well. When plaintiff left, I saw three of his pegs still in. I remember Ramabotta went to Colesberg. They were up then. I saw the claim then. I was then working at another claim about 200 or 300 yards away. When Ramabotta returned from Colesberg we noticed that only one of the pegs was left, and that was lying on the ground, not at its proper place. This was 4th September—a Friday. I went on that day with Ramabotta. I saw Isaac Madella there. He was washing at another claim close by, and he was just about to move to Adams's claim. He did move there; some convicts were already at work for him, I heard last witness tell Isaac that the claim was Adams's. Isaac replied, "He does not pay for it." Ramabotta and I then went to our new claim, and left Isaac at work. When Ramabotta was at Colesberg I worked our claim there for a few days. Jacob and I were in charge.

Cross-examined by Ward: I don't know how I know it was 4th September; but I did know. Same day about midday I heard the big diamond had been found.

Isaac Madella stated: Son of defendant Madella. On 29th August I went to the claim and pegged it out. It is the claim in dispute, next to Hendrik Ramabotta's. I worked there, and on 4th September I worked there and found a diamond of 28 carats. I handed it over to my father.

Cross-examined by Ward: When I first went out the claim was pointed out to me by August Psama, in Donovan's service, who was working a neighbouring claim. There were no pegs on Adams's claim. August Psama moved his own pegs on the same day from Adams's claim back to his proper boundaries. I was working under my father's licence and for him. I saw Ramabotta when the claim was pegged out, and again after diamond was found. On the second occasion he said, "Adams left the claim because it did not pay him, and now you have found a diamond." I saw Adams on 5th. He asked by what authority I worked there. I said "My father's." He said it was his claim. I asked him to show me his pegs. There were none. I got Donovan's letter of 5th September that same morning.

Per Cur.: Neither Ramabotta nor Nol Malope told me before finding the diamond that it was Adams's claim. I contradict them. I am sure I had no conversation with Malope or Hendrik Ramabotta before the diamond was found. I saw a well in claim with a little water in it. It had been sunk for prospecting purposes. It was 11-12 o'clock when I found the diamond.

Samuel Madella, sworn, stated: Interpreter, Resident Magistrate's Court, Barkly West. I am a licensed digger. I remember Isaac, my son, bringing me a diamond on 4th September from a claim Adams had worked in a few months before. I had sent him a few days before to peg out that claim. I had previously inspected the claim, and found it to be abandoned. I sold the stone to defendant White on 7th September, for £70. On my information I thought this a fair price. He paid me in cash. I got Donovan's letter to Isaac on the 5th, and so I knew the property in the diamond was going to be disputed.

Cross-examined by counsel for White: It was between eleven and twelve on Monday that I went to sell to White, but I did not tell him of Adams's claim. I saw Adams in the bar which is next to White's office when I went to sell.

Case for plaintiff closed.

For the defendant White,

Clarence Reginald White stated: Licensed diamond dealer at Barkly West. Know plaintiff. I remember buying the diamond for £70, which was a fair price. I have had a good deal of experience. Madella came to me about 0.30 a.m. on that Monday. I bought, and just after that Adams came in to me, and I bought some other diamonds from him. Adams said nothing to me about Madella's diamond. About a little after one p.m. on same day I saw Donovan, who asked me whether I had bought a diamond from Isaac Madella. I said, "No." I did not know that Isaac was working for "Sam" Madella. I have had the diamond valued by Brink and Hirschhorn, and they each value it at 50s. per carat (£70).

Cross examined: I heard on the Friday that Sam Madella had found a diamond, but nothing about a dispute, nor did I hear on Saturday night that there was a claim by Adams.

Per Cur.: Madella brought his licence when I bought. I made no entry in his register, and don't know whether he brought it. I had bought stones from Madella before.

White's case closed.

For the defendant Madella,

August Psama stated: Digger, Barkly West. Know claim where Madella found the diamond. I worked on next claim. I pointed out the claim to Madella. I was at the time using water out of the well on it, and portion for depositing. My pegs were extended out on to it. When Madella came there I did not move my pegs back. Madella put in his pegs in spots which I pointed out to him. I pointed it out to Madella as a free claim.

Jacob stated: Know plaintiff and his claim. Remember his leaving that and moving down the river. I was the last to work there for him. He left me to work the loose ground. I removed all the implements when I went. I was there three days after he left. I must have seen pegs if they had been there.

[*Per Cur.*: Even while he was there I saw no pegs. I contradict all witnesses who say there were pegs there.]

Cross-examined: Plaintiff did not dismiss me. I left because I did not wish to work monthly.

Per Cur.: Adams did leave his brother there after he left, and it was with him I was working to clear up. I am now working under a digger at the river.

Herbert Rees stated: Clerk to Inspector of Claims, Barkly West. I remember Adams coming to me on 5th September at nine a.m., as soon as office was open, and renewed his licence for Klipdrift diggings. It had been reported to me that he had been working on a claim down the river. His Klipdrift licence would cover any river claim on the Barkly side of the river. Adams said nothing to me about any dispute. On Monday, 7th September, Donovan saw me and asked me about steps to interdict, &c.

Madella's case closed.

The Court gave judgment for plaintiff against White to deliver the diamond—with costs. No order as to Madella's costs.

Against this judgment the appeal was now made.

Mr. Schreiner, Q.C., (with him Mr. Graham) for appellant: (Respondent in default): The diamond was found by Madella in the lawful claim of Adams and was sold to White, who was a duly licensed buyer, and purchased without any notice that there was any claim to the diamond.

De Villiers, C.J.: In *Preston and Dixon* v. *Biden's Trustee* (1 App., 328) the Court held that a claim of this kind gives a personal right to dig for diamonds.

Mr. Schreiner: Judgment of Laurence, J.P., in original case of *Preston, &c.*, is an attempt to apply the doctrine of ownership to the claim law of this colony. *Van Leeuwen* (Kotzé's Edition, p. 211), whom he quotes, does not support him

Chief Justice: I have always considered the right of a claimholder to diamonds dependent on his winning them. Is it not a personal servitude to dig for diamonds?

Mr. Schreiner: Not a praedial servitude nor one of the personal servitudes specifically mentioned in the books, which it is difficult to add to. It is rather a modern right analogous to a personal servitude. *S A. Loan and Mortgage Agency* v. *G. & H. Bank* (J. 6, p. 181) lays down that a licence to dig for diamonds is not an interest hypothecable under the law of this colony. As to *Voet* (41. 1. 29), Laurence, J.P., is in error in his construction of the passage. *Emptor* does not refer to the buyer of the fruits; *Voet* is dealing with the purchaser of *res liena.*

It is a question of very first principle. that a man can vindicate his own property but cannot vindicate property that is not his. What gave Adams his title to the diamond? He expended no labour in winning it nor was any expended on his behalf. Judgment for damages would be given against the trespasser, but there is no continuity over against White. There is no ownership in diamonds not taken out of the earth. In assessing damages for the trespass. the value of the diamond would be taken into consideration. White is an innocent purchaser for value and not liable.

De Villiers, C. J.: This action was brought in the Court below against White and Madella, to recover a certain valuable diamond or its value. The action is in the nature of a *vindicatio* and the plaintiff can only succeed upon proof that he is the owner of the diamond. and is therefore entitled to recover it, not only from the person who found it but from the person to whom it was sold. It is not necessary to decide whether the plaintiff has a good action for damages against Madella, but the peculiarity of the judgment appealed against is that Madella, who found and sold the diamond, is absolved altogether, and White, who bought it without knowledge of any trespass, is ordered to pay the value to the plaintiff. If the action had been brought for trespass against Madella, it does not follow, as the learned Judge-President seems to assume, that assuming there was a trespass, the plaintiff could not recover the value of the diamond from the trespasser. In the case of *De Villiers* v. *Van Zyl* (Foord, p. 77) certain young wild ostriches had been appropriated by the trespasser and in the action for trespass, the value of the ostriches was the

measure of damages awarded. In the present case therefore the plaintiff would not be without remedy if he was the lawful occupier of the claim, although he was not the owner of the diamond. The error into which, with due respect, the Court below has fallen is to treat the holder of a claim in an alluvial digging as the absolute owner of the soil, and of all diamonds therein. The effect of previous decisions of this Court is to regard such a claim-holder as having a right to dig for and win diamonds, but not as having any *jus in re*. Upon finding a diamond he becomes the owner thereof, and as the lawful occupier of the land he may prevent trespasses thereon and may recover damages for such trespasses, but if some one else has found a diamond and sold it to an innocent purchaser, he is not entitled to follow it into the hands of such purchaser. I leave out of consideration the circumstance that it is by no means clear that Madella was a trespasser. He *bona fide* occupied the claim in the belief that it had been abandoned. Subsequently the Inspector of Claims decided that the plaintiff still had the right to work the claim notwithstanding that the licence money was unpaid, and that the plaintiff had not for some-time worked it It is exceedingly questionable whether that decision would have a retrospective effect, so as to prove that Madella was a trespasser during the interval, but as the action is not for trespass the point is of no importance. For the reasons already given the appeal must be allowed with costs in this Court, and judgment entered for the defendant with costs in the Court below.

[Appellant's Attorney, C. C. Silberbauer.]

DU PREEZ V. JAARS. } 1897. May 13th.

Magistrate's jurisdiction—Summons—Specific performance.

The mere fact that a summons in a Magistrate's Court incorrectly states that the claim is for specific performance is not sufficient to oust the Magistrate's jurisdiction if it appears from the summons that the real object of the action is to obtain damages for breach of contract.

This was an appeal from a decision of the Resident Magistrate of Philip's Town in an action in which the present appellant, plaintiff, in the Court below, sued the defendant, the present respondent, for delivery of a certain horse or £15 damages.

The summons called on the defendant to answer H. C. du Preez "in an action to compel specific performance of a contract." The contract alleged was the barter of a horse; and the summons alleged that plaintiff had tendered his horse and required delivery by defendant of the horse to be exchanged by him; that defendant had refused to deliver and had caused damages to plaintiff in the sum of £15. The summons claimed an order compelling defendant to deliver the horse or to pay plaintiff £15 as his damages.

The defendant excepted to the summons on the ground that specific performance was claimed, and that the Magistrate had no jurisdiction.

The Magistrate sustained the exception, and the plaintiff now appealed.

Mr. Searle Q.C., for the appellant: There is nothing on the face of the summons to show that the animal was worth more than £20. *Mistje* v. *Matyele* (6 Sheil, 421). The only substantial difference between that case and this, is that on the face of the summons the value of the animal is not given.

The Chief Justice: But the real point here is, that there is a claim for specific performance.

Mr. Searle: *Distin* v. *Lamont* (6 Sheil, 487) is strongly in point on that. Here substantially the Court was asked to give damages.

The respondent did not appear.

The Court allowed the appeal.

The Chief Justice said: The summons prays that the defendant may be ordered to deliver the horse or pay damages to the plaintiff. Now I think it is a misuse of words to call this an action for specific performance. The mere effect of the use of these words would not oust the jurisdiction of the Magistrate. In this case I have no doubt that these words are used in an improper sense. *Distin* v. *Lamont* seems exactly in point. The appeal will be upheld, with costs in this Court, and the case remitted to the Court below to be heard on its merits.

[Appellant's Attorney, Gus. Trollip.]

BURTON V. KNIGHT. } 1897. May 13th.

Master and servant—Act 18 of 1873, section 1—Construction.

This was an appeal from a decision of the Assistant Resident Magistrate, Cape Town.

The appellant sued Rose Knight, the respondent, for damages for breach of contract, alleging that she had agreed to enter his service as a domestic servant for two years under a written agreement signed in London on 20th June, 1896, and in Cape Town on 28th July, 1896.

The defendant's agent raised two exceptions:

(*a*) That the agreement sued upon having been made in England, and containing a penalty, required to be stamped.

This exception was overruled.

(*b*) That a contract entered into in the Colony for any period exceeding a year required to be entered into before a magistrate.

This exception was sustained with costs.

Against this judgment the appeal was now made.

Mr. Graham for appellant: The exception is founded on Act 18 of 1873, section 1, but that only applies to quasi-criminal actions or actions under the Masters and Servants Acts for penalties.

De Villiers, C.J.: Another point is very obscure in the wording of the section. What does "unless, &c.," refer to? Does it not refer to the written contract?

Mr. Graham: Moreover, it is not clear from *Sayers* v. *Thorne* (J. 7, p. 243), that the contract need be entered into before a Magistrate. Act 15 of 1856, Ch. 2, section 1, is unrepealed, and there was ample proof to satisfy the Magistrate that the contract had been entered into. The original contract was entered into in London, although it was re-signed here. If it is valid for one year only, not more than £4 can be claimed. I am willing to accept that.

The Chief Justice said: I am clear that the Magistrate in holding that the contract is wholly invalid was in error. The utmost that can be said is that it is invalid beyond twelve months. But seeing that Mr. Graham is willing to treat it as extending only for twelve months the Court will give judgment for £4, which would be the measure of damages in that case. The appeal is allowed, with costs in this Court, and judgment given for £4 with costs.

[Appellant's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), Hon. Mr Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

MAGISTRATE'S CASE REVIEWED. { 1897. May 14th.

Mr. Justice Maasdorp said that as judge of the week a case had come before him for review in which a Resident Magistrate had convicted one Alleta Kruger for a contravention of Act 21 of 1894, section 2. The Resident Magistrate had sentenced the accused to thirty days' imprisonment, including ten days' solitary confinement, and three days in each week spare diet. As there was no provision in this Act for the imposition of solitary confinement, that portion of the sentence must be quashed.

BARRABALL V. BARRABALL.

This was an action for divorce on the ground of adultery instituted by Percy Claude Barraball against his wife.

Mr. McGregor for applicant.

Reginald Barry, clerk in charge of the marriage registry in the Colonial Office, produced the register of the marriage of applicant with Emily Lavinia Thomas on 29th July, 1891.

Percy Claude Barraball said he was married on 29th July, 1891, and after the marriage he lived at Simon's Town. On 5th March, 1895, he left for Johannesburg. He left owing to certain differences he had had with his wife, and also in the hope of getting work there. He got work, and up to November of last year sent his wife money for her support. In consequence of certain information, he left Johannesburg for Simon's Town on 14th March of this year. He saw his wife on 23rd March at the house of Price Williams, a grocer Observatory-road, when she admitted having given birth to a child on 20th February. She told him who was the father of the child: Walter Jones. There were two boys of the marriage, the custody of whom he wished to have.

Dr. Lawrence (Observatory-road) said he was called to a house in Observatory-road on 20th February to attend to a Mrs. Jones. Mrs. Jones was delivered of a child. The photo produced was that of the lady who took the name of "Mrs. Jones."

Mr. Justice Buchanan: Who paid you your fees?

Dr. Lawrence: I was never paid.

The Chief Justice: Did you apply for your fees?

Dr. Lawrence: I looked for Jones, but he was always out, so I gave it up.

The decree of divorce as prayed for was granted.

[Plaintiff's Attorney, C. C. Silberbauer.]

BERNSTEIN v. BERNSTEIN'S TRUSTEE. | 1897. May 14th. " 17th.

Ante-nuptial contract—Registration—Matrimonial domicile—Husband and wife—Community of goods—Insolvent Ordinance—Household furniture Creditors' meetings.

Where two spouses, not domiciled in this colony, had married in another country without community of goods, the wife is entitled, upon the insolvency of her husband in this colony, to claim goods which can be clearly proved to be her separate property, although no instrument in the nature of an ante-nuptial contract has been registered in this colony.

A trustee in insolvency is not entitled to sell household furniture alleged by him to belong to the insolvent without direction to that effect given by creditors, in terms of the 98th section of the Insolvent Ordinance, at a duly convened meeting held after the second meeting of creditors.

This was an application to make absolute the rule *nisi* for an interdict restraining the respondent, in his capacity as trustee of the insolvent estate of petitioner's husband, from selling certain household effects and jewellery, claimed by petitioner as being her separate property, and for an order that respondent do pay the costs personally.

Mr. Searle, Q.C., for the applicant, Mrs. Mary Bernstein.

Mr. Schreiner, Q.C., for the respondent, Mr. S. James Foster, trustee in the insolvent estate of Nathan Bernstein, appeared to oppose.

The applicant's affidavit (dated 20th April, 1897) set forth that petitioner and her husband were married out of community of property in 1868, at Memel, in Germany (translation of ante-nuptial contract annexed), and that at the time of marriage petitioner was possessed of certain furniture and other assets as enumerated in the ante-nuptial contract; some of these petitioner subsequently sold, and out of the proceeds petitioner bought other articles which she brought with her to the Colony.

That when petitioner came to the Colony with the insolvent, no registration of the ante-nuptial contract was effected in the Deeds Office, the parties being under the impression that they would be sufficiently protected by having the contract translated by the British Consul at Memel, and giving notice to him of the marriage being out of community of property.

That on the 13th March, 1897, the estate of Nathan Bernstein, the husband, was sequestrated, he being then and now in the South African Republic.

That the first meeting of creditors was held on 24th March, 1897, when no creditors appeared; that the second meeting was held on the 31st March, when Messrs. Lewin and Hudson, Vrede & Co. alone proved claims, and Mr. James Foster was elected trustee That the only resolution then passed was for this appointment of the trustee authorising him to act also as auctioneer, and to charge the usual fees.

That the third meeting had not been held.

That on the 2nd April the messenger of the Resident Magistrate's Court placed under attachment the furniture and assets belonging to petitioner, when petitioner informed the messenger that the goods were her property, and that she was married to the insolvent out of community, repeating this in a subsequent letter to the messenger, of which a copy was, sent to the Master of the Supreme Court.

That the trustee has advertised the assets of the insolvent estate for sale at public auction on 24th April, including the assets belonging to petitioner attached as above, but that petitioner protested in a letter to the trustee, to which the latter replied that as there was no registration of the ante-nuptial contract in the Deeds Office the attachment could not be withdrawn.

That only the creditors who had proved were aware of the marriage being out of community, and the petitioner's husband had informed them thereof.

That the trustee has not complied with the 98th section of the Insolvent Ordinance in so including the household furniture in the movables to be sold without getting the instructions of the creditors.

A rule *nisi* was granted in chambers on the 23rd April, 1897, to operate as an *interim* interdict in respect of the furniture and assets claimed by Mrs. Bernstein.

On the 26th April the trustee made a replying affidavit, stating that he held the powers of attorney of the only two creditors proved, and the insolvent had stated that he had no other creditors; though the insolvent attended no meetings of the creditors.

That deponent, after his election, asked Hudson, Vrede & Co. for instructions, stating that he had been informed that they were told that the furniture in the insolvent's house belonged to his wife under an ante-nuptial contract, but that these creditors denied any such knowledge, and directed deponent to realise the furniture, whereupon deponent duly advertised the sale, and issued a notice calling the third meeting of creditors.

That no application has been made by insolvent for permission to retain any part of the furniture, but that Mrs. Bernstein has claimed the furniture.

That no resolution of creditors at the third meeting to allow the insolvent to retain his furniture could be passed without special notice having been given for the purpose, in terms of the 98th section of the Insolvent Ordinance (see also *In re Chiappini*; 2 Searle, 218), that Hudson, Vrede & Co. could alone vote in number and value, and could therefore alone sanction such retention, and that deponent represents the said creditors.

That it is a common practice in insolvent estates to sell the furniture simply on instructions from the principal creditors, especially when there is no application by the insolvent for leave to retain.

That under all the circumstances deponent held there was no necessity to delay the settlement of the estate or to incur the expense of advertising and holding special meetings; and he submits he has acted lawfully in accordance with established custom, in good faith, and in the interests of creditors.

That before the date of the affidavit by Mrs. Bernstein an offer was made to him on her behalf to pay £50 into the estate on condition that Hudson, Vrede & Co. should abandon their claim to the furniture and consent to the insolvent's release, which offer was rejected.

There was also an affidavit by Mr. McKinley (representative of Messrs. Hudson, Vrede & Co. at Oudtshoorn, where the insolvent lived) stating that it was always his belief that the furniture of the house belonged to the insolvent; and an affidavit by the managing partners of the said firm stating that the advances to the insolvent had always been made on the strength of there being no prior hypothec or preferent claim on any part of his assets and in ignorance of the said ante-nuptial contract or of any claim by Mrs. Bernstein on the furniture.

Mr. Schreiner, Q.C., for the respondent: *Steyn* v. *Steyn's Trustee* (Buch. 1874, p. 16) settled the law of the Colony. That case gave rise to the passing of Act 21 of 1875, which contemplates registration of contracts entered into abroad as well as in the Colony. Section 9 gives same force and effect to foreign contracts if registered here. In *Seelig* v. *Registrar of Deeds* (6 H. Ct., p. 108) registration of a foreign contract was ordered.

Chief Justice: Supposing a marriage is entered into in a country where there is no community of property, what are the parties to do?

Mr. Schreiner: They should execute a contract here. *Schoombie* v. *Schoombie's Trustees* (5 J., 189). There the Court gave leave to register a contract entered into after marriage.

Chief Justice: That would be a post-nuptial contract, and the Act speaks only of ante-nuptial contracts. How does the non-registration affect the question of forfeiture of property?

Mr. Schreiner: Creditors must be protected and not defrauded. The old *Placaat* of 1540 protected traders to that extent. *Asshen's Executrix* v. *Blythe* (4 J., p. 186) shows the same doctrine. The contract in that case was entered into before Act 21 of 1875. It is admitted that the law of Germany, which applies in this case, is that husband and wife are married in community unless it is excluded. Act 21 of 1875 is definitely intended to apply to foreign contracts. Doctrine put forward by applicant is a very dangerous one. *Van der Byl's Assignees* v. *Van der Byl and others* (5 J., 170).

Chief Justice: That was not a case in which the wife claimed property which was hers before marriage. Can she forfeit by non-registration property which is clearly her own? Should there not as a preliminary point be a resolution to sell the property arrived at at some meeting of creditors?

Section 98 is for the protection of the insolvent. The Court should require strict compliance. Other creditors might have proved if it had been known that this matter would be discussed at the third meeting. This being usually discussed at a third meeting the insolvent might have delayed application for furniture until notice of third meeting had been given. *In re Chiappini* (2 S., p. 218).

Mr. Searle, Q.C., for applicant: Sections 56 and 77 of the Insolvent Ordinance, taken together, show that any matters affecting the

management of the estate must be settled at the third meeting. "Shall and may be lawful" is peremptory. *Edmeades* v. *Ascher* (J. 3, p. 241). What are parties to do who have been married abroad? The Court would not allow a post-nuptial contract to be entered into.

Chief Justice: The Court has repeatedly held that there is a tacit contract on marriage to the effect that the law of the domicile shall attach. When parties are allowed to execute a contract here, is it not simply allowing registration of this tacit ante-nuptial contract?

Mr. Searle: The Court has never allowed a contract to be executed after marriage, except when there has been some written instrument entered into previously, which is either incomplete or wanting in some formality. It did not appear whether the parties in *Seelig* v. *Registrar of Deeds* (G. 6, 108) had or had not gone to Germany from the Colony with the intention of getting married and coming back again; instructions had been given and a document drawn up, but not signed. Act 21, 1875, was not intended to do away with the law of matrominial domicile; section 9 referred only to persons who had temporarily left the Colony.

As to proof that the property claimed belongs to applicant, the documents were entered into before proper officials in Germany, and certified to by a British Consul; they specify articles and applicant's statement identifies them. It is not necessary that a schedule should be attached to the contract; proof may be given *aliunde*. As to *Van der Byl's* case, Van der Byl was domiciled in the Colony. In *Aschen* v. *Blythe* there was only constructive notice of the contract, but here there has been actual notice.

Schreiner, in reply cited, *In re Abt and wife* (3 Sh., p. 480); *Voet* (23, 2, 60, 61); *In re Levi* (6 Sh., p. 227). Proclamation, 12th July, 1882.

C. A. V.

Postea (May 17th).

The Court decided that the interdict, restraining the trustee from selling the furniture and jewellery, be continued, pending an action to be forthwith brought by the applicant to establish her ownership.

The Chief Justice said: The main question to be decided is whether, in the case of spouses who were not domiciled in this colony at the time of their marriage, and who were married in another country without community of goods, the wife is entitled upon the subsequent insolvency of her husband in this colony to claim goods which can be clearly proved to be her separate property, although no instrument in the nature of an ante-nuptial contract has been registered in this colony. No question arises in this case as to hypothecations, which would, of course, have to be decided according to the law of this colony, where the distribution of the husband's assets takes place, nor is the case complicated by considerations as to whether the law of the matrimonial domicile can affect land situated in this colony. The simple question is whether the applicant, who was married to the insolvent at Memel, in Germany, by ante-nuptial contract, excluding community of goods, but not registered in this colony, is entitled to claim household furniture and personal jewellery alleged to belong to her. The trustee of her husband's insolvent estate denies her right, on the ground that Act 21 of 1875 renders ante-nuptial contracts invalid without registration. In my opinion, however, that Act applies only to contracts executed in this colony or (if executed elsewhere) by persons domiciled in this colony. The 9th section, upon which reliance was mainly placed, does no more than to allow contracts executed elsewhere than within this colony to be registered here even if not originally executed before a notary. There is a further provision that if a notarial copy be deposited in the Deeds Registry Office the contract should have the same effect in regard to creditors in insolvency as if the original had been notarial, but this provision would be quite intelligible if it were confined to the contracts of spouses whose matrimonial domicile is in this colony. It would by no means follow that the contracts of persons who were married elsewhere, and whose matrimonial domicile was elsewhere than in this colony, cannot be registered here. There is nothing to prevent their registration in the Deeds Registry, but, of course, if it is proposed to effect it after marriage it can only be done with leave of the Court. Such registration may be useful to facilitate proof of the wife's ownership of goods in case it should afterwards be disputed and would be necessary for the purpose of establishing any legal hypothecation which the wife might afterwards seek to establish against her husband's estate. But for the purpose of establishing the applicant's ownership in the goods claimed by her registration is not necessary. If such ownership has accrued to her by the law of the matrimonial domicile non-registration of their ante-nuptial contract, whether the contract be express or tacit, would not operate as a forfeiture of her ownership. Proof of such ownership may be difficult, but the wife must be allowed to give it. The question which I stated at the outset must therefore be answered in the affirmative, and the interdict restraining the trustee from selling the furniture and jewellery must be con-

tinued pending an action to be forthwith brought by the applicant to establish her ownership. This being the view of the Court upon the main question, it is unnecessary to say much upon the question whether the trustee was justified in advertising the furniture for sale upon the private instructions of the creditors who had proved their debts at the second meeting. In my opinion h directions contemplated by the 98th section of the Insolvent Ordinance are directions given at a duly convened meeting after the second meeting. The two creditors who had proved at the second meeting had no right to give private instructions for the sale of the furniture, and the trustee ought not to have acted on those instructions. He contended that the furniture did not belong to the insolvent's wife. If this contention was correct the furniture must have belonged to the insolvent himself, and could not be sold except upon formal directions given by the creditors at a duly convened meeting assembled. As to the costs of this application they must abide the result, but it must be clearly understood that the trustee will not be expected to defend the action if he should be satisfied that the applicant's ownership of the goods is capable of clear proof.

Mr. Justice Buchanan said: It has been decided in this Court more than once that the incidents of a contract of marriage, governed by the law of the domicile of the parties at the time of marriage, cannot be altered subsequently by a change of domicile. By the law of the domicile of marriage the wife is the owner of certain property. The question raised in this case is a question of ownership, and nothing more. In my opinion the wife has not lost the *dominium* of any property which was vested in her before she came to the Colony. As to the 98th section of the Insolvent Law, it is clear that the trustee was not justified in acting as he did. He did not comply with the provisions of this section. On both grounds, therefore, this interdict should be granted. I concur in the order given in this case.

Mr. Justice Maasdorp concurred.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. de Villiers, P.C., K.C.M.G. (Chief Justice), Mr. Justice Buchanan, and Mr. Justice Maasdorp.]

FLEGG V. FLEGG AND HUSON. { 1897. May 17th.

This was an action for divorce, on the ground of adultery.

Mr. Buchanan appeared for the plaintiff, Frederick M. Flegg.

Frederick Montague Flegg said he was a harnessmaker, and lived at Woodstock. He was married to his wife in London on 20th May, 1893. There were no children born of the marriage. He and his wife came to Cape Colony in July of last year, and had lived in the Colony ever since. He and his wife lived happily enough together until in December last his wife suddenly left him. After inquiries he found she was living with a man named Huson. Soon afterwards he received a note from her asking if she could have her clothes. That letter he did not reply to, and he tore it up. In the letter his wife asked him to address his letter to the Cape Town Post-office, "to be called for." Later she came to the factory where he worked at Woodstock. Witness offered to take her back, but she refused, saying she loved Huson, and was living with him. Afterwards (in January) he, accompanied by Detective Hill, went to the house of one Webb, in Woodstock, and found the two living there as man and wife in one room. Huson is a carpenter employed at Salt River Works, and earns about £3 a week. Witness had now no idea where his wife was. He had had no communication with her since that visit.

Frederick Webb, Woodstock, deposed that in December last a man and a woman asked him for a room in his house. He identified the woman from the photograph of Mrs. Flegg produced. They gave their names as Mr. and Mrs. Huson. They occupied one room in his house for about three weeks, paying 7s. 6d. a week. About the middle of January Mr. Flegg, the plaintiff, informed him that the woman was his wife, Mrs. Flegg. She admitted to him that she wanted to get a divorce from her husband and to marry Huson. Witness told her to find another place to live in. They then left his place. While with him they used his furniture and provided their own boarding.

A decree of divorce was granted with costs, and £10 damages against the co-respondent.

The Chief Justice: It has been proved that adultery has been committed by the co-defendant

with the defendant, and it is quite clear that the co-defendant must pay the costs. The only difficulty is as to damages. The co-defendant is a carpenter earning £3 a week, and it is unlikely that he can pay heavy damages. But the plaintiff is not to be out of pocket, and in order to prevent him losing money the Court will award £10 as damages, this sum being given not as compensation, but because we award what the co-defendant will be able to pay. The decree of divorce is granted with costs, and £10 damages against the co-defendant.

[Plaintiff's Attorney, C. C. Silberbauer.]

HALL v. CLARKE AND CO. { 1897. May 17th.

Magistrate's jurisdiction—Set-off.

H. sued C. & Co. *in a Magistrate's Court for £19 5s. 9d. and annexed to the summons was an account for £65 14s. 0d., which was originally due to* H. *as commission but which was reduced to the amount claimed by giving to* C. & Co. *credit for £33 3s. 3d., cash received on account by* H., *and by setting-off £13 5s. 0d., being an amount due by* H. *to* C. & Co.

The Resident Magistrate sustained an exception taken to his jurisdiction.

Held, on appeal, *that the Magistrate had jurisdiction to try the case inasmuch as the two amounts were capable of compensation.*

Kruger *v.* Van Vuuren's Executrix (*5 Juta, 162*) *and* Theron *v.* Wolff (*4 Sheil, 18*) *followed.*

This was an appeal from a decision of the Assistant Resident Magistrate, Wynberg, in a case (heard on the 4th March, 1897), in which the present appellant was plaintiff.

The summons against F. H. Clarke (trading as F. H. Clarke & Co.) claimed £19 5s. 9d., balance of an account as commission on advertisements canvassed for, and moneys collected for defendant in October, 1896, and January, 1897, "as per account hereunto annexed."

The account showed a total indebtedness of £65 14s., but from this the plaintiff deducted a sum of £33 3s. 3d. (cash received to date), and £13 5s. (amount owing to Clarke & Co.), leaving the balance sued for.

At the hearing the defendant excepted to the Resident Magistrate trying the case on the ground that plaintiff's claim being for work and labour done above £20, and the credits and set-off given in the account not being admitted, and the whole of plaintiff's claim being disputed by the defendant, this Court has no jurisdiction to adjudicate upon the plaintiff's claim, according to the cases of *Beer* v. *Chiappini* (3 E.D., 131) and *Charsley* v. *Horsley* (3 E.D., 433).

For upholding the exception the following were the Assistant Resident Magistrate's reasons:

The defendant disputes the correctness of the whole account annexed to the summons and produced his ledger showing a balance in his favour of £1 2s. 1d. I could find no entry of the amount £18 5s. in the ledger, nor of the other items shown in the account. The whole of plaintiff's claim being disputed he cannot confer jurisdiction on the Resident Magistrate by giving credit for an amount not admitted by defendant, and by a side-wind getting the Court to adjudicate on a claim exceeding its jurisdiction. No agreement being arrived at between the parties as to a set-off, the Court would be compelled to enter into the whole account in order to arrive at a decision.

The exception is a good one, and must be upheld with costs.

Against this decision the appeal was now brought.

Mr. Graham for the appellant: The Magistrate thinks he has no jurisdiction, because there is no admitted set-off. (*Charsley* v. *Horsley*; *Beer* v. *Chiappini*). But in *Theron* v. *Wolff* (S.C.R., 11, 16) it was held that an amount capable of being set off, could be set off so as to bring the claim within the jurisdiction. In that case, there was an amount which was admittedly due. In *Krug.r* v. *Van Vuuren* (5 Juta, 162), the Chief Justice held that there was no necessity for any agreement as to set off. Plaintiff in any event would have to abandon the £18 5s.

The appeal was sustained with costs.

The Chief Justice said: In this case the plaintiff claimed in the Magistrate's Court the sum of £19 5s. 9d., an amount which was clearly within the Magistrate's jurisdiction. In order to see how he arrived at the amount, the plaintiff attached an account to the summons, showing an amount of £65 14s, and then he places on the other side, cash received to date and amount owing to defendant, £46 8s. 3d. This amount of £46 8s. 3d., the plaintiff, says I shall deduct from the £65 14s., and I now claim the balance of £19 5s. 9d. Now the only question to be decided is, whether this amount which the plaintiff proposes to deduct, is capable of being set off. That is the result of the decision in the

case of *Theron* v. *Wolff*. If in this case the plaintiff, instead of setting off the amount, said I abandon my claim, the Magistrate would have had jurisdiction: and practically the plaintiff did abandon the amount, for even if it were found that the amount was owing to him, he could not at any other time have succeeded in enforcing the claim to it. I am sure that if the Magistrate had seen, or had his attention called to the recent case of *Theron* v. *Wolff*, his judgment would have been different. But his attention was apparently called only to the Eastern District Court cases, which have been somewhat modified by the decision in this Court. In those Eastern District Court cases it was held that a set-off must be admitted, but the Supreme Court has held that there is no necessity for the set off being admitted, so long as the claim is capable of being set off. The appeal must therefore be allowed with costs.

[Appellant's Attorney, D. Tennant, jun.]

MARCUSSEN v. SKIBBE. { 1897. May 17th.

Costs—Magistrate—Judicial discretion.

Where a Magistrate, in giving judgment for an amount tendered, (the tender not having been pleaded) *ordered the plaintiff to pay the cost, the Court, on appeal, declined to interfere with the judgment.*

This was an appeal from the decision of the Assistant Resident Magistrate, Cape Town, in a case in which the appellant was plaintiff.

The summons claimed £1 4s. in respect of work and labour. Plaintiff had made a boat at 12s. a day for defendant, for which he was paid. After payment he put in a further claim for 24s., for two days' assistance (prior to the building of the boat), the work consisting in helping defendant to choose a plank and have it sawn. Defendant tendered 12s., "rather than waste time by going into Court."

The Resident Magistrate gave judgment for 12s., but ordered plaintiff to pay all costs; his reasons being:

I was of opinion that as an unconditional tender of 12s. appeared to have been made before summons, plaintiff was entitled to recover that sum, but that as he had refused to accept that sum, defendant could not be held liable for costs.

Against this appeal was now made on the ground that the Resident Magistrate had not exercised a judicial discretion in making plaintiff pay all costs, as the tender was not pleaded and was not relied on at the trial, the defendant having pleaded the general issue.

Mr. Graham appeared for the appellant: The principle involved is one of extreme importance. Question is, what is the effect of a tender duly made but not pleaded? Plaintiff should have got his costs. *Mostert* v. *Fuller* (S. 1875, p. 23.

The appeal was dismissed.

The Chief Justice said: As to the merits of the case, I see no reason to find fault with the decision of the Magistrate in awarding only 12s. to the plaintiff. It was merely a question of credibility, and the Magistrate believed the evidence that payment was to be made only for building the boat, and not for going about for two days in search of timber for building purposes. The plaintiff objects to pay the costs of this case because he says that the defence was a general one, and the tender was not pleaded. I am not prepared to lay down the rule that even where the defence is a general one such an objection can be maintained. The case of *Mostert* v. *Fuller* is not analogous, for there the amount awarded was larger than that tendered. The Magistrate is always allowed a judicial discretion on the question of costs. Under all the circumstances the Court cannot say that there has been any improper exercise of the Magistrate's judicial discretion. The appeal must be dismissed.

Mr. Justice Buchanan said: On the facts as found by the Magistrate, and which finding is supported by the evidence, the judgment in this case might have been entirely for the defendant. The Magistrate has given the appellant more than he was entitled to, but there has been no cross appeal. That is no ground, however, for giving the appellant, who has already got more than might have been given him, a still further judgment. I concur that this appeal must be dismissed.

Mr. Justice Maasdorp concurred.

[Appellant's Attorney, D. Tennant, jun.]

ROSS v. NEETZER. { 1897. May 17th.

Divisional Council — Lessee — Toll — Exemption from toll—Illegal condition—Reasonable exemption.

The Cape Divisional Council entered into a contract for the lease of a certain toll to the plaintiff, on condition, among others, that the residents within the limits of Mait-

land Village Management Board should be exempt from the payment of tolls.

During the currency of the lease the limits of a neighbouring municipality were extended so as to embrace a portion of the area formerly included within the limits of the Maitland Village Management Board.

Held, *in an action for toll moneys against the defendant, who was a resident within such portion, that he remained exempt notwithstanding the extension of the neighbouring Municipality.*

Held further, *that the condition exempting residents within the proximity of the toll was, under the circumstances, reasonable and was not illegal or contrary to the provisions of the Divisional Councils Act, 1889.*

This was an appeal from a decision of the Resident Magistrate, Cape Town, in a case in which the respondent sued the appellant for 17s. 4d., toll moneys.

The plaintiff in the Court below is the lessee under the Cape Divisional Council of the tolls (upper and lower roads) on the military lines, and at the third milestone, Maitland, his lease running from 1st January to 31st December, 1897.

The lease was signed on the 21th December, 1896, and contained a clause exempting the vehicles and animals belonging to "residents within the limits of the Maitland Village Management Board" from payment of tolls at the third milestone.

A clause providing for such exemption has been inserted in the toll leases for some years past by the Cape Divisional Council, in consequence of a resolution of the House of Assembly, stating that in the opinion of the House the inhabitants of Maitland were either entitled to such relief under the special circumstances of the case or that the toll should be removed outside the limits of the Municipality. This resolution was communicated to the Divisional Council by a letter from the Assistant Commissioner of Crown Lands.

In January, 1897, a proclamation was issued altering the municipal limits of Woodstock, annexing therein a portion of the Maitland Village Management Board area. In consequence of this the toll at the third milestone is within the Woodstock limits, and so also are the houses of the defendant and many others.

The plaintiff claimed that as defendant and the others are no longer within the limits of the Maitland village area, they are now not entitled to the exemption, but are liable to pay tolls, even though at the date on which the contract was signed the defendant was exempt.

The defendant pleaded that he had gone through the toll without paying on the date alleged, but that he was exempt in virtue of the facts above set forth. and that his exemption was not destroyed by the mere alteration of the municipal boundaries; further, that as a title to a fee is in question, it is beyond the Resident Magistrate's jurisdiction.

The Resident Magistrate, holding that he had jurisdiction, gave judgment for the amount claimed with costs, on the ground that as defendant no longer lives within the Maitland limits he is not exempt under the clause of the lease.

From this decision the defendant now appealed.

Mr. Graham for the appellant: The plaintiff went into court on his lease from the Divisional Council, and under this lease certain parties were exempt from toll and had been exempt for many years; moreover he had full knowledge that these exemptions existed. Woodstock Municipality was extended after the lease had been entered into. In the contract a stipulation is entered into on behalf of the defendant and the plaintiff must abide by this stipulation.

Mr. Schreiner, Q.C., for the respondent: An illegal attempt was made to give exemption to a certain area. If an Act of Parliament had been obtained giving exemption, that exemption would be given to locality only and not to individuals, and would vary with the locality. *Maxwell on Statutes* (p. 411). The appellant's case cannot be stronger than if an Act had been passed.

De Villiers, C.J.: Exemption is given to persons living in the village of Maitland. Defendant still lives in the village of Maitland.

Mr. Schreiner: Village legally means area within government of Village Management Board. Act 40 of 1889, section 167, impliedly debars the Divisional Council from exempting from tolls. other persons than those mentioned there. The law was the same in 1885, appellant cannot set up an illegal exemption.

De Villiers, C.J.: The lessee keeps everything he takes as toll; so how can he take toll from a person whom he has promised to protect?

and rings. He admitted having written the letter produced to Miss Winslow. The letter asked her to come to his shop that afternoon between five and six o'clock. He wrote the letter because he intended to close his shop early that day, and he was afraid she might be coming for meat when it was too late. The letter was never sent, and he believed his wife got hold of it. He never gave Miss Winslow Christmas cards or rings. He did not know anything about the account from Toll & Courtis. The account came to his house, and his wife got it. Why it was sent to him he did not know. Miss Winslow might be able to explain. He could not. On December 17 he did not go home in a violent temper, and he did not go into his wife's bedroom and strike her. It was she who assaulted him. He did not take a gun home to threaten his wife with. He always had one in the house. He might have warned his wife not to touch it. He may have told his wife she was not fit for a Kafir to marry; a man in anger says such things. When he struck her it was in self-defence. He was not given to drink, and was not in the habit of going to bars to drink.

Plaintiff admitted having written the following letters to his wife:

Claremont, January 20.

Dearest Minnie,—I am writing to you these few lines with tears in my eyes. I cannot forget to think about you. I feel quite lost and gone. I don't know what will become of myself. I am coming to town to-morrow Thursday afternoon by 4 o'clock train to pay some accounts which must be paid. My Dear, will you kindly come to town and meet me at the Standard Bank as I want to see you very very particularly. I will meet you between five and six oclock please don't disappoint, come for certain, as I have got lots to speak to you, please don't tell anybody that you are coming to meet me: if your Matye ask where you are going to tell her you are going to Bappie. Dearest Love don't disappoint, as I am longing very much to speak to you; do come to town. My heart is too sore to write any more; don't do any thing not before you see me. Now, my Dear, I must end with a broken heart and eyes full of tears, with best best Love to your Dear Self, and don't forget me.—I remain your Loving husband for ever and ever

Lonely Mike V.N.

The second letter was as follows:

Claremont, January 22nd.

Dearest Minnie

Having received your kind letter yesterday afternoon I was thunderstruck when I read your letter to receive such news from you. Dear Minnie, God Almighty knows that I have no where since you left that night. I came out early about five oclock and went to Porter Hodgson, then I came home and had something to eat, about 7 oclock I went to Mrs. Meyall to enquire about what you told me, she denied having said anything. Dear Minnie I spoke to an attorney yesterday; he says we can seperate without going to Court as the Court will take up all little money we have. Dear, I feel miserable and knocked up to think about these things, I will send half of your goods to-morrow and the other half on Monday as Johnnie cant take all at once; do please write to me what day and where I must meet you, say next Thursday afternoon at about 4 o'clock, as I must see you before we sell the goods. Dear Minnie, the figs are getting very nicely ripe now and big ones too; will send you some next week, I conclude with best best Love to My Dear Minnie.—I Remain, Your Ever Your Husband

(Mike)

Re-examined: With regard to the admission of adultery in the presence of Heydenrych, he was so worried with his wife and her charges that he might have said, "All right. believe what you say, and be done with it." His wife made him sick with her charges. On birthday occasions he had got drunk, but he was not given to drink.

Malvena Winslow said she was unmarried, and lived with her cousin, Mrs. Stroud, at Claremont. She was engaged to be married to a young man named Conlin, and the marriage was fixed for 28th July. She knew plaintiff, by seeing him in his shop, where she went at times to buy meat. There had been no familiarity between them, he had given her no presents, and she had not committed adultery with him. The explanation of the acount for rings having been sent to Niekerk was that she was in Cape Town and bought rings, but was 15s. short. Toll & Courtis asked her for the name of some business man at Claremont, and she gave the name of Niekerk

Cross-examined by Mr. Buchanan: Mrs. Niekerk called on her about the charges made against witness. That was shortly before she left her husband. It was not true that she and Niekerk had been seen walking about the streets of Claremont. One evening she met him at the station, and he offered to see her home, but she declined. It was false that she committed adultery with Niekerk in December, January and February. She once called at Niekerk's shop and found Mrs. Niekerk there. It was not true that she "was confused," and

then said she would come back. She went back that day to Niekerk's, taking a lady friend with her.

Andries van Niekerk, brother of the plaintiff, said that he had been called by Mrs. Niekerk after she had been assaulted. He told his brother that he ought to be ashamed of himself, for striking his wife.

Frederick Blankenberg, Peter Johannes Brink, and Henry Greyer gave evidence that when visiting the house Niskerk and his wife appeared to be happy enough together.

For the defence, Wilhelmina Niekerk, the defendant, gave evidence as to the marriage. For a short time her husband behaved all right, but it was not long before he began to abuse her. He was a very disagreeable man, and was always grumbling. He once threw her on the floor, and on the bed, and tried to choke her. She had left her husband twice before, and went back when he promised to reform and to treat her better. He frequently swore at her, using indecent, disgusting language to her, and always before the servants. He told her she was not fit to marry a Kafir, and he had threatened several times to take her life. On one occasion he brought home a gun, saying that he had bought it for the special purpose of shooting her. She had lent him £57 of her own and her aunt's money. On January 1 she received the account from Toll & Courtis for jewellery, which articles were not for her. Witness spoke to her husband about the account. At first he denied, and then he admitted having committed adultery with Miss Winslow. There was no one present when he made the admission, and he told her that as there was no witness present she could not prove anything. She separated from him that night, going to another room. Later her husband said to her and Mr. Heydenrych that he had committed adultery with Miss Winslow At that time her husband was ill and in bed. On 17th January he struck her in the bedroom in the hall, and in the dining-room. It was not true that she kicked him, as her husband alleged. On that occasion her husband said he would not rest until he had killed her. He further said that she must leave his house as he was to bring another woman into the house. She sent or her husband's brother, and for Dr. Beck. Dr. Beck attended to her injuries. It was not true that he kept a gun. When he went out shooting he always borrowed a gun, and that night he said he had brought the gun home expressly to shoot her, to blow her brains out he said. Her husband kept very late hours.

Elizabeth Muller, who was a servant with the Niekerks, said she had often heard her master swear at her mistress. She heard her master say one time that he had brought a gun home with which he was going to blow her head to pieces. On 17th January, she saw Niekerk strike his wife. Witness had seen Niekerk twice with Miss Winslow in Claremont. That was at night, and on both occasions Niekerk was late in coming home.

Cornelius Heydenrych, master tailor, Kenilworth, deposed that he was in Niekerk's house in January. Niekerk, in the presence of his wife, said he had committed adultery with some one, the name witness could not remember. Niekerk said he had been on the "booze" since the preceding Wednesday. Mrs. Niekerk said he had not only done what he said, but he ill-treated her and gave presents to the girl. Witness did not want to hear more, and left the house.

Dr. Beck, Claremont, stated that he was called to see Mrs. Niekerk—he thought about the 18th—and he found her suffering from bruises about the upper lip and nose. The blows to have inflicted the injury must have been pretty severe.

Gabriel Neilson carpenter, Woodstock, deposed that he knew the Niekerks, although he was not intimate with them. On 4th March this year he was at Claremont between eight and nine o'clock in the evening. When he came down the road to the hotel he saw Niekerk standing in front of the hotel cuddling a girl. The two appeared to be very loving at the time. He had his arm around her neck. It was a a coloured girl he was with. By-and-bye Niekerk went into the hotel, and witness, just to make sure that it was he, followed him, and saw him in the hotel. When Niekerk came out he stood with the girl for about another quarter of an hour, and then she went one way and he another. Witness had seen Niekerk walking about Claremont late at night. One night he saw him in the street close upon eleven o'clock, and on another occasion he saw him come off the last train. Witness did not think Niekerk was sober, he was staggering about the street, and trying to knock people down. Niekerk and his friend went to another house in Claremont that night; he did not got to his own house.

Cross-examined: Witness knew that Niekerk was married, and that was the reason that he paid so much attention to him. He had not been engaged and paid by Mrs. Niekerk to watch her husband.

The Chief Justice: The Court is not satisfied that there is sufficient proof to justify more than the granting of a decree of judicial separation.

After argument.

The Chief Justice said: The most serious charge made in this case is that the plaintiff committed adultery with Miss Winslow. It is sufficient to say here that with regard to that charge there is not sufficient evidence to prove it. There are circumstances of suspicion, and there is the admission made by the plaintiff, but all these circumstances are not sufficient to justify the Court in concluding that there was adultery committed on the part of the plaintiff, and the plaintiff is entitled to the benefit of the doubt. I am quite satisfied, however, upon the evidence that the plaintiff is not entitled to the relief which he asks for. He asks for a decree of restitution of conjugal rights. The treatment which the defendant received from him has not been what could reasonably be expected from a husband towards his wife. This was not a solitary act of cruelty which was committed on 17th January of this year. On two previous occasions the plaintiff's conduct towards his wife was, to say the least of it, most undutiful and improper. Not only did he on several occasions assault her, but he also used language towards her which no husband ought to use towards his wife. There was for instance the telling his wife that she was not fit for a Kafir. The defendant swears positively that this expression was made use of, and the plaintiff is not prepared to deny that it was used. Coming to the occasion of 17th January, I think it is quite clear that it was the plaintiff who assaulted the defendant. I don't believe his story that his wife assaulted him, and that it was in self-defence that he struck her on the lips and nose. He may not have used his full force, perhaps fortunately, but that he severely assaulted her there can be no doubt. Taking also the fact of plaintiff's admission in the presence of Heydenrych that he had committed adultery, I am of opinion that life with the plaintiff could not be expected on the part of the defendant. Heydenrych's evidence bears every trace of being true, and I am convinced that both he and Mrs. Niekerk are speaking the truth. Whether the adultery was committed or not I believe that the plaintiff said he had committed it. That statement of the plaintiff, taken in connection with acts of misconduct towards his wife, would, in my opinion, justify the Court in granting a decree of judicial separation. The judgment will therefore be for the defendant, and an order that the plaintiff pay the costs of the suit.

[Plaintiff's Attorney, J. C. Berrange & Son; Defendant's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before the Right Hon. Sir J. H. DE VILLIERS, P.C., K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

DE MARILLAC V. BRUYNS. { 1897. May 18th. „ 19th

This was an action to recover the sum of £500 due upon a certain agreement dated 27th March, 1895.

The plaintiff's declaration alleged:

1. Plaintiff and defendant both reside at Cape Town.

2. During the early part of the year 1895 the plaintiff performed certain work and rendered certain services to the defendant at his request in connection with the inspection, prospecting, and attempted flotation of the farm Loeriesfontein, in the district of Calvinia, and the defendant became and was indebted to the plaintiff in a considerable sum of money in respect of the said work and services.

3. In satisfaction of the debt so due as aforesaid, the defendant on 27th March, 1895, and at the request of the plaintiff, agreed and undertook to sell two shares in a certain syndicate called the South African Prospecting and Development Syndicate, which shares were then in the defendant's possession, and to pay the proceeds in cash to, or place it in the Bank of Africa to the credit of the plaintiff's wife, E. L. de Marillac, to whom the plaintiff is married out of community of property, and to whom at the said date he was indebted in an amount exceeding the market price of the said shares.

4. The plaintiff, on behalf of his said wife, and with her authority, duly accepted the said undertaking.

5. The value of the shares in the said syndicate immediately after the date of the said agreement was a sum of £250 each, and the defendant did sell two shares and upwards at that price, and received the money therefor.

6. It became and was the duty of the defendant either to pay over to the plaintiff's said wife the sum of £50, being the value or equivalent of the said two shares, or to deposit the said sum to her credit in the Bank of Africa as aforesaid, yet he failed and neglected to do so.

7. On the 15th July, 1895, plaintiff's wife ceded to him for valuable consideration all her, right, title, and interest in the said sum of £500, due to her by the defendant, and the plaintiff is now rightly entitled to sue for the same.

8. All things have happened, all conditions have been fulfilled, and all times elapsed to entitle the plaintiff to be paid the said sum of £500, together with the interest, from the 1st April, 1895, yet the defendant wrongfully refuses to pay any part of the sum.

The plaintiff claims:

(*a*) Payment of the sum of £500 with interest from 1st April, 1895.

(*b*) Alternative relief and costs.

The defendant's plea was as follows:

1. Defendant admits the allegations in paragraph 1 of the declaration, but denies all and sundry the allegations in the other paragraph of the said declaration.

2. He says that if he did make a promise to sell two shares in the South African Prospecting and Development Syndicate, and to pay the proceeds in cash to or to the credit of the plaintiff's wife (which he denies), the said promise was founded upon no consideration, and is therefore not enforceable at law. Wherefore he prays that plaintiff's claim may be dismissed with costs. And for a further plea in case the foregoing shall be considered insufficient, but not otherwise, he says:

3. He repeats the allegations contained in paragraph 1 above.

4. If he did make a promise to sell two shares in the South African Prospecting and Development Syndicate, and to pay the proceeds in cash to or to the credit of plaintiff's wife (which he denies), that he has paid the proceeds of the said shares to plaintiff.

Wherefore he again prays that plaintiff's claim may be dismissed with costs.

The replication was general.

On these pleadings issue was joined.

Mr. Rose-Innes, Q.C. (with him Mr. Close), for the plaintiff.

Mr. Benjamin (with him Mr. Buchanan) for the defendant.

The following evidence was led for the plaintiff:

Ernst Anton Marie de Marillac stated: I am plaintiff in this action. I know defendant, and was introduced to him by Mr. Solomon in 1894. Defendant had certain concession of mineral rights over Loeriesfontein; he spoke to me in glowing terms about them saying there was abundance of graphite, nitrates, coal, alum, &c.; and I was asked to place the concession and flotation by capitalists in London on behalf of the Loeriesfontein Syndicate. I was to receive eight syndicate shares for the flotation. After arranging preliminaries in London I proceeded to Loeriesfontein, and found the matter had been very much misrepresented; and the conditions generally were unfavourable for flotation. I cancelled my arrangement accordingly with the syndicate, but made fresh arrangements to go into the matter as the indications justified further and proper exploitation, though the surface minerals were grossly misrepresented to me. My first visit was in February, 1895. I went then to considerable expense, having, *e.g.*, to pay Mr. Watermeyer's expenses for going with me. On the 18th February I asked for two further shares for my trouble, in addition to the eight shares for flotation. On my return I met defendant in Cape Town, and came to an agreement with him under which he agreed to sell two shares for me and pay me the proceeds. Defendant had all the syndicate shares issued to him personally, in fact, as I ascertained subsequently, he was the syndicate vendor, promoter, and chairman. I corresponded with Mr. Solomon as agent for Mr. Bruyns, and wrote to him on the 12th March suggesting an arrangement in settlement of my claims, and made an arrangement with Mr. Bruyns verbally in terms of that letter. I was still not satisfied, and on 14th March, in confirming that arrangement, I wrote to Mr. Bruyns expressing a hope that I should get a further share in the syndicate in view of the trouble and expense I had gone to in the matter. I saw him again after this, and asked for more shares, and he promised two more in addition to the two extra shares already promised, as to which I had then received a great part of the proceeds from realisation. On the 27th March he put this in writing, and at my request made the proceeds of the two new shares payable to my wife, as I was then indebted to her. This document was duly ceded to me by my wife on the 15th July. On the 29th March I replied, accepting the offer on behalf of my wife, I had done work, and was largely out of pocket. That was why the promise was made. Before the 27th March defendant had paid me large sums on account of the proceeds of the two extra shares first promised. Their sale value was £250 then. In the commencement of April I went back to Calvinia, stayed there a good while, and went to considerable expense again. Including the engineer's fees, &c., the expenses came to £:00, the greater portion being refunded by the persons in London who were interested in the venture, on my representations to them. I went to Calvinia five times in connection with syndicate matters. The only way of recouping myself is by these shares. Even then I shall be out of pocket. I know defendant sold some syndicate shares shortly after the agreement of 27th March. He has told me he then sold to Kitch, Cunningham, Ran-

some, and Smit for £250 a share; to Dix and others he sold half-shares for £125. Nothing has been paid to my wife.

Cross-examined: On my visit in February I found that nitrates, *e.g.*, did not exist superficially, though I had been told the surface nitrates were abundant. They might have been in the soil, but no one could show me where. I went all over the farm, being shown round by the Bastards on the place. I formed my opinions from the geological formation—and also went over with a man experienced in coal. I decided I had been deceived, and immediately stopped the flotation which was in hand. The indications of coal, magnesium, &c, were good; but these minerals were not on the surface as represented. I was not credulous in starting the flotation before I had actually seen the spot. I acted on Bruyns's representation, believing him on Mr. Solomon's assurance to be trustworthy. According to the original contract I was to pay all expenses of the visit to Loeriesfontein. When I found I was deceived I cancelled the whole arrangement and we made fresh terms. The consideration for the extra shares was that I spent a good deal of time at Loeriesfontein and journeys to and from there; and suffered considerable inconvenience. I went solely on Bruyns's business in February. The other trips were after the 27th March. Besides the misrepresentations as to the surface richness, the concession was valueless at the time; the Government consent was required, but had not been obtained. I found this out and put matters right. I have no influence over Bruyns; he has a good head on his shoulders. He is in charge of the bookbinding department at the "Cape Times" and knows very well what he is about. He is not illiterate. I did not like the influence Solomon and Gubbons had over him; but I never tried to set him against them. The shares were saleable, and in great demand at and shortly after the date of the promise to Mrs. Marillac.

Re-examined: The syndicate was first called the Loeriesfontein Syndicate, then it became the South African Development and Prospecting Syndicate, and then the New Loeriesfontein Syndicate. I certainly acted absolutely *bona fide* in regard to the first attempt at flotation; finding I had been deceived I stopped the flotation at once.

Postea (May 19th).

[Before the Hon. Justice BUCHANAN and Hon. Justice MAASDORP.]

Thomas Henry White Barry said he was secretary of the South African Development Syndicate in March, 1895, and he remained secretary until the Loeriesfontein Syndicate was formed. On March 28 two half-shares of the South African Development Company were sold to William Kitch at £125 each, and on 18th August one half-share was transferred to Daniel Thomas Dix, also at £125. These were the only registered sales; there might have been other sales, but he knew of none.

Jacobus Peter Bruyns, for the defence, said that about September, 1894, he held a concession of the farm Loeriesfontein. The farm was populated by Hottentots, and the concession was got by Mr. Feltham. In 1894 witness created a syndicate of ten shares. Two were to be sold for the development of the property, witness retained two, and the six were given to those who formed the syndicate. Negotiations were opened between witness and Marillac, and the negotiations were set forth in the correspondence already produced. Marillac was to undertake the flotation of the company, visit Loeriesfontein and inspect it, paying all expenses. For that he was to receive two shares. On 10th January the original shares were converted into forty shares, and Marillac received eight shares. Marillac left for Loeriesfontein at the end of January, and witness followed a fortnight later. Witness saw Marillac when he arrived at eight o'clock in the evening, and next morning Marillac left, saying he had no time to stay. Witness went over the property. Marillac had done nothing. Witness returned to town on the 3rd March and Marillac told him then that he was dissatisfied at having received only eight shares, and he asked witness to give him two more shares. Witness agreed, and Marillac asked him to put them in his wife's name. When Marillac first spoke to him about the two more shares nothing was said about the wife's name, and it was a couple of days later that he asked that the issue be made to his wife. Marillac then asked witness to sell the shares, and witness put them into the hands of a broker. A share and a half were sold at the full value, £250 a share. Witness handed the money over to Marillac. The first half was sold, he thought, to Kitch, and one-half was sold to Maxwell. Maxwell paid by a cheque. Marillac wrote the agreement referred to (dated 27th March) himself, and sent it to him on 27th March. At that time witness had sold the two half-shares, and given Marillac the money. The written agreement was merely an embodiment of the verbal agreement. Witness sold another half subsequently to James Smit, and the amount he gave to Marillac. The remaining

half he could not sell. Altogether from the first witness sold five and a half shares. Solomon was never witness's agent. On the 18th February Marillac wrote to witness, asking him to sell two shares. These were two of Marillac's own eight shares. He had a conversation with Marillac at Loeriesfontein, when Marillac asked him to sell two shares. Later he wrote asking him to sell three, and still later to sell four. Marillac explained that he wanted £1,000 tofight Lippert,and he could not off-load himself, as it would spoil the market, he having cried the market down. Witness undertook to sell the two out of Marillac's eight shares. On 11th May there was an entry of £500, which represented Mrs. Marillac's two shares, witness havig taken the unsold half-share. At that time there was to be a settlement between the two. An account was rendered by Marillac on 3rd May, which account contained several slight errors, and it was amended on 11th May. On the account dated 3rd May, Marillac wrote asking for the two shares which had been promised Mrs. Marillac. It was not true that he had £500 in hand from shares realised. On the contrary, he was £200 out of pocket. He had raised the £200 by mortgaging some of his property. There had been the rent of the concession, £250 a year, and expenses of the bore. men. engineer, survey, amounting to over £30 a month. There had been various promises made by Marillac, but witness had got no benefit from Marillac. Witness had paid him £500 and expenses, amounting in all to £689 7s. 6d., and witness was no better, but worse, than when he first got the concession.

Cross-examined by Mr Innes: Originally there were ten shares, but they did not belong to him. Feltham got the concession, and ceded it to witness. Witness sent Feltham for the concession, got it, and witness gave him two share. The other eight belonged to Solomon, the secretary, and himself. The distribution of shares did not take place until the forty shares were created. Witness gave his son two shares, but he did not pay and he did not retain them. Marillac had the scrip of his eight shares, and when he (Marillac) asked him to sell, he did not hand the scrip to witness. Witness agreed to give Marillac two shares before the two for Mrs. Marillac's shares were mentioned. He could not remember seeing a letter written by Marillac on 12th March, that he (Bruyns) was to sell two shares and place the money to his (Marillac's) credit at Prieska. On 8th May Marillac wrote to defendant sending a copy of the letter of 12th March. Witness, however, could not say that the 12th March letter was seen by him. Witness gave the cheque for the first half-share sold, but at his request witness cashed it and gave him £125. Witness gave Marillac £125 soon after—after selling the second half-share. Before 27th March, Marillac had received money for his expenses and the proceeds of the sale of the share and a half. It was after the shares had been given to Mrs. Marillac, that Marillac asked witness to sign the letter promising the shares to Mrs. Marillac. Marillac wrote the letter, and witness signed it. It was Marillac who put the phrase in that the shares were presented to Mrs. Marillac on account of the "invaluable assistance rendered" by Marillac. On 31st May witness was seen by Mr. Solomon, and he promised to do his best to sell the last half-share. Witness had sold shares to the value of £1,375, that was five and a half shares at £250 each. Of the forty shares the New Loeriesfontein had got sixteen shares, Marillac eight, Feltham two. Solomon four, and witness ten. At the time of the promise he had twenty-six shares. The New Loeriesfontein took over the assets, and for that witness handed over the sixteen shares. Marillac had forfeited his eight shares in the New Loeriesfontein, because he failed to float. Marillac did not claim four shares. He only asked for the two for Mrs. Marillac, and he only asked witness to sell four of his eight shares.

Re-examined by Mr. Benjamin: Marillac was always pressing witness for money. In August, before the bill was due, witness paid £15. Witness had tried to sell the fourth half-share of Mrs. Marillac's two shares, but had been unable. The £15 was off the bill, and when he was sued for the £98, with interest £3, the £15 was deducted. The bill was given as an arrangement for settling. Marillac said he would not press witness, but the bill was no sooner signed than he began to press for money, and even had had him in the Magistrate's Court. With respect to not giving shares until the syndicate stock was converted into forty shares, what he meant was that although others had an interest in the syndicate no scrip was given out until the conversion into forty.

Harry Solomon, broker, said he introduced Marillac to Bruyns. He acted as agent as much for the one as the other. Marillac represented that he had enormous capital and influence behind him. Marillac used to worry him very much. He corroborated regarding the signing of the bill, and as to Marillac promising not to press for payment, but the bill had not been signed twenty-four hours when he was asking for money. Witness sold one half-share. He knew some had been sold in March, 1896. He

went over Bruyns's books and made out an account for £113 odd as the final balance due. Some slight errors were found out, and a bill was drawn at four months for the amount. That settled the matter so far as he knew.

Cross-examined by Mr. Innes: Bruyns made witness a present of four shares. He had done a good deal of business for Bruyns, and had given him advice on matters all his life.. Marillac wrote him about Bruyns mixing up the two promises of two shares each, but what he meant he (witness) did not understand. The letters of 12th March and 20th May he would naturally have shown to defendant.

Mr. Innes, Q.C.: The matter in dispute is whether there was a contract enforceable at law, and if so, whether it has been performed. *Tradesmen's Benefit Society* v. *Du Preez* (J. 5, p. 269) is applicable. A contract made between A. and B. for the benefit of C., if accepted by C. can be sued on by him. We rely upon the document signed by defendant, in which he says "upon consideration of the services rendered by you," and agrees to give plaintiff two more shares and place the proceeds in the name of his wife.

As to the performance, the whole question is whether the second contract was a mere variance of the first, or whether there were two entirely separate contracts. If there was only one contract, we must admit that it has been performed: but there were two: that of the 12th March had been concluded when on the 27th July defendant signed the letter, agreeing to sell two shares, and place the proceeds in Mrs. Marillac's name. We have our claim on the letter of the 12th March to Solomon, which the letter of the 14th March shows that defendant must have seen. The letter of the 27th March is inconsistent with there having been one contract only.

Buchanan, J.: What do you ask for now? The evidence shows that the shares were not sold as you allege, and there is no claim for damages.

Mr. Innes: The plea is that the shares were sold. They do not plead that they were not saleable; if that case is set up by defendant, the plea should be amended to that effect, and then we can also amend and pray for damages. The evidence is that the shares were saleable.

Mr. Benjamin: Under the original contract plaintiff was to do certain things, and pay his own expenses. He has had eight shares and £600. Defendant has obtained nothing. Letter of 12th March was to Solomon and has nothing to do with the case. Letter of 18th February refers to two of the eight original shares. The two shares which defendant in letter of 16th March agreed to sell, were clearly the same as those referred to on 18th February. The verbal contract entered into in March, was put into writing later. The shares were promised for past services, and it has always been held that past consideration is no consideration. *Anson on Contracts*, p. 94; *Roscorla* v. *Thomas* (3 Q.B., p. 234.) There was no *consensus ad idem*.

Mr. Innes: The plaintiff receded from the flotation contract, but he then required to be paid for services rendered: it was really a *quantum meruit*. We are not suing upon a *quantum meruit*, but if there was a *quantum meruit* and a debt due to plaintiff, and defendant entered into a contract with him to discharge that debt, then there is a legal consideration for the contract. It is sufficient to show some consideration, not necessary to prove its adequacy. Our law goes further than English law with regard to past consideration, for it allows an action upon a donation. If this were a pure donation we could succeed by attaching another count to the declaration. *Van Reenen's Trustees* v. *Versfeld* (9 J., 161): There is no doubt as to the irrevocability, because the shares were to be sold immediately. The prayer for alternative relief would allow of damages being granted.

Mr. Justice Buchanan, in giving the judgment of the Court, said: The declaration alleges that in the early part of 1895, the plaintiff performed certain work and rendered certain services to the defendant at his request, in connection with the inspection, prospecting and attempted flotation of certain farms over which mineral concessions had been obtained. In consideration of these services the defendant agreed and undertook to sell two out of certain shares held by him in a certain syndicate, and to pay over the proceeds. The defendant's plea is two-fold, first that if such a contract was entered into, there was no consideration given; and secondly, that if he did make such a promise, he had performed it. These pleas are to some extent inconsistent with each other, but no exception was taken. The contract is evidenced by the letters which passed between the parties. The plaintiff actually visited and inspected the properties, and though he was not satisfied with what he saw he attempted to carry out the flotation. The defendant acknowledged that these services were valuable, and still hopes to benefit by them. The defence of want of consideration is based on the fact that when the contract was entered into these were past services. There is force in the argument that past services alone would not afford consideration for a contract, but coupled as they are in

this case with future services, which have never been rendered, this defence fails. It is not a question of sufficiency of consideration in this case, but whether any consideration at all exists, and we think that it does. As to the second defence, the defendant certainly did sell two shares and hand the proceeds to plaintiff, but it is clear from the correspondence that the two shares were to meet travelling expenses, costs of prospecting machinery and other outlay, and that the two shares claimed in the declaration were intended to be additional. The declaration states that the plaintiff had actually sold these two additional shares. This, however, is disproved by the evidence, and that as a fact they were merged into another syndicate. Their equivalent however is still available, and the plaintiff is willing to take this equivalent. Judgment will therefore be given for the plaintiff, for the delivery to him of these two shares or their equivalent within seven days, failing which for the sum of £500, which was the price at which other shares were sold at the time of the contract. Plaintiff will have his costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

ADMISSION. } 1897. } May 20th.

Albertus Johannes Marais was admitted an attorney and notary, on the application of Mr. McGregor.

PROVISIONAL ROLL.

COLLINS V. CLARKE.

In this action Mr. Close asked that the case stand over till the end of term, as there was a prospect of the parties coming to a settlement.

The case was postponed accordingly.

ILLIQUID ROLL.

SOUTH AFRICAN ASSOCIATION V. KING.

Mr. Schreiner, Q.C., asked for judgment, under Rule 329 (*d*), for the costs in the action, the amount claimed in the summons on an acknowledgment of debt having been paid.

The application was granted.

ALLENZENSKY V. PICK.

Mr. Schreiner, Q.C., asked for judgment under Rule 319 for the sum of £97 6s. 1d. in terms of the prayer on the declaration.

Application granted.

REHABILITATION.

Mr. Benjamin applied for the rehabilitation of Peter Willem Bester.

Granted.

NOVEMBER V. NOVEMBER.

Mr. Jones applied to make absolute the rule *nisi* admitting applicant to sue *in formâ pauperis* in an action against her husband for divorce by reason of his alleged adultery.

The application was granted; and Mr. Jones was appointed counsel, Mr. Mostert to act as attorney.

PETITION OF F. W. BAKER.

Mr. Gardiner made application for authority to the Registrar of Deeds to issue to petitioner a certified copy of certain mortgage bond for the sum of £1,200, passed in his favour by Margaret van der Hoven, hypothecating a piece of quitrent land called Bellevue, near Willowmore, the original bond being lost or mislaid.

The Court ordered that a rule *nisi* be published in the nearest newspaper, the "Beaufort Courier," returnable on July 12.

IN THE ESTATE OF W. HEATHERSHAW.

Mr. Graham applied to make absolute the rule *nisi* for payment to the General Estate and Orphan Chamber of the balance arising from the sale in execution of portion of two lots of ground situated at Wellington, the said Chamber being creditors for more than the amount available, but the mortgage bond on the said ground securing the same being lost or mislaid.

Application granted.

ALLENZENSKY V. GAERTNER'S EXECUTORS.

Mr. McGregor applied to make absolute the rule *nisi* for an interdict restraining the respondent from transferring to the purchaser thereof erf No. 33 at Hermanuspetrusfontein, pending an action brought by applicant for transfer of the erf in question, which he alleges he purchased from the said Gaertner during his lifetime.

Mr. Searle, Q.C., appeared on behalf of Mr. Kleyn, one of the respondents, to consent.

The rule was made absolute, costs to be costs in the cause.

PETITION OF WILLIAM ROSS.

Mr. Benjamin made application for leave to sue by edictal citation in an action against Henry Cohen, formerly of Kimberley, but now of London, for the recovery of an amount due upon twenty-six promissory notes.

Leave was granted; personal service to be effected, returnable on 1st August.

PETITION OF ALBERT BELL.

Mr. Buchanan applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for registration in the name of petitioner of certain farm known as South Park, in the district of Matatiele, the same having been purchased by him in 1884 from Floris Visagie, whose whereabouts is unknown, and since sold to Henry Watkinson, who lost or mislaid the papers necessary to procure transfer.

The application was granted.

SHEARER'S EXECUTORS V. WHITEHEAD. { 1897. May 20th.

Mr. Searle, Q.C., applied for an order requiring the respondent to restore certain fence, being the boundary between the lots of ground Nos. 7 and 8, the property of the parties, situated on the Palmboom-road, at Newlands, and interdicting him from interfering with the strip of ground in dispute pending an action for a declaration of rights.

Mr. Searle, Q.C.: The applicant has been in possession for nearly twenty years, the fence has been erected for all this time, and no disturbance has taken place. The onus of bringing an action is on the respondent.

Mr. Graham: Respondent's fence has been put up already; it must have taken considerable time, and no opposition was offered by applicant. Respondent cannot restore the live fence now, and it would be hard on him to order him to remove the fence which he has erected. He gave applicant notice that he was going to have the property surveyed.

The Chief Justice: Time ought to be given to respondent to remove his fence or establish his right by action. Within three months from this date the respondent will either remove the fence and restore the one removed by him or bring an action for a declaration of his rights.

[Applicant's Attorneys, Messrs. Reid & Nephew; Respondent's Attorney, G. C. Silberbauer.]

OUDTSHOORN TOWN COUNCIL.

Mr. Searle, Q.C., applied to make absolute the rule *nisi* for authority to the Registrar of Deeds to pass transfer of the one-eighth share of the remainder of the farms Hartebeeste Rivier and Grobbelaars Rivier, in the district of Oudtshoorn, to the petitioners upon condition that they shall be bound to transfer defined portions thereof previously sold to the original buyers or persons establishing their claims thereto.

The application was granted.

IN ESTATE OF THE LATE MACKESO KULU.

Mr. Close applied to make absolute the rule *nisi* for authority to the Registrar of Deeds to pass transfer to petitioner of certain land in the Tambookie Location, district of Glen Grey, petitioner being only son of the said late Mackeso Kulu by his first wife, and as such entitled to the said land by virtue of native custom.

The application was granted.

BETTELHEIM V. WILLIAMS. { 1897. May 20th.

Evidence Commission *de bene esse*—Plaintiff—Further security—Peregrinus.

B., *an inhabitant of the Transvaal, was arrested in Cape Town on an application for extradition.*

B. *thereupon sued the defendant, as the Magistrate who issued the arrest warrant, for damages for illegal arrest.*

Before the plea had been filed the plaintiff went to England and application was made for leave to have his evidence taken on commission.

The Court *granted the order subject to the plaintiff furnishing security additional to that which he had provided as a peregrinus.*

This was an application upon notice of motion to the respondent, Mr. G. B. Williams. A.R.M., Cape Town, to show cause why a commission *de bene esse* shall not issue to take the evidence in London of the applicant and such other of the witnesses as may be there regarding the matters in issue between the parties.

For the applicant an affidavit by Mr. J. B. Kayser was filed setting forth:

I am an attorney of this Hon. Court, and as such entrusted by the attorneys on record for the applicant with the management of the suit.

Immediately on pleadings being closed a letter was written on the 10th May, 1897, to respondent's attorneys suggesting that if an arrangement could not be come to as to the amount of the damages for which judgment should be entered for the applicant in the event of the Court finding the law to be in his favour a commission should issue to take the evidence of the applicant in London. This request was not acceded to.

When the applicant left Cape Town for Europe he was under the impression that the points upon which he desired the judgment of the Court could be settled by exception taken to the applicant's declaration, and he had made arrangements to stay away from South Africa for some considerable period. which it would be extremely inconvenient for him to alter.

The only issue requiring oral testimony is the amount of damage the applicant has suffered by reason of his being arrested, and upon this point it is submitted that his evidence could conveniently be taken upon commission.

Mr. Benjamin stated that applicant and another were arrested in Cape Town during the Transvaal trouble upon a formal application for their extradition. While in prison they agreed to appear at Pretoria to take their trial and bail was accepted. They appeared at Pretoria and stood their trial and were convicted. Now Mr. Bettelheim sued Mr. Williams for £5,000 as damages, he contending that his arrest was illegal.

Mr. Schreiner, Q.C. (with him Mr. Sheil), stated that Mr. Williams had acted in his official capacity, and the Government was behind him in this matter. He opposed the application, but asked that in the event of the commission being appointed further security should be given, as the original security given by Mr. Bettelheim, as a foreigner, was given when such proceedings as those asked for were not contemplated.

Mr. Benjamin: *Atmore* v. *Chaddock* (5 Sheil, 466) is a precedent for the evidence of defendant being taken on commission. There is no reported case as to plaintiff's evidence. Rule of Court 335. English practice is almost identical. Annual Practice, 1889. *Cook* v. *Alcock* (21 Q.B.D., p. 178).

Chief Justice: Real question is whether the Court can get at the truth by evidence taken on commission.

Mr. Schreiner: This will be going further than the Court has ever gone. The only issue is one of damages; there is no specific allegation of damages, and defendant is in the dark as to what instructions to give for cross-examination. The applicant can bring his action after his return: he does not allege urgency. There is no reason given for departure from the general rule. In *Atmore* v. *Chaddock* the Court drew a clear distinction between the case of a plaintiff and defendant.

The Chief Justice said: The main issue to be tried in this case, will be whether the crime of high treason is included in the crimes mentioned in the first schedule of Act 22 of 1882. If that is decided in favour of the plaintiff then the question of damages will arise. The plaintiff asks for leave now to give his evidence as to damages before a commission. The Court has always held that the question of damages is one of evidence. It is not a question which is weighed in a very nice manner. I am not sure that the Court could not give damages in this case without hearing Mr. Bettelheim's evidence, if he succeeded on the legal question. His evidence is not of so much importance, as all the facts are known to the Government. I think the Court should not insist upon the plaintiff's presence in Cape Colony for the purpose of giving evidence as to damages. It is a fair suggestion, however, that the amount of security should be increased. The plaintiff will therefore be examined before a commissioner in London; the Court will appoint Mr. Mackarness as the commissioner; the costs of the application and of the commission will be costs in the cause, and the Court will further order the security given by the plaintiff to be increased by a further £50.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Reid & Nephew.]

GILLET V. COLONIAL GOVERNMENT. { 1897. May 20th. „ 21st.

Railway—Expropriation — Registration of title—Quitrent land—Water—Interdict.

The registered owner of perpetual quitrent land, who bought it without

notice that the Railway Department claimed the right to use the water rising in a certain well, in regard to which there is no indication on the land itself or other proof that it had been expropriated for railway purposes, except the bare fact that it is just within a distance of thirty feet from one side of the line, is entitled to an interdict restraining the Department from taking the water from the well.

This was an action instituted by Nicolas Joseph Gillet against the Commissioner of Crown Land, and as such representing the Colonial Government, for an interdict and for £500 damages.

The declaration alleged that the plaintiff is the registered owner of the quitrent farm Kruidfontein, in the district of Prince Albert, across which farm a line of railways has been constructed, and is maintained and worked by the Colonial Government under the provisions of Act 19 of 1874.

For the purpose of constructing the said railway line, the Colonial Government entered upon the said farm under the powers conferred upon it by the Act aforesaid and duly laid the lines of rails across the farm, but it did not at or before the date of construction expropriate any part of the said farm.

In or about September, 1890, an agreement was entered into between the Colonial Government of the one part, and the Colonial Coal Syndicate, the then owners of the farm, in terms of which the said syndicate agreed for valuable consideration to allow the Government in perpetuity to take and use for the purposes of the railways, or for such other purposes as the same might be required, all water obtainable on the said farm Kruidfontein, up to the amount of 15,000 gallons per diem, but no more. The said agreement was duly registered against the title deeds of the said farm.

The Colonial Government has ever since the date of the said agreement taken from a certain spring upon the said farm a quantity of water for the use of the engines on the said line and otherwise, but at divers times between the 30th day of April, 1896, and the commencement of this action, the defendant, as representing the Colonial Government, has by himself or his agents wrongfully and unlawfully, and in spite of the remonstrances of the plaintiff, taken from the said spring a far larger quantity of water than 15,000 gallons per diem, and the defendant wrongfully asserts that he has a right to take such excess quantity.

By reason of the wrongful and unlawful action of the defendant as aforesaid, the plaintiff has lost the use of water to which he was entitled, and has suffered damage to the extent of £500.

The plaintiff claimed:

(*a*) An order interdicting the defendant in his said capacity from taking more water from his said farm Kruidfontein on any one day than the quantity of 15,000 gallons.

(*b*) £500 damages and costs.

The defendant specially pleaded that the Colonial Government, by virtue of the powers conferred upon it by Act 9 of 1858, and 19 of 1874, in or about the year 1878, duly expropriated for railway purposes a portion of the farm Klein Kruidfontein, to wit, 30 feet on both sides of the rails as now laid across the said farm.

That as the purchase price of the land expropriated as aforesaid, and of all water existing within the said expropriated area the Colonial Government, on or about the 18th July, 1881, duly paid to one Frederick Alberts, at that time the duly registered owner of the said farm, the sum of £140.

He admitted the execution of the agreement referred to in the declaration.

As to the spring, he specially said that it was situated within the expropriated area, that it was the property of the Colonial Government, and that it was in existence at the time the land was expropriated; and that the value of the water obtainable from the said spring was taken into consideration when the purchase price of the land expropriated was agreed upon between the Colonial Government and Alberts at the sum of £14:.

The defendant further said that all water required for the use of the engines at this part of the line is drawn from the said spring, and that no water has been taken from the plaintiff's farm by the Railway Department since the date of the agreement.

He denied that the plaintiff had sustained any damage, and prayed that his claim might be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Innes, Q.C., and Mr. Maskew appeared for the plaintiff.

Mr. Sheil (with him Mr. Bisset) for the Government.

Nicolas Joseph Gillet, the plaintiff, deposed that he first went to Kruidfontein in 1886. There was then no station there. Previous to his going there he knew of no arrangement between

Alberts and the Government. The farm belonged to a coal syndicate. There was a well on the farm, which, however, was dry. The well was about 15 feet long, 12 feet wide, and about 18 feet deep. He set a bore-hole in the well, and after he had gone 331 feet deep he struck water. The result of the boring was that a small well which witness had made and the well referred to were filled with water. The bore-hole yielded 94,0.0 gallons of water every 24 hours. In 1889 a contract was entered into between witness, on behalf of the coal syndicate, and Mr. Elliott, Manager of Railways. Witness purchased the farm from the syndicate in October, 1890. He expected to use the surplus, over 13,000 gallons, for himself, and a large number of orange-trees he brought from Italy had died through want of water. If the well overflows the water goes into the dam. If only 15,000 gallons a day were taken from the well, the well would overflow. Owing to the position of the bore-hole, if only the 15,000 gallons were taken per day, the overflow was direct from the bore-hole. From the centre of the well to the centre of the line was 28 feet 3 inches, so that the well was not within the expropriated area of 30 feet.

Cross-examined by Mr. Sheil: His case was that the Government intercepted the water that came from his bore-hole, and that the Government took more water than they were entitled to. The water came from the bore-hole he had made. He bought the farm on 30th September, 1890, and entered on possession in the following month. The water on Kruidfontein was mineralised, with a good deal of sulphur, and he believed it was the best water on the line for engines. He was an old railway contractor and was under the impression that the department always expropriated 50 feet for railway purposes.

By the Chief Justice: By digging a furrow he could take all the water from the bore-hole. He was afraid that he could not allow only the 15,000 gallons to go into the well. The arrangement was that the Government paid £100 a year for the 15,000 gallons per day, and plaintiff merely wished for the overflow water.

Thomas Logan, Chief Draughtsman to the Engineer-in-Chief, Cape Government Railways, produced a plan showing the expropriation of the line at Kruidfontein. It was the tracing of an original plan, and the copy was made by him. The original was destroyed in a fire that took place at the railway-station, Cape Town.

Cross-examined by Mr. Innes: The original plan would be made from actual survey.

Archibald Mitchell Shaw, Resident Engineer from Worcester to Beaufort West, said he knew the spring at Kruidfontein. He visited that place on Monday. The well is 30 feet 9 inches from the centre of the line to the outside of the well. The well from the top of the masonry to the bottom is 17 feet, and the width of the well 11 feet 6 inches.

Cross-examined by Mr. Innes: The well was about ten feet beyond the earth-works of the embankment. There were no beacons to mark off the 30 feet.

By the Chief Justice: Witness thought that the water came into the well from the upper side, not entering from the bore-hole.

[Before Hon. Mr. Justice BUCHANAN and Hon. Mr. Justice MAASDORP.]

Mr. G. Kilgour, civil engineer, said he had examined the well in question. There is no visible connection between the well and the bore-hole. There is a pipe at the surface of the bore-hole, but witness felt certain that the well was not an artesian well, one close down to the strata from which the water came. He was led to the belief that the flow of water was from the well to the bore-hole, and not from the bore-hole to the well. There were indications on the north side and on higher ground than the well of the presence of water. The supply of water in the well came from the Nieuweveld Mountains to the north.

Cross-examined by Mr. Innes: To constitute a proper artesian well the pipe must go down to the water-bearing strata. There was fungus found in the water which he had found in strata between the surface and the water-bearing strata. He should say that the sinking of the bore-hole did not affect the water in the well further than drawing it off. He considered that the openings from the porous strata around the well were very much greater than that of the pipe.

By Mr. Justice Buchanan: The result of his examination was his conviction that the water in the well did not enter by the bore-hole.

Frederick Alberts deposed that at one time he was owner of the farm Klein Kruidfontein. When the railway was made he was owner. The railway people made their railway through his farm, and they dug a well. They afterwards sunk a well close to the line on the land they had expropriated. Witness saw the well, saw water in it, and saw the railway people taking water from it, not for the engines but for the cottage. Witness afterwards gave a concession to a coal syndicate and afterwards sold. The Government paid him £90 for the land they had taken, and £50 for water. After he had been paid he considered he had no claim to the land taken by

the Government. When his sheep went near the line the Government warned him that if he allowed them within the portion purchased by them they would not be responsible for them. He got £ 00 altogether from his agent, and a £4 bonus. A year after the expropriation the farm was sold. During the time Mr. Gillet was prospecting on his farm the railway people were taking water from the well.

Cross-examined by Mr. Innes: When the Government people made the well there was enough water. They took the water out with buckets to drink, but there was no pumping then. In summer time the water diminished. but the well never dried up. When Gillet made the bore-hole there was a great supply of water. He never saw so much water come out of the earth. He did not think the bore-hole affected the water in the well the railway people had made.

Henry van Laun corroborated as to the Government paying Alberts £90 for land, and damage £4.

Cross-examined by Mr. Innes: The damages were for water they had taken.

This concluded the evidence.

Postea (May 21st).

Mr. Innes, Q.C.: There is no evidence that the Government is in possession of the well. They have shown no right to it. The Court has never held in cases of this kind that the *dominium* has been transferred to Government. In expropriating land Government is allowed to do one of two things, viz.: (1) Take possession of land for railway or other purposes simply as occupiers; (2) take transfer altogether. Without the latter Government has no title. There is no statutory title: in order to get title there must be a properly registered transfer in the Deeds Office. The legal position of the Government was recognised in *Landmark* v. *Van der Walt* (8 Juta, p. 3.0). Distinction was there drawn between occupation of land for railway purposes and *dominium*. See also *Bower* v. *Colonial Government* (6 Sheil, p. 163). It was there argued for the plaintiff that he was entitled to the water on certain land, and the question as to using the water for railway purposes was discussed. The Chief Justice remarked: "What ought to be done by the Government when they expropriate?" They ought at least to cut off the land and have their title registered. No evidence of notice of expropriation ever having been given Government had the right to occupy; they paid £90 for the land, thinking it was freehold.

Chief Justice: The document kept by the Government shows 80 feet on each side of the ine. Did the owner know that he was losing this ground?

Mr. Innes: There is no evidence of that. Even if the Court finds that he had notice of that it only amounts to notice of occupation. Putting earthworks there would not show him that there was any intention of taking more land than that on which the line was actually laid The action of the Government was inconsistent with its being owner. It entered into an agreement to buy the water. It is therefore estopped. It is not necessary to plead estoppel and it will apply wherever one person is misled by the action of another.

Chief Justice: How could Gillet plead estoppel as against the Government?

Mr. Innes: He was misled by the action of the Government towards his principal.

Chief Justice: The Government did not know Gillet was going to buy.

Mr. Innes: As to the suggestion that Gillet should take all the water from the bore-hole and leave Government to take their water from other parts of the farm, the question of the right of the Government to take more than 15,000 gallons is in dispute and must be settled at some time or other. The only other question is whether the well is within the area said to be expropriated. There is no evidence as to where the margin of expropriated area is. *McDonald* v. *District Engineer of the Midland and North Eastern Railway* (Juta 7, p. 290).

Mr. Sheil: The claim in this case is for an interdict. The decision must depend upon the question whether Government has given satisfactory evidence of expropriation and of knowledge on the part of Gillet. Expropriation occurred nearly twenty years ago, and the Government has been in occupation ever since. Unfortunately Alberts cannot remember receiving notice, and it is unfortunate that the records were burnt. The list and plan however were found in the débris and as Act 9 of 1858 requires notice the presumption is that notice was given.

Buchanan, J.: The correspondence of 1881 refers to expropriation. The question remains as to what was the extent of the expropriated area.

Mr. Sheil: Gillet is an old railway contractor and admits that his opinion was that 50 feet were usually taken on each side in railway expropriations. Moreover he was employed by the syndicate and saw the well. Thus his case differs from that of *Bower* v. *Colonial Government*. Bower bought innocently and without notice. Gillet was no party to the contract. Not a fractional part of the land expropriated in the Colony is registered. Concluding portion of section 12, Act 9 of 1858, shows that in certain cases at least there is an absolute vesting of title,

It is clear that this was an out and out sale. In the case of *Clayton* v. *M. and S. Railway* (10 Juta, p. 291), there was an actual transfer, and the Court held that the purchaser could deal with the land as he pleased. If the Court should hold that sufficient evidence of expropriation has been given, and that Gillet had notice of such expropriation, then any water rising on the land belongs to the Government, provided it is not accustomed to flow in a defined channel to a lower proprietor. *Struben* v. *Cape Town District Waterworks Co.* (9 Juta, p. 68). Gillet has suffered no injury. The water must run uphill if it flows from the bore-hole to the well. The evidence is that it flows the other way. The pipe only goes five or six feet below the ground, and it is impossible to find that the water is from an artesian supply. An interdict can only be granted where plaintiff has no other remedy. Here the plaintiff has the remedy in his own hands, in that he can take the plug out of his pipe. The Government does not claim under the contract, but by virtue of the expropriation.

Mr. Innes: There is no hardship involved in holding that Government has no title without registration, except in cases of freehold. As to whether there is any statutory title given by Act 9 of 1858, section 12, "sufficient title" there means sufficient for the use of the land and the acquisition of materials; the Commissioner can take the land, but if he wants *dominium* he must take registered transfer. In a recent case the Government succeeded in an action claiming transfer of expropriated land.

Mr. Sheil: The case of *Colonial Government* v. *Gertenbach's Executor* (7 Sheil, 60) went by default. There was a plea in that case to the effect that there was no provision in Acts 9 of 1858 or 19 of 1874 to compel a person whose land was expropriated to pass transfer, but the point was not argued. There is no statutory provision which compels the owner of quitrent land, which has been expropriated, to pass transfer.

De Villiers, C.J.: It appears that on the farm New Kruidfontein, of which the plaintiff is the registered owner, there is a well just within the distance of thirty feet from the railway line leading to Beaufort West. From this well, as well as from other sources of water supply on the farm, the Railway Department has taken water for railway purposes in excess of 15,000 gallons *per diem*. Their right to use 15,000 gallons *per diem* under a contract with the present and former owners of the farm is not disputed, and the question to be determined is *whether* the plaintiff is entitled to an interdict *restraining* the use of the excess. But for that contract the plaintiff would be entitled to restrain the taking of any water unless the Department can show that by reason of the expropriation of part of the land for railway purposes they have acquired the right to use all the water rising in the well. No portion of the expropriated land has been cut off from the farm, and registered in the name of the Government, and the only test, therefore, of expropriation is the actual user of expropriated land for railway purposes. Thus it would be vain for the plaintiff to attempt to prevent the Department from using land on which there is an embankment for the line, however wide that embankment might be, or from using buildings erected for railway purposes. But there is nothing on the ground to indicate that the land on which the well is had been expropriated, nor was there any indication of the kind at the time when the plaintiff purchased the land. He bought without notice that the Department claimed the well, unless the fact of the well being just within thirty feet of the rail on that side could be taken as notice. But there is no enactment fixing a distance of thirty feet on each side of the line as the extent in respect of which expropriation *ipso facto* takes place. It is true that a plan was produced showing an intention on the part of the Government to take a strip of land extending to a distance of thirty feet on each side of the rails, but that plan comes out of the defendant's possession. There is no proof that this plan was ever shown to any of the owners of the farm, or that any notice was given to them of the extent of land intended to be expropriated. It would have been competent for the Government, after *bona fide* expropriating that extent of land, to claim a registration of the title thereto in their own name. Such registration would have vested the ownership in the Government, and the plaintiff would be owner of the remainder only of the farm. As matters stand, he is the owner of the whole farm; but of course he cannot interfere with the use by the Department of land *bona fide* occupied for railway purposes. It has not been proved that the well is so occupied, and the interdict asked for must be granted with costs.

[Plaintiff's Attorneys, Messrs. Sauer & Standen; Government Attorneys, Messrs. J. & H. Reid & Nephew.]

POWRIE v. POWRIE. } 1897. { May 20th.

Judicial separation Consent paper.

This was an action for judicial separation.

Mr. Graham for plaintiff; Mr. Close for defendant.

Mr. Graham said the declaration set forth that the parties were married in June, 1871, in Perth, Scotland, and afterwards came to Cape Town. There were six children of the marriage —five of them minors. In 1889 defendant left Cape Town, and was away for six years, during which time he refused to contribute to the maintenance of his wife and family. About May, 1895, he returned, and between that time and the present year he had violently assaulted his wife. He had given way to intemperate habits, and his wife was in danger of him. Mr. Graham read an agreement made between the parties, consenting to the separation, and to their supporting themselves separately, &c. A document consenting to judgment in terms of the agreement had been signed, and judgment in terms thereof was prayed.

Mr. Close appeared on behalf of defendant to consent to judgment in terms of the consent paper being entered.

Mr. Justice Buchanan said the Court was averse to giving judgment simply on agreement of parties in matrimonial cases. The facts on which judgment was given should be on record from evidence given in court.

Mr. Graham having been heard,

Mr. Justice Buchanan said that in a case of divorce such an application would never be granted on a mutual agreement of the parties. It was, however, different in a judicial separation case, where the parties might come together and where the judgment of the Court did not terminate the marriage. The Court would, therefore, give judgment in terms of the consent paper.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorney, J. Ayliff].

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

THOMSON AND OTHERS v. BENNETT. } 1897. May 21st.

This was an action to recover a sum of £731 3s. 7d., due as balance of a judgment in an action obtained against defendant in the High Court of Justice of 1893.

Mr. Innes, Q.C., for the plaintiff.

Mr. Molteno, for the defendant, appeared to confess judgment.

HEYDENRYCH v. FALCONER AND ANOTHER. } 1897. May 21st.

Tender—Costs.

This was an action brought by Benjamin G. Heydenrych against Mary Falconer and Robert A. Falconer.

The plaintiff's declaration alleged:

1. The plaintiff resides at Cape Town: the two defendants are married to each other without community of property, and likewise reside at Cape Town.

2. The plaintiff is entitled to the possession of certain carts, wagon, horses, harness and household furniture, &c., more fully described and mentioned in a schedule hereunto annexed, which articles the plaintiff let to the first-named defendant, and she, the first-named defendant, assisted by her said husband as far as need be, took to lease, upon the terms mentioned and referred to in a certain agreement of lease dated the 13th November, 1896, and hereunto annexed, to which annexures the plaintiff craves leave to refer, and have taken and held as herein inserted.

3. The said agreement of 13th November was an extension of an agreement dated the 5th February, 1896 which again was an extension of a certain agreement dated 30th April, 1895, to which lease of the 30th April the second-named defendant was a party and which he signed as surety *in solidum* and joint principal debtor with renunciation therein of the *beneficia ordinis seu excussionis*; the second-named defendant in like manner and subject to the like liabilities became a party to and signed the subsequent agreements, and more particularly the agreement of the 13th November in paragraph 2 referred to, as such surety *in solidum* and joint principal debtor, with such renunciation as aforesaid.

4. By the said agreement it was stipulated and agreed that the lease should extend over a period beginning 1st November, 1896, and ending 31st January, 1897, and that the defendants should pay to the plaintiff at the end of every month the sum of £5 per month as and for rent.

5. The lease in paragraph 2 mentioned terminated on the 31st January, 1897, as was by the said lease provided, and was not further extended, and the plaintiff gave to the defendants notice in writing of such termination.

6. There is now owing by the defendants to the plaintiff the sum of £15 as and for rent due under the said lease for the said period of three months.

7. All things have happened, all conditions been fulfilled, and all times elapsed, to entitle the plaintiff to the possession of the articles in the first annexure mentioned, and to be paid the sum of £15 aforesaid, yet the defendants, and each of them, refuse to pay any part of the said sum or to return the said articles.

The plaintiff claims:

(a) Payment by the defendants and each of them the sum of £15.

(b) That this Honourable Court do order the defendants and each of them to restore to the plaintiff the articles mentioned in annexure A to this declaration annexed, or in default thereof to pay the sum of £200 as and for damages by them sustained in the premises.

(c) Alternative relief and costs of suit.

The agreement of lease of the 13th November, 1896, was an extension of a previous lease from 1st day of November, 1896, to end on 31st January, 1897, at £5 a month; also an extension of an option of purchase (given to the lessee) to the 31st January, 1897; the purchase price to be £139; the option not to be available if the current rent is not fully satisfied.

The following was the plea of the first-named defendant:

1. Defendant denies the allegations in paragraph 2 of the declaration, more especially denies that she had any knowledge of the terms of the second agreement annexed to the declaration which was signed by the second-named defendant as holder of her power of attorney.

3. As to paragraphs 5 and 6, defendant refers the Court to such proof as plaintiff may adduce, and says that extensions were granted from time to time and the sum of £107 received on account by the said plaintiff, with the distinct understanding that on the payment of the balance due and the current rent the furniture, &c., referred to in the agreement would be released from pledge.

4. Payment of the said balance, together with the rent, was offered to the plaintiff prior to the action brought in full satisfaction of all advances given on security of the said furniture.

5. Defendant admits that the said rent is due, but states that it was tendered prior to action brought.

6. Defendant denies allegation in paragraph 7 of the declaration, and says that on the offer of £139 and the rent due plaintiff refused to cancel the agreement.

7. Defendant specially pleads that the furniture and other articles mentioned in the first agreement were never absolutely sold or ceded to the said plaintiff, except by way of pledge, but that a form of sale was merely adopted for the purpose of securing the advances made to the defendant by plaintiff, and that such furniture and other articles was never the property of the plaintiff or in his possession.

Defendant claims that plaintiff's claim be dismissed with costs.

For a claim in reconvention defendant craves leave to refer to matters pleaded above, and again tenders £139 and £15, as rent, being the balance due to plaintiff under the said agreements; and claims cancellation of the said agreements on payment of the said sums with costs.

The replication in convention was general.

The plea to the claim in reconvention denied that any legal tender had been made in satisfaction of plaintiff's claim.

On these pleadings issue was joined.

Mr. MacGregor for the plaintiff.

Mr. MacLachlan for the defendants.

After evidence, the plaintiff stated that he was willing to accept the sum alleged to have been offered to him, £139, with the rent for the property amounting to £15.

The Chief Justice said: As the plaintiff has expressed his willingness to receive the £139 and the £15, it was not necessary for the Court to deal further with that point or seek to construe the agreements. The only question is, whether the defendant should pay the costs. There have been many decisions of the Court where it has been held that the actual tender of money was not required if it were perfectly clear that the person to whom it would be tendered would refuse to accept it. I am of opinion that the tender in the present case was not in the form alleged, and no evidence has been produced in proof of the allegation of tender. It has been stated that the defendant received advances of £150 and £100 from a financial agent about that time, but there is no proof that at the time of the alleged tender he actually held the sum stated in his hands. The judgment will therefore, be for the plaintiff with costs; that is, payment of £139 and £15, and failing payment of each of the said sums within forty-eight hours, the goods in question to be delivered as agreed upon.

[Plaintiff's Attorney, V. A. van der Byl
Defendant's Attorney, H. P. du Preez.]

SYTNER V. SYTNER. { 1897. May 21st.

This was an action for divorce brought by Albert Henry Sytner, managing director of the firm of P. Barnet & Co., Port Elizabeth. Mr. Searle, Q.C., appeared for the plaintiff. There was no appearance for the defendant.

Mr. Searle stated that the parties were married on the 4th February, 1885. The plaintiff left Cape Colony for England in November last year, leaving his wife in Port Elizabeth. Between 1st January and February last it was alleged that Mrs. Sytner committed adultery with an engineer at that time resident at Port Elizabeth. By reason of that adultery Mr. Sytner claimed damages from the co-respondent to the extent of £1,000. Co-respondent had admitted the allegation of adultery so far as it concerned him, tendered £50, and offered to pay the costs to date. That offer had been refused, but since that time co-respondent had increased the amount tendered, and guaranteed the costs of the action, and this offer Mr. Sytner had accepted, so that the proceedings would be dropped against the second defendant. Mrs. Sytner was at present in England, but before leaving South Africa she had signed a power of attorney to accept process.

Reginald Barry, from the Registrar's Office, proved the marriage.

Albert Henry Sytner, the plaintiff, said his wife's name was Rose Jackson. They were married at Port Elizabeth on the 4th February 1885. Witness was managing director of the firm of P. Barnet & Co. (Limited). There were three children of the marriage—two boys and one girl. There was an ante-nuptial contract, by which he settled a life policy of £500 upon his wife. Witness left for England on business in November of last year. Before leaving Port Elizabeth he gave up his house to a friend of his, Mr. Morris, but arranged with Mr. Morris that his wife should have three rooms in the house. It was arranged that she should have her meals at the Grand Hotel, which was opposite the house. His wife was able to draw what money she required, and he provided her with a servant. While he was in England he had letters from his wife by every mail. He returned to Cape Colony on 17th February, and on arriving in Table Bay was surprised when his wife came out in a tug and met him. In answer to his questions she said she had been very uncomfortable in Port Elizabeth. While in England witness received information that Mrs. Sytner had had to leave Mr. Morris's house, and that evening, the first opportunity he had, he asked her why she had to leave the house. After equivocating for a time, his wife admitted that Mr. Morris had objected to certain gentlemen coming to her room. After a lot of persuasion he managed to drag from her the confession that she had a man in her bedroom and that Mr. Morris had discovered them. Witness had never spoken to co-respondent. His wife asked his forgiveness, but after taking advice of his cousin and a clergyman, the matter was placed in the hands of an attorney. His wife went to England by the next boat, and he, at her request, paid her expenses home. Before she left she knew that proceedings would be taken.

Walter Vernon Morris, in whose house Mrs. Sytner lived, said he was not intimate with co-respondent. The first time he saw him was in the Grand Hotel, Port Elizabeth, where he (co-respondent) and some other men were sitting at a table drinking champagne. Witness and his wife had their meals in the Grand Hotel, and frequently saw co-respondent there. On 2nd February co-respondent accompanied Mrs. Sytner from the hotel to her rooms after dinner, walking across the street without his hat. About nine o'clock that night witness heard someone speaking in Mrs. Sytner's bedroom. He looked in at the window and saw co-respondent in the room. Later the same night his wife was attracted by a noise, and saw co-respondent in the room. Witness went to Mr. Rogaly, at the Algoa House Hotel, who held Mr. Sytner's power of attorney, and informed him of what had taken place. Two nights later co-respondent was again in Mrs. Sytner's bedroom, and witness waited outside until he came out, and asked him what he meant by his conduct. Witness told Mrs. Sytner he would not allow such things to go on in his house, and she left at his request on the following morning.

Mrs. Morris corroborated her husband's statements, and described what she heard and saw on the nights of 2nd and 4th February.

The judgment was: Decree of divorce as asked, the forfeiture of all benefits from the ante-nuptial contract, and Mr. Sytner to have the custody of the children.

[Plaintiff's Attorneys A. Steer.]

SUPREME COURT.

Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS, P.C., K.C.M.G.), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.

VAN SCHALKWYK V. HAUMAN. 1897. May 25th. „ 26th June 3rd. „ 4th.

Riparian proprietors—Perennial streams — Prescription—Reasonable use — Total diversion—Extraordinary use —Irrigation—Return of water—Tributary.

H., *an upper riparian proprietor, diverted by a furrow the water in a perennial stream* F. *and used it for the purpose of irrigation.*

After irrigation the water was allowed to find its way into a tributary of the F. *river; the tributary joining* F. *some distance below the farm of* H.

In 1897, during an exceptionally dry season, H. *diverted all the water in the* F. *river.*

S., *a lower riparian proprietor obtained his water from the* F. *river by means of a furrow from a dam situated on* C., *a farm lying between the farms of* S. *and* H.

S. *was in consequence of* H.'s *diversion deprived of the use of any water.* H. *maintained that he was entitled to take the water, not on the ground that he had a prescriptive right to all the water in this river, but that he had a prescriptive right to divert and use for irrigation a certain quantity, irrespective of the question as to whether this entailed a total diversion of the water or not.*

The Court held *that this was not a reasonable user by* H., *and that* H. *had not established any such right as alleged.*

This was an action brought by Willem J. D. van Schalkwyk against Johannes Stephanus Hauman for an interdict in regard to the use of certain water in the Frenchhoek River, and for damages in the sum of £100.

The plaintiff's declaration alleged:

1. The plaintiff is the registered proprietor of the farm Zanddrift, in the district of the Paarl; the defendant similarly owns a divided portion of the farm Laborie, in the said district.

2. A perennial stream, called the Frenchhoek River, flows over the farm Laborie, then over certain other farms, and thereafter it flows into and over the plaintiff's farm. The share of the farm Labori owned by the defendant is situated upon the eastern bank of the said stream, but another perennial stream crosses the defendant's said share and joins the Frenchhoek River at a point between the properties of the defendant and plaintiff.

3. Ever since the year 1889 the plaintiff and his predecessors in title have led out the water of the Frenchhoek River by means of a dam situated on the farm Cabrière and a water furrow leading therefrom. The dam is above the plaintiff's farm, but below the defendant's farm in the course of the said stream, and the plaintiff is entitled to continue so to use the said water.

4. At divers times between the 1st day of February and the 13th day of March, 1897, inclusive, the defendant, by means of a dam placed in the said stream where it passes his property, led out all the water of the said stream, which he used for irrigating his pasture lands, in such a way that the water could not after such use flow back into the channel of the Frenchhoek River.

5. By reason of the defendant's wrongful act as aforesaid, the plaintiff was deprived of a reasonable use or of any use of the water of the said river. The plaintiff during the said period, and in consequence of the said act, was deprived not only of water for irrigation, but also of water for distilling and for domestic use, and he sustained damage to the extent of £100.

The plaintiff claimed:

(*a*) Payment of the sum of £100 for damages as aforesaid.

(*b*) An order interdicting the defendant from doing anything to interfere with the plaintiff's use of the water of the said stream, as the same has been used by himself and his predecessors as aforesaid.

(*c*) An order interdicting the defendant from so using the said water for irrigation as to make it impossible for the said water to return to the channel of the said Frenchhoek River.

(*d*) Alternative relief.

(*e*) Costs of suit.

The defendant's plea was as follows:

1. The defendant admits the allegations in paragraph 1 of the declaration, and says that the plaintiff's farm is also known by the name of Paulina's Dal, and the defendant's farm by the name of Keur Valley, which consists of two portions of the original farm Laborie, or La Brie, one of which was purchased by the defendant from his father, in the year 1849, and the other was thereafter purchased by him from his father's executors, and of both of which he received transfer by two deeds dated the 3rd September, 1862.

2. The defendant admits the allegations in paragraph 2 of the declaration, and says that the Frenchhoek River flows over several other properties before reaching the farm Laborie, and that the other perennial stream, referred to in the said paragraph, joins the said river at a point on the farm Cabrière, above the plaintiff's farm, and above the point at which the plaintiff, by a watercourse, diverts water from the said river for use on his said farm.

3. As to paragraph 3, the defendant has no knowledge of the date at which the plaintiff or his predecessors in the title first led out water from the dam by the water furrow mentioned in the said paragraph, and does not admit that, even if the plaintiff and his predecessors in title have used the water as alleged since the year 1839, the plaintiff has thereby acquired any prescriptive right as against the defendant to continue to use the said water to any greater extent than as a lower riparian proprietor he may be entitled to the reasonable use of the same, subject to the defendant's rights hereinafter set forth.

4. For a time long anterior to the year 1849 there existed, and still exists, on the Frenchhoek River, during all dry seasons, a dam, situated on the portion of the farm Laborie owned by the defendant, by which dam nearly all the water of the said river flowing at that spot in times of scarcity is, and has been, caught, and from the said dam the said water is, and has been, diverted by a water furrow running across the said portion of the farm Laborie.

5. At a time, thirty years and upwards before the commencement of this action, the water so diverted by the said furrow was, at a point in the said furrow, again diverted from its previous course, by a water furrow, leading it to the defendant's homestead, gardens, orchards, and cultivated lands on his said property, and during the period of thirty years and upwards the defendant has, at all times, had and enjoyed the reasonable use of the water so diverted and led, for domestic purposes and for the purposes of irrigation, cultivation, and distilling upon his said property, after which use so much of the said water as might remain has not returned directly to the Frenchhoek River, but has flowed into the other perennial stream mentioned in the declaration.

6. The defendant specially denies that in the year 1897, or at any time, he used, or that he claims to use, the water so led as aforesaid for irrigating his pasture lands.

7. Save as aforesaid, he denies the allegations in paragraph 4, and he denies all the allegations in paragraph 5 of the declaration.

8. The defendant claims no more than the right, reasonably, to use the water, as he has used the same for thirty years and upwards, and says that he has, in the year 1897, only used the water in accordance with his said right, but the supply of water at his dam, in the said river, in times of scarcity during recent years, has been diminishing by reason of the increase of cultivation by upper riparian proprietors upon the said river, who take and use its water.

9. The defendant does not, in fact, divert or use, save for domestic use, any portion of the water flowing across his said property, in the other perennial stream mentioned in the declaration, which water flows down in the said stream for the use of the plaintiff and other riparian proprietors on the said river, and the plaintiff has other sources of water supply for his said farm, not derived from the said river or perennial stream.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

The replication was general.

On these pleadings issue was joined.

Mr. Innes, Q.C. (with him Mr. Close), for the plaintiff.

Mr. Schreiner, Q.C. (with him Mr. Graham), for the defendant.

The facts appear sufficiently from the judgment.

Mr. Innes, Q.C.: The plaintiff alleges that the defendant has deprived him of a reasonable use of this stream, or of any use at all, between the 1st February and the 12th March last. The defendant's claim is indefinite: he says he does not use or claim to use all the water, but that for 30 years he has used nearly all the water. The water from Kriel's dam in terms of the deed signed by defendant in 1866 was divided by days. Defendant did not then claim any of this water. There was very little cultivation then on the eastern side and it was only after the furrow had been made that general cultivation took place. As to defendant's own dam its period

of existence appears to be 28 years. Roux's dam on Champagne is apparently old, but does not catch much water now. As to plaintiff's own dam on Cabriere he is, as between himself and the lower proprietors, clearly entitled to use all the water coming from it. It is undisputed that between February and March plaintiff was entirely deprived of his water and suffered considerable damage thereby. It is also undisputed that defendant's farm Labori had a substantial stream of water running in the furrow at that time. He used more water than he was entitled to as an ordinary riparian proprietor; there is no registered servitude, and therefore any right he claims he must prove by prescription. Defendant is not entitled to use the lower proprietor's water because the proprietor above him uses his. That is not a reasonable use; he must get his remedy from his upper proprietor. As to the user, there is a conflict of evidence as to whether the furrow was made in 1861 or 1868; the onus is on the defendant, and if there is any doubt as to the date plaintiff is entitled to the benefit of it. Even if it is held that the period of prescription has been established the question still remains whether or not the user has been the same. Plaintiff's remonstrances followed by the defendant's act in allowing the water to come down would be sufficient to break prescription. Defendant does not allege that this was done as an act of grace. Increased cultivation is no justification for taking more water than formerly. There has been no trial made of the stream in order to support the defence that the water would not reach the plaintiff if allowed to come down the bed of the river.

Mr. Schreiner, Q.C.: The dam has clearly been made thirty years.

Buchanan, J.: We are inclined to think that the furrow to the mill was made more than thirty years ago.

Mr. Schreiner: And for the last thirty years the dam has taken all the water that it could take, and the furrow has carried all that the dam received. After such a period the water in an artificial furrow becomes water to which the owner of the land is entitled. *Myburgh* v. *Van der Byl* (Juta, 1, 360). We must admit that the French Hoek River is a perennial stream (*Van Heerden* v. *Wiese* (1 App., 8). The defendant does not take more water than he is accustomed to; as a fact, he takes less. Defendant is a riparian proprietor of two streams; from one he only takes drinking water, and allows all the rest to flow down. Van der Spuy and Roux should have been joined as defendants. There is no proof of damage by any user of defendant. No case has been made on which to found an interdict. There is no evidence that the water would ever have reached the plaintiff if it had been allowed to flow down.

Mr. Innes: It is not necessary to join Van der Spuy or Roux, because Van der Spuy has not taken more than a reasonable share, and Roux has not stopped the water at all. In *Myburgh* v. *Van der Byl* it was held that where each party had led water out of an artificial stream for thirty years it acquired the characteristics of a perennial stream, not that a furrow led across a man's farm for thirty years became a perennial stream. We are not bound to institute proceedings against all the upper proprietors in order to help the defendant. If the quantity of water is sufficient to be shared with the lower proprietors the defendant must share it with them. *Haugh* v. *Van der Merwe* (Buchanan, 1874, 148).

C.A.V.

Postea (4th June).

The Court gave judgment for the plaintiff for £20 damages and costs of suit.

The Acting Chief Justice said: The French-hoek River, a perennial stream, taking his rise in the mountains above the farm of one Kriel, flows over the said property and through other farms, down to and over the farm Labori, thence onwards over succeeding properties till it reaches the plaintiff's farm Zanddrift. The riparian proprietors as a rule obtain their "drink" water from springs on their own ground, but for farming purposes they lead water out of the river by means of dams and furrows. These dams are of the temporary character common in this colony, and are washed away by the stream when in winter flood, and are restored in summer when the flow of water slackens. The farm Labori extends on both sides of the river, and formerly belonged to defendant's father. By purchases made in 1849 and in 1862, the defendant became the owner of the portion of the farm on the eastern side of the river. From the year 1778, as appears from a decision of the old Court of Landdrost and Heemraden, a dam on Kriel's farm fed a furrow on the western side of the river, which furrow supplied the two immediate farms and Labori with water for farming purposes. The old homestead and cultivated lands of Labori were situated on this western part of the farm, and they are still supplied with water from this source. On the eastern side water was led out from a dam near the upper boundary of Labori for the purpose of working a mill, the furrow from the dam running near the river, and after passing the mill, and serving a second mill on the next farm, Champagne, returned the water to the river. Both these mills have long since been dismantled, and the lower part of the furrow became broken,

and fell out of use. The only cultivation on this side of the river in former times was of some patches of garden used by the coloured people on the farm, remains of which gardens still exist. After the defendant purchased the eastern portion of Labori, he built thereon, and planted vineyards and orchards and made gardens, which year by year he enlarged. Owing to the moist nature of his ground, the defendant did not require to irrigate his vineyards; but to supply his orchards and gardens he led water out of the river from the old dam, using a portion of the old mill furrow, and making a new furrow to his cultivated lands. The water so led out, after passing the new homestead, was not returned to the river, but the surplus not used found its way into a tributary which joined the Frenchhoek River some considerable distance below his property, but above the dam from which the plaintiff obtained his water supply. From time to time the several farms along the Frenchhoek River were subdivided, large extents of land were brought into cultivation, more and more water was used by the upper proprietors, and less and less water found its way down the river. Defendant's farm is only about twenty-seven morgen in extent, and though recently he has planted additional vineyards, he has not to any great extent increased his gardens and orchards during the last twenty years. As the tributary above referred to ran through defendant's farm, and as there were springs on his own ground, he did not require, and indeed would not use the river water for drinking. The river water was used by him for irrigation purposes and for distilling. Until recently there was sufficient water in the river to supply defendant's needs without his taking the full flow, and he allowed the remainder of the water to run down in the river-bed. But owing to the farmers above taking more water, the flow to his farm had gradually diminished, and this year being an unusually dry season, for the first time he found it necessary to take all the water in the river. Even though diverting all the water, the defendant stated that he had not sufficient for his requirements, and that his orchard and gardens had suffered in consequence. Disputes had arisen between the plaintiff and defendant during the last fifteen years as to the user of the river water. It is, however, only the total diversion of the stream from the 1st February to the 12th March last, of which the plaintiff complains, and for which he claims damages, and to prevent such total diversion in the future he prays an interdict. To this claim the defendant pleads the use for upwards of the period of prescription of the dam and furrow on his land, and the enjoyment of a reasonable use of the water thereby diverted for domestic purposes, and for the purposes of irrigation, cultivation, and distillation; and he asserts further that he now claims no more than the right reasonably to use the water as he has used the same for thirty years and upwards. Upon this plea issue is joined. The rights of riparian proprietors to the joint use of a perennial stream have been settled with fair accuracy by a series of decisions of this Court. The remarks of Lord Kingsdown in the case of *Milner* v. *Gilmour* (12 Moore, P. C., 131), have frequently been quoted as summarising the principles to be applied in these cases. His Lordship said: "By the general law applicable to running streams every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition he may dam up the stream for the purpose of a mill, or divert the water for the purposes of irrigation. But he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of water by other proprietors, and inflicts upon them a sensible injury." It is true the Privy Council in that case was dealing with the Canadian law, but these remarks were cited with approval in a more recent case which went in appeal from this Court in regard to a dispute which had arisen in this very neighbourhood, viz., *The Commissioners of the Frenchhoek Municipality* v. *Hugo* (10 Ap. C., 344). The distinction here noticed between the primary or ordinary use of the water of a perennial stream and of the secondary or extraordinary use was clearly drawn in our own leading case of *Hough* v. *Van der Merwe* (Buch. S.C. Rep., 1874, p. 148), where the above-cited passage was compared with the Roman-Dutch authorities. As to the secondary or extraordinary use of the water, which is what we have to deal with in this case, it was laid down by the present Chief Justice (p. 155), that "by our law the owners of land by or through which a public (*i.e.* perennial) stream flows, is entitled to divert a portion of the water for the purposes of irrigation, provided, firstly, that he does not thereby deprive the lower proprietors of sufficient water for their cattle and for domestic purposes;

secondly, that he uses no more than a just and reasonable proportion of the water consistently with similar rights of irrigation in the lower proprietors; and thirdly, that he returns it to the public stream with no other loss than that which irrigation has caused." As to this third proviso, as between the parties to this suit, considering the manner of user of this water since the defendant came into possession of his portion of Labori, and since he made the furrow by which he diverted this water, in my opinion the defendant sufficiently complies with the requirements of the law if he returns the surplus water into the Frenchhoek River by means of the adjacent tributary, admittedly itself a perennial stream, and one which joins the main stream above plaintiff's dam. But this leaves the question still open whether or not the defendant is entitled, in times of scarcity, to divert all the water running in the river. Whether or not the law could not be made more suitable to the advanced state of cultivation is a question which may be well considered, but the law as it stands is clear. This water is not requiredby the defendant for what is termed the ordinary or primary use. The evidence shows that the defendant does not need or use this water for *drinking* purposes or to water stock. What he takes it for is for farming purposes. This being so, according to the authorities cited, which have been repeatedly affirmed, he has by law no right absolutely to deprive the lower proprietor of the whole flow of the river, unless indeed he can establish an adverse right created by prescription or otherwise. In his plea the defendant does not claim any prescriptive right to take all the water passing his land, and in face of his own evidence such a right could not be maintained. But as I understand his case, the right he claims is the right to take as much water now as he was accustomed to take in previous years, irrespective of the quantity of the water which may be in the river. If the flow of water is sufficient to supply this quantity, any surplus may go down to the lower proprietors; if it is insufficient, then he claims to be entitled to take the whole of the water. And it is the user of the water in this manner which he maintains to be a reasonable user under the circumstances. All the cases show that what constitutes a just and reasonable use of the water is entirely a question of degree, which depends on the facts of each particular case. It seems to me obvious that where no adverse right absolutely to cut off the whole flow of the river is established, that the quantity of water in the river is one of the leading circumstances to be considered in determining on a reasonable user. The mere fact that hitherto, say, a third or a half of the flowing stream has been sufficient for the requirements of the upper proprietor cannot, I think, justify such upper proprietor in taking the whole of the stream when the water has diminished so as to supply only the quantity which he formerly diverted. That is the way in which the issue here should, I think be viewed. In such a case the upper proprietor is not in law entitled to have his own wants supplied, while he deprives the lower proprietor altogether of any supply. When it is a question of the secondary use of the water, both parties must abate equally. The defendant, however, in his evidence tried to justify the diversion of the whole of the stream on the ground that in dry seasons the flow of water is too weak to be of any benefit to the lower proprietor. It is difficult on the evidence before us accurately to determine the quantity of the water taken by the defendant during February and March last. The plaintiff's attorney, who visited the locality early last March, found that the stream running out at defendant's dam was two feet wide, and from four to six inches deep according to flow, which was very sluggish. Other witnesses expressed opinions for and against the probability of such a stream being sufficiently strong to reach plaintiff's property. The conclusion I have come to on the evidence on the whole is that the water would reach the lower proprietors if allowed to flow free at defendant's dam. There are several ways in which a reasonable proportion of it might be taken, either by dividing the stream or by leading the whole flow in turns. The Court, however, is not now in a position to make a division of the water, as there are intermediate proprietors of ground between the plaintiff's and the defendant's farms who are not before the Court. Indeed, one of these proprietors, Roux, in the witness-box, has already set up his claim as a riparian owner to share in the distribution of the water Taking the view which I do of the facts, I must hold that the defendant has failed in justifying his diversion of the whole of the water of the stream. The plaintiff has estimated his damages from this diversion at £100. But the evidence shows that the season was such that the upper properties, including the defendant himself, suffered from the effects of the season. I therefore think the plaintiff is not entitled to attribute his loss entirely to defendant's wrongful acts, and in our opinion £20 would be a fair amount at which to estimate his damages, for which amount the plaintiff will have judgment. This will establish

that as between the parties to this suit that the diversion of the whole of the stream is not a reasonable use of the water by the defendant. Under these circumstances it is not advisable to grant an interdict, which could only be framed in general terms, and which would require an action to prove whether or not it had not been complied with. As the plaintiff has succeeded in his contention, he is entitled to costs. Judgment will therefore be entered for the plaintiff for £2 ' damages and costs of suit.

[Plaintiff's Attorney, V. A. van der Byl; Defendant's Attorneys, Messrs. Walker & Jacobsohn.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS, P.C., K.C.M.G.), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

AZIZ V. RAGIEM. 1897. May 28th.

[Mr. McLachlan moved for judgment under Rule 329 for an account.

Application was granted.

FREE STATE PROSPECTING SYNDICATE V. B. J. MINNAAR.

Mr. Close applied for judgment for £50 under Rule 329, value of certain shares and costs.

The application was granted.

RHODEN V. FOURIE.

This was an application for provisional sentence on a mortgage bond for £200 with interest and costs, and for the landed property specially hypothecated to be declared executable.

No counsel appeared when the case was called on.

After the adjournment for lunch,

Mr. Close appeared for the applicant, and stated that subsequent to the case being called in the morning he had been instructed to apply.

The Court granted the application.

GENERAL MOTIONS.

Re ALIWAL NORTH BOARD OF EXECUTORS.

Mr. Molteno applied for an order in terms of the fourth and final report of the official liquidator, as to the settlement effected with debtors to the company, distribution of assets, disposal of books, and remuneration of the official liquidator.

The application was granted.

NEL AND ANOTHER V. DU TOIT. 1897. May 28th., 29th., 31st., June 1st.

Contract — Construction — Interdict — Damages.

A perennial stream flowed over the farms Hoeko Rietfontein and Weltevreden.

Part of the water therein had for many years been diverted by a watercourse leading to the farm Weltevreden.

By a contract between N. *and* D., *owners of sub-divided portions of Weltevreden, it was agreed that* N. *should have three clear days undisturbed use of the water from the watercourse.*

The children of N., *his successors in title, brought an action against* D. *on the ground that he was in the habit of diverting the water, when his turn of waterleading came on, at a spot near plaintiff's boundary, but that when plaintiff's turn for waterleading came on* D. *returned the water into the watercourse at a spot considerably higher up, whereby the plaintiffs did not get their full three clear days' use of the water.*

Plaintiffs claimed that they were entitled to have the water reach their boundary at the time appointed for the commencement of their waterleading.

The Court held *that they were so entitled, but as plaintiffs were willing to forego their strict right and to accept a compromise by which* D. *should return the water at the spot where he took it out, judgment was entered accordingly.*

This was an action brought by Charl John Nel and Pieter Johannes Nel for an order as to the use of a certain stream: also for an interdict and £500 damages.

Mr. Innes, Q.C. (with him Mr. Molteno), for the plaintiffs; Mr. Schreiner, Q.C. (with him Mr. Searle, Q.C., and Mr. McGregor) for the defendant.

The plaintiffs' declaration was as follows:

1. The plaintiffs and defendant are all farmers, residing in the district of Ladismith.

2. A certain perennial stream of water rises in the Zwarteberg Mountains in the said district, and thereafter flows down to and over the farms Hoeko, Rietfontein, and Weltevreden. The plaintiff annexes hereto a rough diagram, marked "A," which shows the position and certain subdivisions of the said farms, and also the course of the said stream, and he prays that the said diagram may be considered as forming part of this declaration.

3. The plaintiff C. J. Nel is the registered owner by separate title of lot 5 of Weltevreden; he also owns certain subdivided shares of lots 3 and 7. The plaintiff P. J. Nel is the registered owner of certain other subdivided shares of lot 3, and also occupies, under a contract of lease, lot 6 and a subdivided portion of lot 3 registered in the name of his father, the late Johannes J. Nel. The defendant is the registered owner of lots 1, 2, and 4 of Weltevreden, and he also owns the farm Rietfontein and certain subdivided shares in the farm Hoeko, which it is not necessary for the purpose of this case to specify. Certain water of the said stream has for very many years been diverted at a spot marked "XX" upon the said diagram, and been conducted therefrom by means of a furrow to the farm Weltevreden.

4. On the 1st February, 1867, a notarial deed was entered into between the defendant, who then owned lots 1 and 2 of Weltevreden, and one J. J. Nel, since deceased, who was the father of the plaintiffs and their predecessor in title, and who at the time was registered owner of lot 3 of the said farm, a copy of which deed is hereunto annexed and marked with the letter "B." After the execution of the said deed, the defendant became the owner of lot 4, and the said J. J. Nel became the owner of lots 5, 6, and 7.

5. In terms of the said deed it was agreed by the defendant that the said J. J. Nel, of Weltevreden, should have the free and undisturbed use of so much of the water in the stream hereinbefore mentioned as ran in the watercourse aforesaid past a certain mill on the farm Hoeko (which mill is marked upon the diagram annexed) down to the farm Weltevreden "for the space or time of three full days, that is to say, from Monday morning at six o'clock till Thursday morning at six o'clock in each and every week." The said deed was thereafter and still remains registered with the defendant's title deeds to the shares of the farm Hoeko, Rietfontein, and Weltevreden owned by him.

6. Thereafter, in the year 1890, the then owners of lots 3, 5, 6, and 7 of Weltevreden, divided between them the right to the said water secured as aforesaid. One Barker, who then owned portion of lot 7, was awarded a turn of four and a half hours at six o'clock on each and every Monday, and at 10.30 o'clock in the said day the turn of water-leading for land now owned by the plaintiffs commenced. The said agreement of division has been observed by the said parties and their successors ever since, and is still of binding force and effect.

7. Thereafter the defendant acquired five-sixths of the water rights of the said Barker, equivalent to a turn of 3¾ hours, commencing every Monday morning at six o'clock, and the plaintiff C. J. Nel acquired the remainder of this said right during a period of three-quarters of an hour in each and every Monday morning. The plaintiffs and the defendant are now the only persons interested in the water dealt with by the deed in section 4 herein referred to.

8. By reason of the premises, the defendant, as owner of lots 1, 2, and 4 of Weltevreden, is entitled to use the water aforesaid upon the farm Weltevreden from Thursday morning at six o'clock until Monday morning at 9.45 o'clock, from and after which last-named hour and during the continuance of their turn of leading until Thursday morning at six o'clock, the plaintiffs are entitled to the free and undisturbed use of all the said water upon their shares of the farm Weltevreden.

9. The plaintiffs contend that it is the duty of the defendant either so to use the water that the full flow of the stream may cross the boundary of the lot No. 5 at 9.45 o'clock every Monday morning, or else to discontinue the use of the said water at 9.45 in the said morning at the same spot where he commenced to use it at six o'clock a.m. on the preceding Thursday, so as to allow the plaintiffs the full and undisturbed use of the said stream for the number of hours of their water-leading.

10. The defendant has continually during the years 1895 and 1896 (*a*) used the water to which he was entitled as owner of Weltevreden upon his portions of the farms Hoeko and Rietfontein, and thereby prejudiced the plaintiffs in their use of the water to which they were entitled on Weltevreden; (*b*) commenced his turn at water-leading at or near the boundary of lot 4 of Weltevreden, and concluded it on

the farm Hoeko at a spot near the mill marked upon the said diagram; (*c*) failed to remove dams and obstructions placed by him in the channel of the said stream, and thus compelled plaintiffs to clear away the said obstructions before their turn of water could be utilised; (*d*) by himself, his servants, and agents, polluted and contaminated the said water by washing clothes and depositing filth therein.

11. By reason of the defendant's wrongful and unlawful acts as aforesaid the plaintiffs have suffered damages in the sum of £500.

The plaintiffs claim:

(*a*) An order compelling the defendant either (1) to use the said water during his turn of water-leading so as to allow the full stream thereof to flow free and undisturbed over the boundary of lot 5 aforesaid at the commencement of the plaintiffs' turn of water-leading; or (2) to return the full flow of the said stream into the course by which it runs down to the defendant's land at the same spot at which in each occasion of water-leading he commenced to use the said stream.

(*b*) An order interdicting the defendant from making any use upon the farms Hoeko and Rietfontein of the water which formed the subject of the notarial agreement of the 1st February, 1867.

(*c*) An order interdicting the defendant, by himself or his agents, from polluting the water of the said stream, or from placing any obstructions therein which interfere with the free flow of the water during the plaintiffs' turn of water-leading.

(*d*) Payment of the sum of £500.

(*e*) Alternative relief.

(*f*) Costs of suit.

Annexure B contained the following clause: "Now, therefore, the appearers do hereby agree that the said Johannes Jacobus Nel, or his heirs, administrators, or assigns, shall have the free and undisturbed use of the aforesaid stream of water coming from the said mill at Hoeko for the space or time of three full days, that is to say, from Monday morning at six o'clock until Thursday morning at six o'clock in each and every week. The said Johannes Jacobus Nel shall be bound to assist, when called upon by the appearer of the first part, to clean and keep in repair the whole length of the watercourse from the mill to the dwelling-house of the said Pieter Cornelis du Toit. In consideration whereof the said Pieter Cornelis du Toit doth hereby acknowledge to have received from the said Johannes Jacobus Nel the sum of one hundred pounds sterling (£100)."

The defendant's plea and claim in reconvention were as follows:

For a plea to the declaration, the defendant said:

1. He admits the allegations in paragraphs 1 and 2 of the plaintiffs' declaration.

2. As to paragraph 3, defendant admits that the stream therein referred to has for many years been diverted at the spot marked XX on the said diagram. He says that when he entered into occupation of the farm Weltevreden, in or about 1859, the water of the said stream was diverted at the said point XX, and there was also a dam at the point X on the farm Weltevreden already constructed, and that a stream of water was taken out at the said point for the joint use of himself and J. J. Nel, father of plaintiffs, as owners of portion of Weltevreden.

3. In or about the year 1867 the furrow from the dam XX was continued from the boundary of the farm Rietfontein to a sluice on the farm Weltevreden, where the said furrow joined the water taken out of the dam X, and it was so arranged between the said J. J. Nel and the defendant that water should be taken out at XX at the same hour as it was turned out at X.

4. Theretofore the agreement "B" annexed to the declaration was entered into, and the defendant says that during and since the year 1867 up to the commencement of this action defendant has at all times turned off and used the water of the said stream at any point below the mill shown upon the said plan as might suit his convenience, but without interfering with the rights of the said J. J. Nel or the plaintiffs under the agreement of 1867; and, subject to the above, the defendant refers to such proof as the plaintiffs may produce of the other allegations stated in the said paragraph 3.

5 He admits the allegations in paragraphs 4 and 5, save that for the terms of the said deed he craves leave to refer to the document itself.

6. As to paragraph 6, he admits that J. J. Nel, the owner of lot 3, entered into an agreement whereby the owners of the other lots in the said paragraph referred to obtained certain rights to share in the water of the said stream secured under the agreement "B," but for the terms of the agreement between J. J. Nel and the said owners he craves leave to refer to the agreement itself. He has no knowledge as to the observance of the said agreement between Barker and his co-owners, and craves leave to refer to such proof as may be adduced thereof.

7. As to paragraph 7, he denies that he at any time acquired five-sixths of the water rights of the said Barker, as therein stated, or has made any agreement to that effect with the said

Barker. He has no knowledge as to whether the plaintiff C. J. Nel has acquired any of the said rights.

8. He denies that he has acquired rights, as stated in paragraph 8, to the use of water of the stream in the manner and to the extent stated in paragraph 8, and says that the plaintiffs are entitled to the use of the water secured to them by the agreement "B," as modified by the subsequent agreement with Barker and others, and that they have at all times enjoyed the said use without let or hindrance from him, the defendant.

9. As to paragraph 9, the defendant denies that there is any agreement whereunder he is bound to deliver the water across the boundary of lot 5 at 9.45 a.m. on Thursday, as therein alleged; nor is he bound to discontinue the use of the water at the same spot where he commenced to use it at six a.m. on the preceding Thursday.

10. He claims that, subject to the rights of the plaintiffs under the agreement "B," he is entitled to use the water of the said stream at any spot that he thinks proper, or at any spot on his property, including the farms Hoeko and Rietfontein, and that he has lawfully done so, as hereinbefore stated, during and since 1867, and save as aforesaid, he denies the allegations in paragraph 10.

11. He denies the allegations in paragraph 11, and says that he has not in any way interfered with or prejudiced the rights of the plaintiffs, or caused them loss, with regard to the user of the water of the said stream.

Wherefore he prayed that the plaintiffs' claim be dismissed with costs.

And for a claim in reconvention, the defendant, now plaintiff in reconvention, said:

12. He craves leave to refer to the matters above pleaded.

13. At divers times between the years 1892 and the present year, and more particularly on two occasions in 1892, and in 1895 and 1896, the defendants in reconvention have trespassed upon defendant's property Weltevreden, and certain dams above the dam X have been wrongfully and unlawfully broken open by the defendants in reconvention, and the sluice destroyed, and a portion of the vineyard of the plaintiff in reconvention thereby injured.

14. Owing to the above illegal acts of the defendants in reconvention, the plaintiff in reconvention has sustained damage in the sum of £100.

The plaintiff in reconvention claimed:

(*a*) Payment of the sum of £100 as damages.

(*b*) Alternative relief.

(*c*) Costs of suit.

Plaintiffs' replication was general; the plea to the claim in reconvention was as follows:

1. They ask leave to refer this Honourable Court to the matters set forth in the declaration.

2. They say they at no time entered upon the property Weltevreden, save to remove obstructions in the channel, by which the water to which they were lawfully entitled flowed down to their land; and they say that in removing the said obstructions, as they had a right to do, they inflicted no damage upon the plaintiff or his property.

3. Subject to the above, they deny the allegations in the said claim in reconvention.

Wherefore they pray that the said claim may be dismissed with costs.

The defendant's rejoinder and replication in reconvention were general.

On these pleadings issue was joined.

For the plaintiffs were called:

Carl Johannes Nel, plaintiff, said he owned portions of the farm Weltevreden, in the Ladismith district. In 1867 there was a deed entered into between his father and the defendant by which his father was to get three days' water weekly. Afterwards the farm was divided, but defendant was no party to the division. Plaintiff got about three hours' water. Under the agreement the water was to go to his father at six o'clock on Monday morning. After the division this was altered, and it was arranged in 1890 that Barker get the water first. As a matter of fact plaintiff and his brother took the water alternately. Witness began to take the water at a quarter to ten o'clock. Between six o'clock and ten on Monday morning defendant's son, John du Toit, took the water. That was the water which Barker was entitled to. Plaintiff had lived at his farm since 1861. In his father's lifetime there were disputes between Nel and plaintiff's father. On Thursday mornings Du Toit took the water at the sluice and sometimes he took it at the boundary marked 4 on the plans. Defendant had lands at the mill which he irrigated. Witness had sometimes turned the water into the furrow at the mill, and if the water was weak it took about twelve hours to come down. If there were plenty of water the time was much less. Plaintiff could say of his knowledge that his father brought the matter to the attention of the defendant. His father in plaintiff's presence had complained, and Du Toit on the last occasion had ordered him off. Du Toit was a man of violent temper.

By the Chief Justice: He had always to go up and turn the water on. He had to turn on the water himself. Defendant did not turn the

water on. Plaintiff frequently had had to remove obstructions below the mill which diverted the water. When last he went to Du Toit it was to discuss the water question, and on saying so to Du Toit, Du Toit refused to speak with witness on the subject, and declared that he would only discuss the question with a man who was more reasonable. On the following Monday, February 17, 1896, the water did not reach plaintiff's farm until seven o'clock in the evening. On the following Thursday defendant turned the water off below the sluice. Plaintiff claimed for damages £500. In 1895 he had heavy losses, and in 1896 he lost about everything. Plaintiff complained further about the pollution of the water. In 1896, one afternoon they went to look at the water, and found a number of pots and saucepans lying in the stream opposite defendant's house. There was a servant washing these articles. Later on, he saw a girl cleaning offal in the stream, and on another occasion he saw women washing clothes in the furrow. Defendant had a stable about fifteen feet from the water, and liquids from the stable found their way to the water. When he spoke to Du Toit about the pollution, Du Toit said to him that he was not worth anything better, and that plaintiff must not bother him. Plaintiff was charged with having broken certain dams. In 1892 he did not break any dam, but he removed an obstruction. One day plaintiff went to let the water down, and Du Toit on seeing them put the plank down at the sluice. Plaintiff's boys attempted to raise the plank, Du Toit laying on top of the plank, and the result was that the plank was broken. Du Toit then said that plaintiff would have to suffer for what he had done, and that he would take everything from him. Later there was a regular pitched battle between them. Du Toit appeared with thirty men and plaintiff turned up with thirty-one. Plaintiff had the best of it, and kept the water going.

Cross-examined by Mr. Searle: Generally speaking Du Toit took the water at the sluice. On many occasions he took the water higher up. Witness had three different ways by which he could get water.

The Chief Justice: What is the real question? Is it not that the water must come down exactly at the time fixed upon, and therefore it is a question of the construction of the agreement?

Mr. Innes: That is so.

The Chief Justice: If you are entitled to three days' water from a certain hour, why should you not take it at the hour and return it at the hour?

Plaintiff, in reply to the Chief Justice, said that if he got the water at ten o'clock on a Monday morning he would have the water turned on at the sluice about a quarter of an hour before.

By Mr. Searle: Plaintiff had written to Du Toit on different subjects, but he had not mentioned the pollution. Since January last there had been obstructions in the mill sluit only one occasion. During 1895 and 1896 he did not complain to Mr. Du Toit. The furrow was not very clean. Du Toit had asked him to clean the lower portion of the sluit; they had the furrow in common, and they all had to clean it. At the stand-up battle, one of plaintiff's men put Du Toit in the water. From the stable to the sluit the distance was 15 feet. Du Toit had altered the furrow in February last so that it might now be a little further away. The last two years water had been very scarce, and in 1895 hail did a good deal of destruction. The commission he got to look at the water was composed of friends but they were impartial people.

By the Chief Justice: The contract made between Du Toit and plaintiff's father had not been altered by any verbal agreement.

Re-examined by Mr. Innes: No steps were taken against plaintiff after the pitched battle in 1892, and it was now brought up against him in reconvention. Witness had never refused to clean out the sluit.

[Before the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.]

P. J. Nel, brother of the plaintiff, corroborated as to the pollution of the water at Du Toit's place, and to the late hours when his brother received the water.

Cross-examined by Mr. Searle: His principal complaints were that they did not get the water between the dam and the sluice and on account of the obstructions. They generally sent men up to turn on the water. Frequently in 1896 the water came down late in the day. Witness was not aware that defendant had frequently asked his brother to clean the furrow. Witness was present when the sluice was broken. He was present four Thursdays running. They claimed the right to the water from the dam, but they did not get it. They had not had the water on the Thursdays. The dam he referred to was the X dam; the dam above it was the Request dam.

J. J. Nel, son of the plaintiff, said he knew the furrow in dispute. His father, he knew, was entitled to the water at a quarter to ten o'clock. Sometimes he found the water above the mill,

sometimes below it. He went on Mondays The defendant had been irrigating out of the furrow, and witness had to remove the obstructions. On Thursday mornings at half-past six they lost the water. It took sometimes until the following morning for the water to reach his father's place. Witness, on one occasion, had seen Du Toit's servants washing offal, clothes, and pots in the water, and he had even seen Du Toit's son bathing in the same water. Witness had frequently removed stable manure from the water in the furrow.

Cross-examined by Mr. Searle: On his way to the mill, if he found any obstruction in the furrow he removed it. The water from the X dam came down at the same time. It was turned on on Monday mornings, so that if there was water there was always some in the sluit. The stable was about five yards from the furrow. He did not speak to the Du Toits about that manure, for the reason that if anyone went to them they would not even greet the visitors. He saw Du Toit's servants cleaning offal in the furrow in July of last year.

Re-examined by Mr. Molteno: He had no trouble in telling when the water arrived at his father's farm.

Johannes April, water-leader, in the employment of the Nels, said he knew the mill stream. It was his duty to see that the water came down. He went on Mondays, and generally found the water at the mill. There were lands there, and the people were generally leading the water then. On Thursdays the Du Toits took the water above and below the sluice, and used the water until he brought the water back to the mill. He had seen Du Toit's servants dirtying the water, and he had removed dung from the water at the stable.

Cross-examined by Mr. Searle: Witness had been water-leader for about two years.

Petrus la Grange, formerly in the employment of the Nels, corroborated as to the time the water used to reach Nel's farm, and as to the obstructions in the furrow and the pollution of the water.

Gert B. Bauwer said he went with others, the plaintiff and his brother, to the mill to see about the water. The water had just been turned into the main furrow when he arrived. On another occasion he and Nel went to Du Toit's. Du Toit used language towards Nel which witness would rather not repeat. Witness understood that what took place between him and Du Toit was private. All that he could remember was that Du Toit said he could not understand what Nel wanted. Du Toit, however, insisted that the agreement was that Nel should take the water below the mill. He saw a flat stone and a plank, and signs of clothes having been washed in the furrow.

Cross-examined by Mr. Schreiner: At the time Du Toit used the bad language witness did not know that the Nels had been breaking down Du Toit's sluices. He and the others went to see the water as a commission appointed by Nel. The stone and the plank he saw, but he could not say when the washing of clothes in the furrow took place.

By Mr. Justice Buchanan: He was a member of the commission. He did not think the Nels and he were related. Their ancestors might have all at one time lived in Europe.

Johannes C. Wolfaardt, a member of the commission, gave corroborative evidence.

Mr. Schreiner: Can the Nels get their three days' and three nights' water without taking part of Du Toit's four days and four nights?

Witness said he could only reply that the water must be turned on and turned off at the one place.

John C. Houlsen, another member of the commission which went to inspect the furrow in question, corroborated the previous witnesses on what took place and what they saw on the occasion of their visits. Witness visited the place this month. The furrow, he found, had been cleared out, and a thorn hedge had been removed. The hedge used to obstruct the furrow.

Cross-examined by Mr. Schreiner: He was sure there were marks of soap on the stone in the furrow and there was soapy water there too.

Isaac M. Nel, from Riversdale, brother of the plaintiff, said that two years ago he sold his portion of Weltevreden to P. J. Nel. He knew about the water supplies since his father's time. He knew that his father and Du Toit had frequent discussions about the water. He remembered that in 1892 Du Toit's sluice was damaged. There was a good deal of trouble then about the water from dam X. He and his brother went and told Du Toit that they claimed the water on Thurdays. Du Toit said they had no such right and ordered his men to turn the water off higher up. Du Toit refused to discuss the question. They turned the water on for the next two Thursdays, but on the next occasion Du Toit pessed down the sluice plank. Witness's brother told his men to lift the sluice, and it came out of the screw. Du Toit attempted to press it back and broke it.

Cross-examined by Mr. Schreiner: It was not true that Nel's servants broke Du Toit's sluice, injured Du Toit, pulled down the wall and flung the stones into Du Toit's vineyard. Du

Toit broke the sluice himself. Witness and his brother went to secure the water to which they had a right. Witness and his brother had a great crowd. What was thrown out was a bunch of straw with a klip in it that Du Toit tried to block up the stream with.

Re-examined by Mr. Innes: Du Toit drew up his men beside his vineyard and the Nels drew up theirs in the furrow.

This closed the evidence for the plaintiff.

THE DEFENCE.

Sydney Herbert Adley, surveyor, Oudtshoorn, put in certified plans of the farms in question, Witness was at the farms in March last. The sluit from the dam was fairly broad. One dam alone appeared to be in use. Other dams there were broken. The stable used by Du Toit was forty-four feet from the sluit, but the nearest portion of the stable, which was only used by guests, was twenty-six feet from the sluit. On the occasion of his visit he saw no stable litter near the sluit. He saw a washhouse forty-four feet from the sluit, properly constructed, and with a cement floor. There was no nuisance from the washhouse on the occasions of his visit.

Cross-examined by Mr. Innes: Witness had only been at the farm three or four times.

Post.a (May 29th).

[Before the Hon. Mr. Justice BUCHANAN and Hon. Mr. Justice MAASDORP.]

P. C. du Toit, the defendant, said he was proprietor of portions of the farm of Weltevreden and proprietor of part of the estate of Hoeko and part of the estate of Rietfontein. The latter belonged to Becker, and he made the purchase in 1867, when he made the agreement with Mr. J. J. Nel about the water. Defendant was seventy years of age and he first lived on Weltevreden in 1859. Before that he lived on Hoeko. In 1848 he began to live on Hoeko. He went to live in his house near the sluice shortly after he took possession of the farm, and had lived there ever since. Between 1859 and 1867 he got his water from Weltevreden dam, or dam X. The furrow which leads to the mill was there in 1848. Until he bought in 1867 the furrow was used on Hoeko and no further. Until that time it had not been extended to Weltevreden. It was extended so as to join the furrow from dam X in 1867. The extension was made in pursuance of an agreement. It joined the other furrow at the sluice-gate. The sluice had been there since 1865, but at first the sluice only took the water from the river. That was the sluice which was broken in 1892. Witness had always used the water at any place he chose. But his custom had been to begin leading at the sluice on Thursday mornings at six o'clock, taking the water into a garden. He did not allow his "bywoners" below the sluice to lead water until the sluice was turned off. The "bywoners" got water which he supplied. On one occasion Holtzhausen turned off the water too early, but witness allowed the water for two hours extra to make up for that. In 1865 there was litigation between J. J. Nel and himself regarding drink water, and again in 1878 Nel raised an action against him. That litigation was about the water from dam X. The litigation had nothing to do with the stream from the mill. Old Mr. Nel and he never had any dispute about the water from the mill. On Hoeko and Rietfontein he also irrigated. In 1895, 189 , and 1897 he had done exactly what he had done since 1867. When his four days' leading of water was over, the furrows leading to his lands were closed. Old Mr Nel never complained to him that the stream was obstructed; once Sarel Nel, sen., complained. The Nels sent someone to turn on the water, and whoever went to do that would see that the obstructions in the main furrow were removed. Defendant did not claim to alter the position of things as they existed. In 1893 an award of aribtration was made by which the Nels got liberty to lead the water across the farm and down on the other side. The Nels came to him to get that right, and the award was made. After that time they used water from that point. Most of their water travelled by that furrow. In 1892 Mr. Sarel Nel came to his sluice. The Nels claimed the Thursday's water from dam X. Witness said the Nels had no right to the water. He and the late Mr. Nel came to an agreement as to which day they should have the water, and defendant was to have the water on Thursdays. The Nels never had the water on Thursdays. The Nels came on four or five Thursdays, and brought various forces with them, sometimes more, sometimes less. After they had been there once or twice the Magistrate attended. That was the day the sluice was broken. It was not true that he broke the sluice. Witness had a hole bored in the plank, so that he could lock the sluice. The sluice was locked that morning before six o'clock, but the Nels and about thirty men appeared, and by force pulled out the sluice and smashed it, and at the same time threw witness into the furrow. They also threw stones into his vineyard, doing great damage to his ripening fruit. Sarel Nel and his water-leader Steyn went one day to the Request dam and opened the dam. The Nels had no right to that dam. The dam

had been repeatedly cut nearly every week for the past two years. The dams above had also been broken. Whenever defendant's turn for the water came these dams were b oken. By the acts of the Nels witness had sustained great damage. He calculated the damage at £1,000, owing to loss of crops, damaged sluit, and the like He was, however, only charging £100 for damages. No one had complained to him about the water being polluted. They could not make such a charge against him, as there was not the slightest truth in the allegation. It was not true that the manure went into the furrow and dammed the water up. It was equally untrue that clothes were washed in the furrow. The washing was done in the washhouse, and the water from there flowed on to his land. Were any of his servants or "bywoners" to pollute the water he would send them off at once, and if they did not go, he would give them a thrashing. His son who lived on Hoeko bought Barker's water, and used it. Witness, however, did not use it.

Cross-examined by Mr. Innes: He used the water on erf No. 4 on Fridays and Saturdays. He never heard of turning any of the Nels out of his house. Carl Nel first made a demand for the mill stream water in January, 1896. That was the first intimation he got that his right to the water was disturbed. He, however, did not think the letter worth replying to. Nel was always going about looking for disputes. Witness did not like disputes. Several times he had gone to see that his "bywoners" did not take the water. His people had not used the washhouse since March. They washed in a place nearer the mountain, not in the furrow. After the "pitched battle" nothing further was done. The matter was just allowed to drop.

Elsie du Toit, wife of the defendant, said no complaint had been made to her that the water in the furrow had been polluted. There was no washing done in the furrow. There was a plank across the furrow to let people cross. There was no washing-stone in the furrow. At the time the sluice was broken her husband was injured by the Nels pressing him against the sluice and he was all wet. She heard Carl Nel say to the people to break the sluice.

Cross-examined by Mr. Innes: She had given orders to the servants as to where the washing should be done. There had been no washing in the furrow with her knowledge, and if it had been done it was against her orders.

E. Joubert farmer, deposed that he formerly lived on the farm Weltevreden. Mr Du Toit was there when witness went to live at the place. Witness was the miller, and he could remember the late Mr. Nel and Mr. Du Toit coming to the mill at the sale of Becker's estate. The two afterwards fixed upon a place from which to take the water. Mr. Du Toit used to take his water from the sluice. There was no unpleasantness then. When he first went there the Request dam was in existence. The dam above the sluice was also there, as well as the dam above the mill. These were the three principal dams then.

Cross-examined by Mr. Innes: In those days there was practically no cultivation on Hoeko. The water then was brought to the sluice, and it was then used on Weltevreden. There was now a good deal of cultivation on Hoeko.

D. Rieneker, farmer, said his father owned a portion of Hoeko. Mr. Du Toit was uncle of witness, and witness lived with him for thirteen years. Witness assisted in extending the furrow from Hoeko. All the time witness was there the late Mr. Nel took his water at the mill from Mondays till Thursdays, and Mr. Du Toit took the water at the sluice. Witness was away from the place for about eight years, and when he went back the old arrangement continued. In February, 1892, he was at the sluice-breaking. Du Toit's hand got hurt and he was made wet.

Hermanus Steyn, jun., said he had been in the employment of the Nels. He corroborated generally as to the time the water was taken by the Nels and by Du Toit. He had never seen obstructions or filth in the sluit. He had by Nel's instructions cut open the dams. Other people on Nel's instructions had cut open the same dams.

Postea (May 31st).

The hearing of further evidence for the defence in this case was resumed, when Hermanus Steyn, sen., and V. Balthazar gave corroborative evidence.

J. J. du Toit, son of the defendant, said he was brought up on Weltevreden, but now lived on his father's ground at Hoeko. He corroborated generally as to the mode and the time of using the water.

William Thomas Barker, farmer, Weltevreden near the Nels' farm, said he first lived on the farm in 1877. When he first went to live there the Nels used the water from six o'clock on Monday mornings until six o'clock on Thursday morning, and witness's father-in-law, who occupied the farm before him, always turned it off on Thursdays. From the dam X he used the water from Sunday at midday until ten o'clock on Monday mornings, In 890 witness and the lower proprietors entered into a new agreement, by which witness's time was from six o'clock

until half-past ten o'clock on Mondays. Witness, however, never had any benefit from the water, as it did not come down quick enough.

Heinrich John Cilliers (Hocko), a "byvoner" of Mr. Du Toit, corroborated generally, and mainly about the opening of the dams by Steyn.

This concluded the evidence for the defendant.

Postea (1st June).

Argument on the case was heard.

The Court intimated that it was not necessary to hear Mr. Innes on the claim in convention.

Mr. Innes, Q.C.: As to the claim in reconvention, the plaintiffs claim the right to use the water coming from dam X every Monday. There was a *bona fide* dispute, and although the plaintiffs may not have acted very legally they did not act in such a way as to create a substantial trespass. In 1853, an agreement had been entered into between the predecessors of the parties as to the division of the water. In 1867, another agreement was entered into. There is no declaration of rights claimed by defendant and it is inconvenient to raise the question in this way. With regard to defendant's user we will be satisfied with his taking it at any spot he pleases provided he returns it at the same spot.

Mr. Searle, Q.C.: The plaintiffs' claim is four fold, but the first is the only important one and it depends on the construction of the contract. There is no evidence of pollution or obstruction. By the contract entered into by the owners of Weltevreden in 1867, Nel is entitled to the free and undisturbed use of the stream for three full days. Nothing is said as to full stream. The rights of an upper proprietor cannot be taken away by such words as these. The upper proprietor was then entitled to the water for four days; the agreement means nothing more than that the water was to be allowed to run past the mill for three days. Defendant has done all he is bound to do under the contract if at six a.m. on Monday he has allowed the full stream to run down for plaintiffs' benefit. He does not put any obstruction in the way, and does not lead any water between Monday and Thursday. The water has been used by Hans Nel at the mill since 186.. If there is any doubt as to the construction of the contract, the user is most important.

Chief Justice: If it is a registered servitude only prescription can alter it.

Mr. Searle: As to the claim in reconvention, we have been in uninterrupted and peaceable possession of this water for many years. The circumstances of the trespass should also be borne in mind in assessing damages.

The Chief Justice: This case has taken a considerable time, and a great deal of evidence has been taken, but the real questions in dispute between the parties appear to be very simple and easy of decision. The first question arises out of the construction of a contract. That contract has been duly registered, and there is no question as to knowledge thereof. Both the defendant and the plaintiff have full knowledge of the terms of the contract. By that contract it was agreed that Johannes Nel or his heirs, administrators, or assigns, should have the free and undisturbed use of a certain stream of water for the space of time of three full days, *i.e.*, from Monday at six o'clock until Thursday at six o'clock in each week. The terms of this contract are as clear as any contract could be. Now what has the defendant done? He takes the water at a point near to the plaintiff's boundary when his time of water-leading begins. When the plaintiff's time of the water-leading begins the defendant lets in the water, but at a point considerably higher. The result is undoubtedly that for the full space of three days the plaintiff does not receive free and undisturbed use of the water. Now, strictly according to the construction of this contract, I am of opinion that the plaintiff is entitled that the water should reach him at the appointed time, and at the appointed time the water may be taken away at the boundary. But the plaintiff is prepared, according to his declaration, to forego that right because he claims an alternative, and the alternative claim is this, that the defendant be compelled to return the full flow of the said stream at the same spot at which he takes it. Now, in my opinion the plaintiff is fully entitled to that relief at all events. Under the contract he is entitled to the full stream for three days. I am clearly of opinion, therefore, that the plaintiff is entitled to the relief sought for in clause 2, and there must be an order compelling the defendant to return a full flow of the said stream as prayed. Mr. Searle has argued that that would deprive the defendant of the water for his full four days, but there is nothing in the contract to give him the water for four days. As to the pollution of the water, no doubt there has been a certain amount of pollution of the water, but it appears not to have been intentional, and there is no assertion of right on the part of the defendant to make any pollution, and therefore I do not see that any good purpose would be served by granting an interdict. There is no assertion at all of a right to pollute the water, and I have no doubt that the defendant in future will be careful not to allow stable refuse to go into the stream. As to damages, Mr. Searle has laid considerable stress upon the fact that for a considerable number of years the use of the water has been in

the way in which the defendant says he is entitled to. That is no reason for altering the construction of the contract, even if the full period of prescription has passed, But the full period of prescription has not yet passed, and the plaintiff is now entitled to have this contract carried into effect. But I do not think that the plaintiff is now entitled to claim any damages. It is sufficient for his purpose that there should be this declaration of right. Then we come to the claim in reconvention, and it strikes me that the defendant did not attach very great weight to the claims which he now raises, seeing that he has been lying by for several years since the plaintiff committed the main trespass of which complaint is made. There has been some amusement caused by the evidence but fortunately no injury was done, but at the same time I think that the Court ought to make it clearly known that no person ought to take the law into his own hands in the way in which the plaintiff has done here. Fortunately it did not end in serious trouble, but it might have done, and the proper course for the plaintiff to have taken was to come into court, and not to bring twenty or thirty men to assist him in forcibly carrying into effect what he thought were his rights. Although some years have elapsed, I think the defendant is entitled to some damages, and we are of opinion that judgment for £10 will be sufficient. Then comes the more important question of costs. I certainly think that the costs of witnesses, who have been called for the purpose of supporting the claim in reconvention, ought to be paid by the plaintiff, but for the rest all the other costs should be paid by the defendant. Judgment will therefore be for an order in terms of prayer A2, with costs, excepting the costs of witnesses called to substantiate the claim in reconvention. Then, as to the claim in reconvention, judgment for the defendant for £10 damages, with costs of witnesses called for the purpose of substantiating the claim in reconvention.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Sauer & Standen; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before the Right Hon. Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

VAN HEERDEN V. VAN HEERDEN. { 1897. May 31st.

Mr. Close made application for provisional sentence on a promissory note for £400, with interest and costs.

Granted.

THE MUTUAL V. COETZEE.

Mr. Jones applied for provisional sentence on a mortgage bond for £1,200, with interest at the rate of 6 per cent.; the property specially hypothecated to be declared executable.

The application was granted.

COLLINS V. F. H. CLARKE.

Mr. Close applied for provisional sentence on a promissory note for £60 1s. 6d., with interest and costs.

The application was granted.

ILLIQUID ROLL.

CAMERON V. ROONEY.

Mr. McLachlan applied for judgment under Rule No. 329 (*d*) on an account of £41 3s. 10d., being value of goods supplied to Captain Rooney, master of the Gordon Castle.

Judgment as prayed.

ADMISSIONS.

On the application of Mr. Schreiner, Arthur Dennison Scanlen was admitted as attorney and notary.

On the application of Mr. Close, Adriaan Jacobus Murray was admitted as attorney and notary, the oaths to be taken before the Resident Magistrate of Oudshoorn.

GENERAL MOTIONS.

APPLICATION OF J. E. TRUTER.

Mr. Buchanan asked on behalf of Johanna E. Truter for leave to sue by edictal citation in an action against her husband for divorce,

by reason of his alleged adultery, also for the custody of the minor children of their marriage, and a monthly payment for maintenance.

The leave asked for was granted, the citation to be returnable on 31st August, intendit and notice of trial to be served with the citation.

IN THE MATTER OF THE MINOR GERDS.

Mr. Close applied for authority to the Master to pay out of money to the credit of the minor in the Guardians' Fund certain costs incurred by Alfred J. Coleman, a connection by marriage, on his maintenance and education, and for future payment for the same purpose, also for authority to the Master to take the necessary steps for the appointment of a tutor dative in place of the present tutors, who have tendered their resignation.

The Court granted an order in terms of the Master's report, except that it ordered that the annual payment should be such amount as is necessary not exceeding £100; the expenditure to be subject to the Master's approval.

Costs out of the minor's estate.

PETITION OF A. P. DE VILLIERS.

Mr. McGregor applied on behalf of Abraham P. de Villiers for the attachment *ad fundandam jurisdictionem* of this court of certain lot of land in the town of Uitenhage, being No. 1 of lot 4, the property of John E. Will, in an action about to be instituted against him by petitioner, by edictal citation, for the recovery of professional fees and disbursements.

The application was granted and leave given to sue by edictal citation, returnable on 1st July.

PETITION OF GEORGE BYL.

Mr. Graham applied for a rule *nisi* requiring the Green Point and Sea Point Tramway Company to show cause why applicant shall not be admitted to sue *in forma pauperis* in an action for the recovery of damages for personal injuries sustained by him through the negligence of the company's servants in charge of a tram car.

Leave was granted, the rule to be returnable on 12th inst.

VAN DER BYL AND OTHERS V. SCHOLTZ.

Mr. Innes, Q.C., applied to make absolute the rule *nisi* for an interdict restraining the persons in possession of the proceeds of the assets of the joint estate of the respondent and his deceased wife, pending an action by applicants to set aside the will purporting to be executed on 28th January, 1887, on the ground that the same was not executed according to law.

Mr. Schreiner, Q.C., appeared for the respondent, but did not oppose the motion.

The application was granted by consent, the interdict to continue pending an action to be brought in the August term, and the costs to be costs in the cause.

PETITION OF MARY BERNSTEIN.

Mr. Searle, Q.C., on behalf of Mary Bernstein, asked for leave to sue *in forma pauperis* in an action against the trustee of the insolvent estate of her husband for the recovery of certain goods, chattels, and personal effects attached by him as the property of the said estate but claimed by petitioner.

The rule *nisi* was granted.

PAARL FIRE ASSURANCE AND TRUST COMPANY.

Mr. Innes, Q.C., asked for an order placing the said company in liquidation under the Companies Act of 1892, and appointing an official liquidator thereto with the necessary powers, and approving of Vincent A. van der Byl as attorney to such liquidator.

The order was granted.

THE UNION BANK.

Mr. Innes, Q.C., applied for the sanction of the Court to the compromise proposed to be effected by the official liquidators with the Rev. Hendrik E. Faure, a contributor in respect of sixty-six shares in the said bank.

The application was granted.

ELDER'S EXECUTORS V. COXHEAD. } 1887. May 31st.

Ejectment—Motion—Facts in dispute.

Ejectment will not, as a rule be decreed on motion especially where facts are in dispute.

This was an application on notice calling upon the respondent to show cause why he should not be ordered to remove from the house and premises situate at Newlands, known as the Bricklayers' Arms Hotel, occupied by him, and to deliver up the licence relating thereto, duly endorsed, to the applicants on the ground that he had contravened the provisions of the agreement under which he held the premises, first in not regularly paying the rent, and secondly in not properly conducting the house

Mr. Graham for the applicants: As to whether ejectment can be ordered on motion, see *Potgieter* v. *Olivier* (6 Shell p. 314), where the Court said that it was possible to make such an order in extreme cases.

This is an extreme case. The rent for three months up to April was in arrear. There was no waiver.

Mr. Buchanan for the respondent.

The Court refused the application with costs.

The Acting Chief Justice said: This is an application on motion for the ejectment of respondent on two grounds: first, that the rent has not been regularly paid, and secondly, that there has been a breach of the covenant of the lease as to the conduct of the hotel. It was pointed out in the case of *Olivier* v. *Potgieter* (6 Shell. 312), that it is not usual to grant ejectment on motion; but it was also said that there might be cases in which the Court might depart from such practice. I think in order to induce the Court to lay down a new practice there ought to be no facts in dispute. This is certainly not such a case. In this case the respondent said that it was his custom to pay rent at his convenience, and it was always accepted. The breach of covenant as to the keeping the hotel properly is disputed, and this is a matter impossible to decide without going into evidence. There is also the singular fact that immediately on the last month's rent becoming due, the applicant sued the respondent in the Court of the Resident Magistrate for the month's rent, and for arrears. No arrears were due and respondent tendered the month's rent, which was accepted, and the action for ejectment was withdrawn. Under these circumstances the application will be refused with costs.

MITCHELL'S EXECUTRIX v. REGISTRAR OF DEEDS, KING WILLIAM'S TOWN. | 1897. May 31st.

Minors—Immovable property—Sale—Consent of Court—Costs *de bonis*—Public officer.

M. and her husband on the 1st September, 1880, executed a joint will in terms of which the children of the marraige were appointed sole and universal heirs.

The will then went on to provide that the survivor should be allowed to keep the whole of the joint estate under his or her sole and entire direction and administration, and to remain in full and undisturbed possession thereof, and in the enjoyment of the usufruct of the estate for his or her natural life, provided however that in the event of the testatrix being the survivor and remarrying, she, as executrix, should realise the entire estate and invest the proceeds in landed property in the Colony, the interest to be paid to her during her natural life. The testator died on the 7th May, 1882, and on the 12th December following letters of administration were granted to M.

Thereafter M., before all the heirs had reached majority, sought to sell certain land forming part of the estate to which she had waived her life interest, but the Registrar of Deeds refused to pass transfer.

M. then applied to the Court for an order compelling the Registrar to pass transfer and claimed costs de bonis propriis *against that officer.*

The Court referred the matter to the Master for report as to whether the proposed sale was for the benefit of the minors and ordered the applicant to pay any costs which had been incurred by the Registrar of Deeds.

This was an application on notice by Catherine Mitchell, in her capacity as executrix testamentary of the estate of her husband, the late George Mitchell, of East London, calling upon the respondent to show cause why an order should not be issued by the Court, compelling him forthwith pass and register in the name of Robert F. L. Ross a deed of transfer tendered to him for registration by Josias Howard, of King William's Town, the duly authorised agent and conveyancer of the applicant, and also why he should not be ordered to pay the costs of the application *de bonis propriis*. The notice of motion was supported by the affidavit of Mr. Howard, who deposed that he was the duly appointed agent of the applicant, for the purpose of effecting the transfer of the property mentioned in the deed of transfer annexed.

That acting as such agent he duly tendered the said transfer for registration at the office of the respondent. That the respondent refused to accept and register the transfer on the grounds

that the applicant had no right or authority to sell the property therein mentioned without an order of Court.

That with the deed of transfer he also exhibited to the officer in charge of the office, as is the custom and practice in the conveyance of landed property, the following documents:

(*a*) Original letters of administration in favour of the applicant, dated 12th December, 1882.

(*b*) Power of attorney granted to him by the applicant on the 13th April, 1897.

(*c*) Transfer duty receipt.

(*d*) A certified copy of the death notice of George Mitchell.

(*e*) A certified copy of the joint will of the applicant and her husband, George Mitchell.

(*f*) Deed of transfer in favour of George Mitchell.

(*g*) Notarial deed executed by the applicant. That he duly pointed out to the officer in charge of the office that there was no special bequest of the landed property mentioned in the will, and therefore no order of the Court was necessary.

That he had suggested to the said officer that a reference should be made to the Law Department for guidance and advice, and that he had not been told that this had been done, but the deed of transfer was rejected. The applicant and her husband on the 1st September, 1880, executed a joint will in terms of which the children of the marriage were appointed sole and universal heirs.

The will then went on to provide that the survivor should be allowed to keep the whole of the joint estate under his or her sole and entire direction and administration, and to remain in full and undisturbed possession thereof, and in the enjoyment of the usufruct of the estate for his or her natural life, provided however that in the event of the testatrix being the survivor and remarrying, she, as executrix, should realise the entire estate and invest the proceeds in landed property in the Colony, the interest to be paid to her during her natural life. The testator died on the 7th May, 1882, and on the 12th December following letters of administration were granted the applicant.

The Registrar of Deeds refused to pass transfer of the property which formed part of the estate, on the following grounds:

(*a*) That the applicant did not contemplate a remarriage, but desired to sell one of the immovable properties of the estate, to which she had waived her life interest.

(*b*) That there were minors concerned in the estate.

(*c*) That it was not shown that the money was required for the education or maintenance of the minors, nor that it was for the benefit of the heirs that the property should be sold.

Under these circumstances the executrix should apply to the Court for leave to sell the property.

Mr. Graham in support of the application: The question is, whether the proposed transfer contravenes the provisions of the will? There is no prohibition against alienation. It has always been the practice to allow transfers of this nature without applying to the Court.

Mr. Sheil for the respondent: It is submitted that the Registrar of Deeds was justified in declining to allow transfer of this property to pass without an order of Court. The applicant as survivor is given the administration of the estate, to the usufruct of which she is entitled, but no power of sale is given her under the will except in the case of remarriage. It is true that she renounced her life interest, but minors are interested, and it is not alleged in this case as it was in *Brown's* (7 Juta, 237), that the proceeds of the sale are required for the maintenance and education of the minors, nor is it alleged that the sale is a profitable one for the estate or that the heirswill benefit by it, nor is any security offered that the money will be preserved to the heirs. Under such circumstances the Registrar of Deeds was amply justified in refusing to pass transfer without an order of Court.

The Chief Justice: Why were costs *de bonis propriis* claimed against the respondent?

Mr. Graham: He was called upon to pay costs in accordance with the practice in similar applications.

The Chief Justice: Costs should not be claimed against a Government official who is endeavouring to do his duty unless *mala fides* can be proved against him. The applicant has only a life estate, and as she has renounced that the property has fully vested in the children, but the Court should be satisfied that it is to the interests of the minors that the property, the subject of the present application, should be sold. The present petition will be referred to the Master for report as to whether the sale is for the benefit of the minors, and the costs which have been incurred by the Registrar of Deeds must be paid by the applicant.

Applicant's Attorneys, Messrs. Findlay & Tait, Respondent's Attorneys, Messrs. Reid & Nephew.

THERON AND ANOTHER v. SCHOOMBIE. | 1897. May 31st. June 1st.

Purchase and sale—Eviction—Sale by non-owner—Fraud—Price.

The sale of a thing not belonging to the vendor is not illegal if made bona fide, *but is subject to the buyer's right to be indemnified against eviction.*

Where such a vendor has given free and undisturbed possession of the thing sold—and the purchaser has not claimed an indemnity, and the circumstances of the sale were such as to debar the owner from recovering the thing or its value from the purchaser,

Held, *that the vendor is entitled to recover the price from the purchaser.*

This was an appeal from a decision of the High Court, Griqualand West, on an appeal from a judgment of the Resident Magistrate, Vryburg.

In the original suit before the Resident Magistrate, the plaintiffs John Jurgens Theron and George Coenraad du Plessis summoned Cornelius Jan Hermanus Schoombie, a farmer, residing at Wolvedaus, in the district of Vryburg, to show why he had not paid to the plaintiffs the sum of £54 10s. (fifty-four pounds and ten shillings) with interest *a tempore moræ*, for and being the purchase price of certain cattle sold and delivered by plaintiffs to defendants on the 13th day of October, 1896, that is to say:

8 young oxen at 30s. each	£12	0	0
4 cows at 40s. each	8	0	0
3 heifers at 30s. each	4	10	0
10 oxen at £3 each	30	0	0
making the aforesaid sum of ...	£54	10	0

The defendant's plea was as follows:

Cornelis Jan Hermanus Schoombie, the above-named defendant, comes into court by his attorneys, Minchin & Sonnenberg, and as a plea states:

1. That the alleged sale of the said cattle by the plaintiffs to the said defendant, if it has been made and entered into (but which the said defendant denies), is illegal and not binding upon defendant, for the reason that the said plaintiffs were not the owners of the said cattle at the time the alleged sale is stated to have taken place, nor were they the duly authorised agent of the owner or owners of the said cattle with special power to sell same.

2. That, even if it be held that the said plaintiffs were entitled and authorised to sell the said cattle, they are, however, not competent to bring this action without having first obtained from the owner or owners of the said cattle cession of action therein.

3. That, if the alleged sale was made and entered into (but which defendant denies), the same was subsequently cancelled and annulled.

Plaintiff's attorney objected to the special plea on the ground that

1. Paragraphs 1 and 2 are null and insufficient, on the grounds that the several allegations therein contained do not in law amount to a defence against the action brought by plaintiffs.

2. That the pleas are null, being vague, inconsistent, argumentative, and embarrassing.

Overruled.

Plaintiffs' attorneys then joined issue.

The following evidence was called for the plaintiffs:

George Coenraad du Plessis: I am one of the plaintiffs in this case. I and John Theron sold some cattle to defendant. We were jointly in the transaction. The prices were

8 young oxen at 30s. each ...	£12	0	0
4 cows	40s.	„	...	8	0	0
3 heifers	30s.	„	...	4	10	0
10 oxen	60s.	„	...	30	0	0
25	£54	10	0

The sale was on the 13th October last. We delivered these cattle to defendant, who received them. He has never returned them, nor has he paid the purchase price.

Cross-examined: We went to Mr. Schoombie's house, and told him that Government had given up shooting, and that there were certain cattle in the kraal, and that they were either to be shot or the owners had to take them back. We told him there were twenty-six head, and that fourteen belonged to Strydom and twelve to Raubenheimer. We told him he could have the cattle if he paid compensation money for them. We were not at all anxious, and did not press him to take them. From the house we went to the kraal, and there we told Schoombie he could have the twenty-six at compensation prices. There were more than twenty-six head of cattle in the kraal. I made a mistake just now. I told Schoombie at the house that there were twenty-six head of cattle belonging to Strydom, at the house, which he could have at compensation prices. I told him at the kraals he could drive out twenty-six of the cattle in the kraal. There were other people's cattle in the kraal under Mr. Raubenheimer's care. Schoombie drove out twenty-six head of cattle. Schoombie, I think, asked Theron whether they were all

Strydom's. I am not quite sure none of the cattle driven out belonged to Geneham; not that I know of. About an hour afterwards Theron and I went over to Schoombie with Mr. Raubenheimer, who said we might get into trouble for selling to Schoombie. All the cattle in the kraal were to have been shot that morning. I was assisting Mr. Theron in his duty as Field-cornet. I had no authority at that time from Strydom, the owner, to sell these cattle. The Government instructions were that if the owners did not take them back the cattle were to be shot. Government had already taken over these cattle. When we got to Schoombie's I said to him: "You had better bring these cattle back, and let them be shot at once." He would not agree to this. He said: "I have bought the cattle, and if Government can buy I can." I am positive that I did not suggest that Theron and Schoombie should go into town and get Mr. Schoombie to consent to the sale. I will say so if Schoombie says I did suggest it. About a month after this I came to Mr. Schoombie. I did not ask him for a declaration from Mrs. Strydom that she had not sold him the cattle. I asked him for a declaration that Mrs. Strydom had given him the cattle to treat. I did this because he said she gave it. He gave me the declaration. I have not got it now. I may have it. I took no notice of it. Schoombie told me that Theron said he made him a present of the cattle the day I got the declaration. The reason we did not bring the action before was because I thought he would change his mind and pay. We sue now because we sold the cattle to him. We have paid the owners for the cattle. The twelve we paid a long time ago, and the fourteen lately. I do not know what has become of the other beasts. I know we sold twenty-six. Government paid Mr. Raubenheimer for his twelve. He claimed for them by mistake. I have received no cession of action from Strydom. He wanted to sue me if I did not pay. I do not know what has become of these cattle. They may have died of rinderpest. Several persons were present when the original conversation took place. There was not a native boy with Coffee there.

Re-examined: It was twenty-six head of cattle we sold. We claimed for twenty-six. I do not know how it is the claim is only twenty-five in the summons. Twenty-six were driven out, but afterwards young Strydom said he would not let his cow be sold. He had one, and took it away. When Schoombie purchased the cattle he knew that twelve belonged to Raubenheimer and thirteen to Strydom. Strydom's cattle were under charge of Raubenheimer. He came up and said, "I do not mind about mine, but Strydom might object, because they might recover and he might claim the cattle." I paid Raubenheimer for these cattle, or rather I paid Government on behalf of Raubenheimer, as the money had been paid in error. The money was actually paid by Theron on our joint account. No transaction that I know of took place between Schoombie and Raubenheimber and Strydom. The transaction was entirely between us. We were the only responsible parties. The declaration was given by Schoombie, so that I need not pay Strydom for his cattle. Schoombie told him so. This was when I took the account and asked for payment. Schoombie then told me Mrs. Strydom repudiated the sale, and had given the cattle to him to take care of. This was the first intimation I had that he repudiated the sale. He refused then to pay for Raubenheimer also. This was after the cattle had died. He never offered to give the cattle back while they were alive. I think two or three of the cattle were salted. He never offered those that were salted. Defendant professed that he could save cattle from dying of rinderpest; he gave this out.

By the Court: The kraal in which the cattle were is Vryeboom Vlaakte. Mr. Schoombie lives on the same farm. Mr Theron was there in his official capacity as Field-cornet. I was there assisting him as such. I hold an appointment as J.P. Mr. Theron and I were at the time both engaged by Government for taking measures for the prevention of the spread of rinderpest. Mr. Theron's police were going to shoot the cattle. He had instructions to shoot the cattle. I did not see the instructions. The instructions were that the cattle were to be shot unless they were claimed by the owners. They were given by the Rinderpest Commissioner. Mr. Theron and I simply took the responsibility on ourselves. We were thinking we were doing a good thing. I admit we had no right. We thought we should help Schoombie and help Government. I was sure the owners would not object to it. We had absolutely no right at the time to sell the cattle. Shortly afterwards Mr. Raubenheimer came and did not object to the sale. He never in any way made over his right to the cattle to us, nor has Mr. Strydom. Mr. Strydom and Raubenheimer have received their money. Mr. Schoombie was to pay the money to us, and we were the responsible persons to the owners. We were not to get any profit out of it. Mr. Raubenheimer was on the same farm. We were not acting in the interests of the owners, but in the interests of Mr. Schoombie and Government.

Johan Jurgens Theron stated: I am one of the plaintiffs in this action. I am now claiming from defendant the sum of £54, as stated in summons. This property was sold by us to defendant. He received delivery, but has not paid the purchase price up to date. The amount still remains due.

Cross-examined: The transaction took place on or about 18th inst. I did not go to Schoombie's house with the last witness before the sale. When I arrived, last witness and Schoombie were at the kraal. I received a telegram from the Rinderpest Commissioner stating that no more slaughtering was to take place unless the owners wished it. The cattle in the kraal had been taken over by the Government some time before. I will not swear I was not at Schoombie's house. I cannot remember I was. Schoombie said, now the people's cattle are not to be shot, they had an advantage over him, as his cattle had been shot, and he was willing to take over twenty-six head of cattle and pay the full amount Government gave for compensation. We agreed. The cattle were in charge of Mr. Raubenheimer before Government took them over. I knew the owners of the cattle, not the cattle. I gave a certificate to Mr. Raubenheimer that so many cattle were shot; not to each individual owner. I told Schoombie he could have twenty-six if he paid the Government value as compensation. I had no authority whatsoever from either the Government or the owners to sell the cattle. I did it on my own responsibility. I am certain it was Mr. Schoombie approached me first. I said nothing about the owners. I merely said he could take twenty-six out of the kraal. I found out afterwards the cattle belonged to Mr. Raubenheimer, Mr. Strydom, and his son. I am not aware that any belonged to Mr. Tincham. Mr. Raubenheimer came over afterwards, and seemed to think what had been done was not correct. He said the owners could claim the cattle if they were salted. He was not so very strong on the matter. He did not point out to me that I might get myself into trouble. He may have done so to Mr. Du Plessis. I never asked defendant to cancel the sale. No one that I heard of asked him to do so. Mr. Schoombie and Raubenheimer suggested that Schoombie and I should come to Vryburg and see whether it was Strydom's intention to take the cattle and treat them himself. We came in and found Mr. Strydom was away. I did not try hard to persuade Mrs. Strydom to agree to the sale. She was not surprised to hear that the cattle had not been shot. I did not tell her defendant had purchased twenty-six head of cattle belonging to her husband. Mr. Schoombie asked Mrs. Strydom if she would consent to the sale. She said she had nothing to do with it; that Mr. Strydom was not at home. Mrs. Strydom sent for her son. One of the cattle belonged to him. Mr. Schoombie asked him if he would consent to the sale. He refused. I took no part in the conversation. Mr. Strydom and Raubenheimer have given me no cession of action.

Re-examined: These cattle had been handed to me to be dealt with under the Rinderpest Regulations, under Proclamation 310. Subsequently I got instructions that the owners could doctor the cattle if they desired. These cattle had been handed over to the veterinary surgeon, and he had valued them prior to them being destroyed. We had shot a lot of cattle when the defendant came up to us. He asked us to let him have some cattle at the compensation price already fixed. He knew the price, and he drove out twenty-six. Defendant took them to his own kraals. Subsequently the same day, in consequence of what Raubenheimer said, we went to Schoombie's. Schoombie was not made aware that day whom the cattle belonged to, but he was informed that cattle of Mr. Raubenheimer were among those he purchased. Raubenheimer said there was a little danger about the cattle belonging to Strydom. He was satisfied about his own. I did not cancel the sale of Strydom's cattle. I came in with Schoombie. If Strydom had been there and had refused to let the sale go through, and if Schoombie brought me a document to that effect, the sale would have had to be cancelled. Nothing of this sort was done. Schoombie was in possession ten days later, when young Strydom came out he came to me and said one cow belonged to him, which he refused to sell, and that he had come to an arrangement with Schoombie to keep this. Schoombie then knew how many cattle belonged to Strydom and how many to Raubenheimer. Schoombie remained in possession of the cattle until all died, except two or three; these he had still in his possession. Schoombie knew that I was responsible to the owners for the amount for which the cattle were sold. I sold the cattle to Schoombie, who took delivery. He had not offered me any salted cattle.

By the Court: I had been put in charge of the Rinderpest Special Constables by Inspector Fuller. I sold the cattle on my own responsibility. I produce copy of telegram received from Rinderpest. It gives no authority to sell. I took this telegram to Mr. Raubenheimer, and he said he was willing that the cattle should be shot. I was aware that he was not the owner, but, as he was in possession of the others I considered him the owner. He preferred having the compensation and having them shot. I

gave him a certificate of the number shot, and by mistake I included this number sold to Schoombie among them. I made a report of this sale to the Commission at Kimberley. Dr. Hutcheon told me to pay it to the Civil Commissioner, Vryburg. I paid it on the 18th January. I found it out when I saw some papers of Raubenheimer. I told him the mistake had been made.

[The following was the telegram referred to:
From To
Rinderpest. F. C. Theron,
Pudimoe.

Re slaughter of herds of cattle herds already examined and valued may be shot if owners are willing, but if they prefer to be allowed to treat them they may be permitted to do so by first obtaining written authority. Veterinus no further slaughter is to be carried out in this district of newly reported outbreaks on and from yesterday.]

John Adam Raubenheimer stated: I handed over a number of cattle to Field-cornet Theron to be shot under Rinderpest Regulations. There were a number of my own and some of Strydom's. I had charge of them, and had instructions to do with them as with my own. They were all mixed up. The next thing I saw was some being driven away by Schoombie from the place where he was slaughtering to his house. I went down to ascertain why this was. I met Du Plessis, and Theron came up directly afterwards. I said, "What are you doing with those cattle?" I had seen the telegram put in in the morning. They said they had sold the cattle for the amount of Government compensation. I said, "It is all right about mine, but there may be some trouble about Strydom's." We went to Schoombie's. Du Plessis said: "Then it is better to have them brought up and shot." We went up. I said, "Strydom might be nasty, as the cattle might be claimed if salted." I said it was all right about mine. Nothing was said that I heard about cancelling the sale. Schoombie knew at the time that there were some of my cattle, but not how many.

Cross-examined: One of the cattle belonged to Tineham. I had it on the halves. Tineham said all his must be shot. I did not consent. I expected them to be shot. I saw some of my cattle that had been sold. I did not look into the account when I was paid. I did not see for how many I was drawing. I never received the money for mine from Theron. I was paid by Government for them. I found out the mistake the same day after I received the money. Theron came to me afterwards, and said there was a mistake. I said yes. I received the money on the 20th October. The cattle were put in the kraal five or six days before they were shot. I saw Mrs. Strydom on the 12th, at Taungs, and told her they were busy shooting the cattle, and most likely they were all shot that day. It was my opinion Theron and Du Plessis had no right to sell the cattle. I said my cattle were nothing, because Schoombie was my son-in-law. I did not hear anything said about cancelling the sale. I said to Schoombie, "I will not have anything to do with it. It is nothing if they like to give you my cattle." I told Theron and Du Plessis I wanted my money from Government. Afterwards Theron told me he had to pay me. This was before I drew the money from Government. I was willing to take it from Theron. Veterinary Surgeon Hutcheon took over my cattle first; afterwards he told me I could take out some if I liked, and so I turned out some. The veterinary surgeon was not there when the sale took place. Theron was in charge of the specials.

Re-examined: Theron offered to pay me the money, and I told him to pay it to Government. It was paid in with my knowledge.

Gert Nel Strydom stated: I left certain cattle with Raubenheimer. They were some of those sold by Theron and Du Plessis to Schoombie. I told Raubenheimer he could do with mine as he did with his. After I came back from Molopo, Schoombie came to me. I had had a message from him before to say I must do nothing in the matter till I had seen him myself. About a week or two afterwards I saw him. He told me he bought twenty-six cattle from me out of the whole when they were shooting, and that he was in Vryburg to pay, and wanted a specified account, and he did not get this, and therefore he would not pay it.

Cross-examined: I have not tried to sell any of these cattle. I told Dennison I heard one of mine had salted, but that my cattle were sold, but if it fell to me he would buy it. Schoombie had told me before this he had bought them. As long as I got my money I was satisfied. I did not give instructions to have an account sent for the purchase price of these cattle, because I had not sold them.

Re-examined: Schoombie did not buy from me, but from Theron and Du Plessis. I sent a demand to Theron and Du Plessis for the money. Schoombie has never offered me any cattle.

By the Court: I was paid last month, about three weeks ago.

Appeared: Cornelius Hendrik Theron, duly sworn, states: I was a special constable at the Vrijeboom Vlakte. I remember Schoombie buying cattle at the price given by Government.

[Defendant's attorney admits that an arrangement was made as described by Theron and Du Plessis, by which they sold the cattle at the price stated to Schoombie.]

A few weeks afterwards I was at Schoombie's. He said he had cheated himself, because the cattle were all dying.

Cross-examined: All his people were present.

Plaintiff's attorney closed his case, subject to the right of calling rebutting evidence should evidence be adduced as to the cancellation of contract.

Leave granted by Court.

Defendant's attorney applied for absolution from the instance.

Absolution from the instance was granted with costs by the Resident Magistrate for the following reasons:

My reason for granting absolution from the instance in this case was that plaintiff sued for the sum of £54 1ˢ., being the purchase price of certain cattle sold and delivered to defendant, and I considered there was no valid sale. It is clear that at the time of the alleged sale plaintiffs were not the owners of the cattle, nor had they even any authority to sell from the owners. They could not therefore pass the property to defendant, and the essential element in a sale was wanting. This appears to be clearly laid down in the case of *Lunn* v. *Thornton* and other cases (*Benjamin on Sales*, p. 79) and in *Van der Linden* (Institutes of Holland, sect. 8, p. 136). In the face of these decisions and the general law regarding sale and purchase, it does not appear to me that any subsequent transactions could cure this radical initial defect so as to enable plaintiffs to succeed in their present form of action, even if it were held that plaintiffs subsequently acquired the right of property, which I consider open to doubt. In giving judgment, I stated that I expressed no opinion as to whether the agreement entered into was such as would entitle plaintiffs to recover in another way, as I did not consider the question raised in the present action, and I may point out that, unless it is held there was an actual and valid sale, the case is beyond my jurisdiction.

From this decision appeal was made to the High Court. The appeal was dismissed with costs, for the following reasons given by the learned Judge-President:

The facts of this case were somewhat complicated, but so far as material seem to have been substantially as follows:

The plaintiff Theron, as Field-cornet, was in charge of certain cattle on behalf of the Government, which had been collected and were to be shot under the Rinderpest Regulations, and the co-plaintiff, Du Plessis, was assisting him in the performance of his duty. These cattle included twelve belonging to Raubenheimer and thirteen the property of Strydom, who was absent, and which had been left in charge of Raubenheimer.

Theron received instructions that, instead of shooting the cattle, the owners, if they preferred, could have them back. Raubenheimer does not seem to have wished to have them returned, and thereupon the plaintiffs, instead of shooting, offered the cattle to Schoombie, whose place seems to have been adjacent, at compensation prices, and they were delivered to and accepted by him. With the exception of two or three, they appear to have since died. It is admitted that, while the plaintiffs doubtless acted in good faith, this transaction took place without any authority either from the owners or from the Government, and that the plaintiffs have obtained no subsequent cession of any right of action. The Government afterwards compensated the owners, on the assumption that the animals had been shot, and the amount was ultimately refunded to Government by the plaintiff Theron.

Presumably, if they had not been compensated, the owners could have ratified the sale and sued the purchaser, or, if they preferred, could have claimed the return of their property or damages for its conversion; but as the Magistrate has jurisdiction in the case of claims exceeding £20, under section 5 (*b*) of Act 43 of 1885, only for the "recovery of the price" of movable property, the simple question appeared to be whether the plaintiffs' evidence showed that there had been a valid sale and delivery, so as to give them a right of action within the jurisdiction of the Magistrate and in terms of the summons. Whatever other remedy may be available to the plaintiffs, or to either of them, for the amount disbursed, the High Court was of opinion that, on the issue before him, the Magistrate was right in granting the application for absolution from the instance.

Further appeal was now made to the Supreme Court.

Mr. Searle, Q.C. (with him Mr. Benjamin), for the appellants: As to the Magistrate's reasons, he is wrong because the sale is admitted in the pleadings. The Judge-President is not correct in saying that the Government compensated the owners, because Strydom was not paid by Government but received the money from Theron. The sale was ratified by the owners.

Chief Justice: If there was ratification then the owners should have sued.

Mr. Searle: By Roman-Dutch law the property of another can be sold and the purchaser

can insist upon a guarantee against eviction—insuring the repayment of the purchase price or damages if evicted.

Chief Justice: Ought not Theron's action to be one for money advanced to Raubenheimer and Strydom on behalf of defendant? It is quite true that by our law a person can sell the property of another but does he not act as the agent of the other?

Mr. Searle: Defendant cannot take the objection that the plaintiff cannot sue him. The only objection he can take is that he may be evicted by the true owners and should have security against that. But the plaintiffs do not sue as agents: they sue as persons in legal possession.

Maasdorp, J.: Is not the contract illegal; and will the Court in that case help you?

Mr. Searle: It does not lie in the mouth of the defendant to say it is illegal. There is no illegality. The High Court found that the plaintiffs had acted *bona fide*.

Chief Justice: The peculiar part is that nothing was said to the Government about the sale to third parties.

Mr. Searle: The money was paid to the Government in January. The position of the plaintiffs was, that they intended to take over the cattle, and sell them on their own account. See *Moyle's Contract of Sale in the Civil Law*, p. 17; *Voet* (18, 1, 14); *Van der Linden* (p. 136); *Grotius* (III., c. 15, section 4); *Censura Forensis* (1, 4, 19). There was no fraudulent intention here. *Van Leeuwen Commentaries* IV. 18, sections 1, 2); *Burge* (Vol. II, p. 537.), &c.

Mr. Graham (with him Mr. Jones) for the respondent: The transaction is strongly tainted with fraud. Plaintiffs had no right to do anything with the cattle, but shoot them or return them to the owners. As to the position of the plaintiffs, the statement that Du Plessis asked Schoombie if he had a certificate from Strydom, as to treating the cattle, is inconsistent with the view that he took all the responsibility on himself. Theron's evidence as to the attempt to get Strydom's consent shows that they preferred to act as agents. Evidence shows that they said they were acting in the interests of Government and Schoombie. And there was no ratification of their acts.

Mr. Searle in reply: See *Voet* (18, 1, 14). In cases of this nature the vendor must give *vacua possessio*. The purchaser may call on the vendor to give him security against eviction. *Voet* (19, 1, 10).

Chief Justice: The real difficulty is whether there was any intention to sell the property in their own name. If there had been any warranty of soundness implied would they have been liable?

Mr. Searle: The evidence shows that the plaintiffs were acting in their own individual capacity.

De Villiers, C.J.: This is an appeal against a judgment of the High Court of Griqualand affirming a judgment of the Magistrate's Court of Vryburg. The action was to recover the price of certain cattle alleged to have been sold by the plaintiffs to the defendant, and the pleas raise the defence that the sale was illegal, because the plaintiffs were not the owners of the cattle nor the duly authorised agents of the owner and had obtained no cession of action from the owner. This defence was sustained by both Courts below. In his judgment the learned Judge-President says: "It is admitted that, while the plaintiffs doubtless acted in good faith, this transaction took place without any authority either from the owners or from the Government, and that the plaintiffs have obtained no subsequent cession of any right of action." The circumstances disclosed in the evidence would seem to support the statement that the plaintiffs acted in good faith. They knew that the cattle belonged to Strydom and Raubenheimer, but after the cattle had been taken by the Government for the purpose of being killed under the Rinderpest Regulations the Government decided that the cattle might be returned to the owners if they preferred to treat the cattle themselves. Strydom and Raubenheimer, however, preferred to receive compensation from Government and thereupon the plaintiffs, one of whom was Field-cornet and the other Assistant Field-cornet, took it upon themselves to sell the cattle. They did so in their own name and on their own responsibility. The cattle were delivered to Schoombie, the defendant, who knew all the circumstances under which the sale took place. There is no possible danger of eviction, for the owners have received their compensation, and raise no objection to the retention of the cattle by the purchaser. Under these circumstances the question arises whether the sale was illegal merely because the cattle did not belong to the vendors. The civil law on the subject is well explained in *Benjamin on Sales* (4th ed., p. 377). "On the completion of the contract of sale," he says, "the vendor was bound simply to deliver possession, and the buyer had no right to object that the vendor was not owner. But the possession thus to be transferred was something more than the mere manual delivery, and the Romans had a special term for it, it must be *vacua possessio*, a free and undisturbed possession, not in contest when delivered. . . . . And if the vendor knew that he was not the owner and made a sale to a buyer ignorant of that fact, so as wilfully to expose the latter to

the danger of eviction, the vendor's conduct was deemed fraudulent, and the buyer was authorised to bring an equitable suit, *ex empto*, without waiting for an eviction." These principles have not been materially modified by the Dutch law. Under that law the sale of a thing belonging to another was not illegal if made *bona fide*, but was subject to the buyer's right to be indemnified against eviction. In the present case there is no possible danger of eviction; the sale took place in good faith, the defendant has not demanded any indemnity from the plaintiffs, he knew all the circumstances under which it took place, and would be liable to no one for the price of the cattle bought by and delivered to him if the plaintiffs are not likely to recover it. I regret, therefore, that I cannot agree with the judgment of the Court below. The judgment granting absolution from the instance must therefore be reversed, with costs in this Court and in the High Court, and the case must be remitted to the Magistrate's Court to decide it on its merits and as to costs in that Court.

[Appellants' Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN and Hon. Mr. Justice MAASDORP.]

HAINES V. HAINES. { 1897. June 1st.

This was an action for divorce brought by the husband, a sergeant in the Cape Mounted Rifles, against his wife, Catherine Elizabeth Haines, on the ground of adultery.

Mr. Benjamin appeared for the plaintiff; the defendant was in default.

John M. Haines stated that he was a sergeant in the C.M.R. on service in Pondoland, and was married to the defendant on June 9, 1885. They lived in King William's Town, and towards the end of 1885 he sent his wife home to England to live with his mother. She returned in 1889 and lived with him at the various places in the Colony where he was stationed. In 1894 witness was in King William's Town and was removed into Pondoland in connection with the annexation, making due provision for his wife during is absence. While away he received a request from the defendant asking his permission for her to go to Port Elizabeth with a Mrs. Fisher, but he refused to allow her to go. He received an answer, saying that she would leave her home for ever as he was so mean as not to allow her to go to Port Elizabeth. He telegraphed to her at the first telegraph station telling her not to do such a thing. Finally he returned to Umtata, where he received one letter from King William's Town, saying that his wife was going to East London. He obtained leave of absence in May, and returned to King William's Town, where he found his home deserted, and learnt that his wife was staying with her mother at East London. He went to East London and saw the defendant, but she refused to return to her home when asked, and witness returned to King William's Town. A week later he went back to East London, and again saw the defendant. He gave her a gold medal he had just won in the shooting tournament, and tried by every means to induce her to go back again, but she refused, but offered to go away with him if he would leave the regiment. He told her he was willing to do that, and give up his ten years' service. Next morning his wife said she was going to the West Bank for a couple of days, and asked witness if he was not going back to King William's Town. He walked down Oxford-street with her towards the telegraph office, and she said she would send a telegram for him. He said good-bye to her, and five minutes later met a man named Morley Hyde, a private in the regiment. He subsequently obtained certain information, as a result of which he accused the defendant of being unfaithful to him with Hyde. Defendant went into hysterics, and called witness a low cad for accusing her of such a thing. The next evening she again denied any misconduct, and on the following morning he said he was going to the Beach Hotel to make inquiries, and told her that he had heard that she had stayed at the hotel with Hyde under the name of Mr. and Mrs. Morley on May 3, 4, and 5. Defendant then admitted that she had committed adultery, and on going to the Beach Hotel he found that a Mr. and Mrs. Morley had stayed there. He then returned to Umtata, and (having to handle the mails) used to notice letters in his wife's handwriting addressed to Hyde. He wrote to the defendant and asked her to leave off writing to Hyde, but he saw that the letters still continued to arrive. Subsequently, on returning to King William's Town, he received several letters from his wife asking him to go down to see her, and eventually he went down to East London and found her in a well-furnished house. He asked her who was

keeping her there, and she said that had nothing to do with him. She added that she had heard that he was going to divorce her, and she intended to swear that he had been there and had condoned the offence. As a matter of fact, he had never condoned the offence or cohabited with the defendant since her confession. After he had commenced proceedings for divorce, the defendant wrote defying him, and saying that she had plenty of witnesses to prove that he had condoned the offence, and that he would lose his case.

Mrs. Harriet Helen Parker said she kept a boarding-house in East London. In August, 1894, a person named Mrs. Haines, took a room in her house, and while she was there a man named Row used to come to see her, and was received in her bedroom, the door of which was generally closed. A married man was also in the habit of visiting her at the house, whose name witness did not wish to disclose.

This concluded the evidence.

Mr. Justice Buchanan said that the evidence was not so conclusive as it might be, and it was a great pity that personal service had not been effected.

The case was ordered to stand over till to-day, in order to obtain an affidavit from the defendant's employer as to Mrs. Haines having had notice of the trial, defendant now being resident in Cape Town.

Postea (June 2nd.)

Mr. Benjamin produced the required affidavit.

The Court granted a decree of divorce as prayed.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and Hon. Mr. Justice MAASDORP.]

INDWE RAILWAY, COLLIERIES, AND LAND CO., LIMITED V. COLONIAL GOVERNMENT. | 1897. June 2nd. „ 8th.

Railway grants—Land—Survey expenses – Act 3 of 1882, section 1—Act 15 of 1887.

By Act 3 *of* 1882 *provision was made for the construction of a railway line, and the Government was empowered to pay partly in cash and partly in land, though nothing was said as to the terms of the grants or of the conditions of the titles under which the land should be conveyed.*

The Government thereupon entered into an agreement with W. *and others whereby in consideration of the line being constructed by them, a grant was to be made to them of* 25,000 *morgen of land, to consist of farms to be chosen by them out of a list of farms detailed in a schedule annexed to the agreement.*

The agreement further provided that the land granted should be held under title in all respects similar to those issued under Act 15 *of* 1887.

The Government refused to deliver the title deeds until the company paid survey and other expenses, on the ground that as the land was to be held under title in all respects similar to those issued under Act 15 *of* 1887, *the grantees were liable under that Act to pay such expenses.*

The Court on a special case stated upheld the contention of the Government.

This was a special case, stated for the determination of the Court in the following terms:

1. The plaintiff is the Indwe Railway, Collieries, and Land Company (Limited), a company duly registered in this colony with limited liability. The defendant is Sir John Gordon Sprigg, K.C.M.G., in his capacity as Treasurer-General of the Cape Colony, and as such representing the Colonial Government.

2. Under Act 3 of 1882, section 1, it was provided that it should be lawful for the Government to contract with any individual or joint-stock company willing to construct a certain railway line to the Indwe coal-fields (as set forth in the said Act) at his or their own expense (hereinafter called the contractor), to pay or grant as the case might be to the contractor, upon the the completion of the said railway, within the term of five years from the entry into any such contract to the satisfaction of the Government:

(*a*) A sum of money not exceeding £50,000.

(b) An area of not more than 1,000 acres of land, being land at the Indwe, the site to be settled by mutual agreement.

(c) In lieu of one moiety of the said sum of money in sub-section (a) mentioned, at the option of the contractor, an area not exceeding 25,000 morgen of land at such place or places contiguous to the said line of railway as may be agreed upon between the Government and the contractor.

3. Acting under the provisions of the aforesaid Act, on or about the 8th March, 1893, the Government entered into a written agreement with Messrs. James Wilson Weir, Edmund John Byrne, and John Linden Bradfield, whereunder, in consideration of the said persons constructing the said railway, and performing the other conditions imposed upon them by the said agreement, the said Government agreed to grant to them 25,000 morgen of land, to consist of such farms as the former might select from those mentioned in a schedule to the said agreement. (The 5th clause of the said agreement is hereunto annexed, marked A.)

4. It was provided in the said clause that the land granted as aforesaid should be held under title in all respects similar to that issued under the Crown Lands Act 15 of 1887.

5. At the date of the said agreement all the farms referred to in the said schedule had been duly surveyed. In accordance with the provisions of the said clause, the land above mentioned was duly selected, and the titles prepared for issue.

6. The plaintiff company has acquired all the rights of Messrs. Weir, Byrne and Bradfield aforesaid under the said agreement, and is entitled to the benefits conferred upon them under the said contract of March, 1893.

7. The plaintiff company is entitled under the said agreement to have the title deeds of the said farms issued to it, but the Government refused to deliver the said deeds until the expenses incurred in and about the survey of the said land had been paid by the plaintiff company.

8. Thereafter the plaintiff company paid the amount of the survey expenses, amounting to £266 14s. 4d., under protest and upon the understanding that the question of liability therefor should remain open for decision.

The plaintiff company contends that it is entitled to claim from the defendant repayment of the said sum of £266 14s. 4d. paid under protest as aforesaid.

The defendant contends that the plaintiff is not entitled to claim repayment of the said sum of £266 14s. 4d.

Mr. Innes, Q.C. (with him Mr. Searle, Q.C.), for the company: It is provided by Act 3 of 1882, that it shall be lawful for the Government to contract with the contractor . . . . to grant the latter an area of not more than 25,000 morgen as consideration for the construction of a line of railway. There are no conditions laid down and nothing is said as to the tenure. The reference to the Crown Lands Act 15 of 1887 in the contract only shows the tenure under which the land is to be held. Under Act 3 of 1882 the Governor had a free hand, he could select any 25,000 morgen out of the farms mentioned in the 5th clause of the contract, and the contractor was bound to accept those. These farms were not only ordinary Crown land; it is admitted that at the date of the contract they had been surveyed and the Government had paid the survey expenses. If they wished to claim such expenses already incurred a special stipulation should have been put into the contract. The special case does not state that the survey was made with an eye to the grant. Even if the land had to be surveyed in order to give title there would be no duty upon the part of the purchaser to pay the expenses without special stipulation. The duty of fulfilling the contract is entirely upon the seller just as if he had sold a certain quantity of wheat, he would himself have to see that that quantity was weighed out. There is no custom pleaded as to payment of survey expenses. The seller must give transfer and he cannot do so without a survey. The Transfer Duty Act only enacts that the duty must be paid by the purchaser. Other transfer expenses are usually matters of special stipulation. The first statutory reference to survey expenses is found in Sir J. Cradock's Proclamation, section 8. Also in Act 2 of 1860, Schedule section 4; Act 1 of 1877, section 3, sub-section 6; Act 14 of 1878, section 7, and by Act 15 of 1887, section 2, sub-section (e), it is specially provided that the purchaser shall pay survey expenses. The fact that these special provisions are made seems to show that there is no hard and crystallised custom with regard to them. This is not an ordinary sale of Crown land to a private person. The contract would be illegal save for Act 3 of 1882, which gives the Governor wider powers than he would ordinarily have.

Mr. Sheil, for the Government: Act 15 of 1887 must be considered as incorporated into the contract. See sections 2 and 5. The purchaser must pay the costs of transfer, The company must be considered in the light of purchasers.

Although no reference is made to custom in the special case, yet it is a custom which comes before the Court so frequently that I submit the

Court will take judicial notice of it. If anything depends on the point it will be easy to get affidavits of the custom that the purchaser pays all expenses where there is no special stipulation. This is clear also from all the Crown Lands Acts. The contract does not refer only to section 5 of Act 15 of 1887. The provisions of section 2, have to be fulfilled before section 5, comes into operation: the fulfilment of the earlier section is a condition precedent. If inquiries were made it would probably be found that the land was surveyed for the purposes of the grant to the company: this was necessary before transfer could be given, and the Government now ask only for the bare expenses of the survey. It must have been contemplated in the contract that these expenses should be borne by the company.

Mr. Innes: The Government relies only on Act 15 of 1887—not upon the common law. The erroneous theory as to custom probably arose from the conditions of sale laid down in "Tennant's Notary's Manual"; but that shows only what are the customary agreements.

C.A.V.

Postea (June 8th.)

The Acting Chief Justice said: The question raised in this special case is whether the plaintiff company or the Colonial Government are to pay the costs of survey of the farms granted to the company under the provisions of Act No. 3, 1882. This Act authorises the Governor to contract and agree for the construction of the Indwe railway upon certain conditions, but is silent as to the terms on which the grants of land mentioned are to be made, or the titles given. By the contract entered into under this Act between the Government and the company, it was agreed, *inter alia*, that in consideration of the construction of the Indwe railway, the plaintiffs should receive "a grant of 25,000 morgen of land, such grant to consist of such farms as the Governor may select from those mentioned and described in the schedule annexed, and to be held under title in all respects similar to that issued under the Crown Lands Disposal Act No. 15, 1887." The schedule contained a list of seventeen farms, totalling an extent of 26,652 morgen. It was stated during the argument that these farms had been surveyed in prospect of this agreement, though before the agreement itself was in fact completed. It was further provided by the contract that the plaintiffs could within twelve months, with the consent of the Governor, exchange any of the farms mentioned in the schedule for a like extent of land then at the disposal of the Government, but no such exchange appears to have taken place. The plaintiffs contend that as the contract is silent on the point, the Government is bound by its obligation to grant this land, to do everything that is necessary to complete the title deeds. The defendants, on the other hand, maintain that the expenses should be borne by the grantees. As the necessity for a survey arises from the requirements of our local practice of having a diagram annexed to each grant, no common law rule could be found in the books directly in support of either contention. Reference to Act No. 15, 1887, shows that it contains full directions as to the manner and procedure to be followed in the sale of Crown lands, and the reservations and conditions to be inserted in the title deeds of the lands so sold. Among other things the Act provides that the purchasers of Crown lands shall pay the expenses of survey, of the erection of beacons, and of the title deed. Mr. Innes, however, urges that the words of the contract embody only such of the conditions as by the Act are required to be inserted in the title itself, such as those relating to tenure, and to the right of making roads and the like; and that the proviso as to survey and other expenses is merely directory, and referred only to the sale of lands by auction. He also contends that whatever be the practice which has grown up in sales between private persons, if such a custom has hardened into law, it should, assuming it was admissible in this instance of express contract, be proved as a fact. No decision in which such a custom has been judicially established has been cited; nor is there such a custom relied on in the statement of this case. But I think it is competent for us to note that all the statutes which during the last thirty years and upwards have from time to time been passed by the Legislature dealing with the disposal of Crown lands, expressly provide that the expenses of survey and of title shall fall on the purchaser or grantee. It is argued that the fact of such express enactment being necessary, evidenced the common law to be to the contrary effect. This argument, however, is not conclusive, for it may well be that it was intended to give legislative recognition to a recognised practice. With these public statutes before them, it may fairly be assumed that when persons contract directly with the Government to acquire Crown lands, this condition must be taken as implied, if there is no express agreement to the contrary. In this case not only is there no inconsistency with such an implied condition but the contract itself refers in general terms to the Act, which contains such a proviso. This supports the presumption that the statutory rule was in the

contemplation of the parties when they entered into the agreement in question. The fact that the company has paid the other expenses of title is not relied on in the special case, and need not be taken into consideration, seeing that the company paid these survey charges under protest and upon the distinct understanding on both sides that the question of liability should remain open. Independently of any such payment, our opinion is against the claim of the plaintiff company, and in favour of the contention put on record by the Government. Our judgment will therefore be for the defendants, with costs.

[Plaintiff's Attorneys, Messrs. Sauer & Standen; Defendant's Attorneys, Messrs. Reid & Nephew.]

WALKER V. PRICE. } 1897. June 2nd.

Master and servant—Dismissal—Misconduct.

This was an appeal from a decision of the Resident Magistrate of Cape Town, given on February 26, 1897. The appellants, John Walker & Co., of the Louvre, were sued by the respondent, Edward James Price, a furnishing draper, for £20, being £6 for nine days' wages, and £15 for damages for wrongful dismissal, alleged by the appellants to have been occasioned by misconduct and insubordination. The Resident Magistrate gave judgment in favour of the plaintiff for £15.

The facts appear sufficiently from the Magistrate's reasons which were as follows:

The plaintiff was a competent draper's assistant, engaged to defendant at a salary of £20 a month. In consequence of certain reports which the defendant Joseph Walker heard, he gave plaintiff a month's notice to quit on the 9th February, and that the plaintiff agreed to accept, and subsequently on the following day hearing further reports regarding the plaintiff, he dismissed him, offering him salary, £5 1s 8d., to date.

The grounds for dismissal being:

1. That on the morning of Saturday, 6th February, plaintiff sent a packer in the defendant's employ to fetch a bottle of Cape beer, for his, the plaintiff's use, at a hotel close by.

2. That he the plaintiff went for tea at five o'clock, and remained half an hour over time, and when he returned he was under the influence of liquor, and unfit for business and neglected his work.

3. That he took out with him another draper's assistant, whom he made drunk.

4. That he was impertinent to the manager.

After hearing the evidence I came to the conclusion that these charges were grossly exaggerated.

The plaintiff's conduct was not quite discreet, but there was nothing in it which amounted to gross moral misconduct or wilful disobedience of orders justifying instant dismissal. I don't consider it proved that plaintiff made the man Raymond drunk, and the plaintiff was not unfit for duty on the Saturday evening, owing to being under the influence of liquor. The man Raymond is one very fond of his glass, and he went out following plaintiff, simply because the latter nodded to him, and then he accompanied him to the hotel, where they had liquor together.

Then the plaintiff served several respectable customers during the time when he was supposed to be under the influence of liquor, and none of these parties could see that there was the least thing wrong with him.

Further it was with difficulty that Mr. Davidson the manager could explain to the Court in what way the plaintiff was impertinent to him.

If there was impertinence it was of a very mild form.

I was not favourably impressed with the evidence given by the witnesses for the defence. I gave judgment for plaintiff for £15 with costs.

Against this judgment the appeal was now made.

Mr. Innes, Q.C., for the appellants.

Mr. Graham for the respondent.

After argument by Mr. Innes (Mr. Graham not having been called upon)

The Acting Chief Justice gave judgment. He said: This case was brought before the Magistrate for damages for wrongful dismissal. The defendants justified the dismissal on certain grounds set forth in the Magistrate's reasons. I quite agree with the law as laid down by the Magistrate that an employer of labour is entitled to dismiss instantly in cases where his servant has been guilty of gross misconduct or wilful disobedience. Well, Mr. Walker was not present when the plaintiff misconducted himself, and all he heard was communicated to him by another person. The grounds for believing that the plaintiff had misconducted himself were that he had sent a packer out to fetch a bottle of Cape beer, that he went out for his tea and remained half an hour over time, and that when he returned he was under the influence of liquor. Now I think the grounds upon which Mr. Walker dismissed the plaintiff were amply sufficient to justify his conduct if they were well founded, but the question is, were they well founded? The

Magistrate found that the plaintiff did send for a bottle of beer. Well, if it had been shown that the plaintiff had been in the habit of doing so, in spite of a prohibition, this might have amounted to wilful misconduct, but under the circumstances found in this case the sending out for the beer would not justify a dismissal. The defendant went out for tea, and remained half an hour over time. That was a matter for reprimand, and if it was repeated it was a reason for dismissal. Mr. Walker says that the plaintiff was unfit for business and under the influence of liquor, and if this had been proved he would have been justified in dismissing him. But the Magistrate found that this charge was not proved. It was alleged that the plaintiff took an assistant out with him and made him drunk, but the Magistrate found that this also was not true. It is further alleged that he was impertinent to the manager, but the Magistrate said that if there was impertinence it was of a very mild nature. These are questions of fact which, if they had been proved, would have justified Mr. Walker in dismissing the respondent. But the Magistrate found that these grounds for dismissal were not founded on fact, and this being apparently a question of fact we are not prepared to disturb the Magistrate's decision, and the appeal will therefore be dismissed with costs.

[Appellant's Attorney, J. Ayliff; Respondent's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and the Hon. Mr. Justice MAASDORP.]

CORPORATION OF MANCHESTER V. PERKINS, GRAHAM AND CO., LIMITED, AND OTHERS. { 1897. June 3rd.

Mr. Searle, Q.C., appeared for the applicant corporation.

Mr. Schreiner, Q.C., appeared for the respondents.

This was an application under letters of request issued from the Queen's Bench Division of the High Court of Justice in England, dated April 12, 1897, asking for the evidence of certain two witnesses mentioned therein to be taken by the Supreme Court of the Colony in such manner as the Court might direct, as authorised by the constitution of the Court.

Mr. Searle, Q.C., now asked the Court to fix a day for the taking of the evidence and to authorise the Registrar to issue summons for the witnesses. The action is one brought for fraudulent breach of contract in the construction of certain sewers in Manchester. The defendants alleged that the work was certified for by Messrs. Olive and Muller, the two witnesses to be examined.

The Court, at the suggestion of counsel, appointed Mr. Advocate Buchanan, commissioner to take the evidence on Monday, June 28, and authorised the Registrar to issue subpœnas to the witnesses for that date, the evidence to be reported to the Registrar of the Court.

SOEKER'S EXECUTORS V. LAWRENCE. { 1897. June 3rd.

Executors—Partnership—*Locus standi* to sue.

Where a partnership had been dissolved by the death of the two partners Held, *that the executors of both partners were entitled to join in suing to recover the amount of a claim due to the partnership estate.*

This was an appeal from a decision of the Assistant Resident Magistrate, Cape Town. The case was heard on January 5, and was postponed to February 20. The plaintiffs (the executors of Mars Soeker and of Slammadien Soeker, in their lifetime trading as Soeker Bros.) sued the defendant, Lawrence, for the sum of £27, with interest from February 29, 1896, the balance due of a certain acknowledgment of debt for £45, of which £18 had been paid, made in connection with a purchase by the defendant from the partnership of a Scotch cart, two horses, and harness. The document sued on set forth that defendant acknowledges to have purchased from Soeker Bros. the cart and horses for £45, to be paid in instalments of £5 per month, the cart and horses to remain the sellers' property till all instalments have been paid, and that on failure of any instalment the whole amount shall become due at once, and the sellers may take possession of the cart and horses, dispose of the same, and deduct the unpaid balance.

Defendant raised two exceptions before the Resident Magistrate:

1. It is impossible that the parties named can be "executors of the firm of Soeker Bros." The action should have been brought in the name of the cessionary of the debts due to the partner-

ship, his heirs, executors, or assigns. The partnership was dissolved at the death of one or other of the partners.

2. The document sued on is not a liquid document or acknowledgment of debt so called, but a contract under which the late firm of Soeker Bros. had certain rights to sell and dispose. They cannot possibly sue defendant until they have either sold as agreed or have been refused, let, or hindered in so doing by the defendant.

The Resident Magistrate upheld the exceptions for the following reasons:

(*a*) The two partners in the estate of Soeker Bros. are both dead, and two executors were appointed separately in each estate.

The four executors now combine and sue for a debt due to the partnership estate. I upheld the exception that this could not be done.

(*b*) The second exception is also a good one. The document sued upon is not an acknowledgment of debt, but a deed of purchase and sale, and to show the cause of action it should have been stated that defendant had failed to pay one of the instalments, and that hence the whole amount fell due.

From this judgment the plaintiffs now appealed.

Mr. Graham was heard in support of the appeal.

The Acting Chief Justice said: Both of the exceptions in this case are untenable. The debt was due to two persons trading together, and these persons having died, their executors sued, as they were clearly entitled to do. As to the summons not stating that one of the instalments had not been paid, the document sued on and annexed clearly showed that £18 only had been paid, leaving £27 to be paid, being overdue. On both points the appeal must be upheld. Appeal allowed with costs. Case remitted to Resident Magistrate of Cape Town for trial.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné.]

RHOODE v. JEFTHA. { 1897. June 3rd.

Power to sue—Witnesses—Act 10 of 1879, section 2.

Under the Act 10 *of* 1879, *it is not necessary for the validity of a power to sue that it should be witnessed, all that is necessary is that it should be signed by the person giving the power with his ordinary signature or mark.*

This was an appeal from a decision of the Resident Magistrate, Wynberg. The case was heard on March 4 last. The plaintiff sued the defendant for £3 damage caused by the defendant's dogs, which killed a pig belonging to the plaintiff. Exception was taken that the power of attorney to sue, which was signed by plaintiff with her mark, was only witnessed by one person, and the Magistrate upheld the exception.

The Resident Magistrate's reasons for the decision were:

When defendant's agent raised the exception plaintiff's agent applied to have the power amended in accordance with section 50 of Act 20 of 1856, to which he specially drew the attention of the Court, and requested leave to have an additional signature of a witness added to the power, which was dated 8th March, 1897. Defendant's agent objected to any amendment of the power granted on the 8th March last. The Court thereupon refused to allow the amendment to the power granted on the 8th March last as applied for, and upheld the exception with costs.

The plaintiff now appealed.

Mr. Graham in support of the appeal: By Act 10 of 1879, section 2, a mere signature or mark is sufficient without witnesses.

Mr. Benjamin for the respondent: "Any other person" includes the Magistrate in this case. The power not only authorises the issue of summons but also the appearance of plaintiff's agent in court. The Magistrate was therefore right in requiring a second witness if he thought it necessary.

Acting Chief Justice: Under Act 10 of 1879 it is not necessary for the validity of a power to sue that it should be witnessed; all that is required is that it should be signed by the person giving the same with his ordinary signature or mark, but it is competent for the official to whom it is tendered to require witnessing if not satisfied with its authenticity. In this case the Magistrate's clerk was satisfied with the authenticity of the signature to the power, which was signed by one witness, and issued the summons. On the case coming on, defendant's agent objected to the power to sue on the ground that it was witnessed by only one person; plaintiff there and then offered to supply a second witness, which was refused. In any case the Magistrate erred in this matter. If he held that two witnesses were absolutely necessary he was wrong; and if he wanted two witnesses to the power he ought to have accepted the offer on the day the case was heard. The appeal will be allowed with costs.

[Appellant's Attorney, D. Tennant, jun.; Respondent's Attorney, C. W. Herold.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and the Hon. Mr. Justice MAASDORP.]

LUSITI v. BEN. { 1897. June 4th.

Native Appeal Court—Transkeian Territories—Review—Gross irregularity—Act 26 of 1896.

B. *sued* L. *in the Court of the Resident Magistrate, Elliot, to compel defendant to restore his daughter,* B.'s *wife (married according to Kafir custom), or to restore certain six head of cattle paid to* L. *as dowry;* B.'s *wife having deserted* B: *and returned to* L.

L. *pleaded:* (1) *The general issue;* (2) *that the marriage alleged was invalid and that the consideration therefor was criminal;* (3) *that* B. *had promised to give ten head of cattle as dowry whereas he had only delivered six, and that he was ready to restore* B.'s *wife on receiving the remaining cattle due.*

The Resident Magistrate, after hearing some evidence by plaintiff, gave judgment of absolution from the instance with costs.

B. *appealed to the Native Appeal Court for the territories of Tembuland and Transkei. The Appeal Court holding that the marriage was not invalid and that the consideration was not illegal, gave judgment for* B. *for the return of his wife or of the cattle paid as dowry.*

The case came before the Supreme Court for review on the ground of gross irregularity in the proceedings; the ground alleged being that there was no proper opportunity given to defendant to lead evidence in support of the pleas.

The Court held *that the Resident Magistrate had given judgment upon the ground of the exception taken by the defendant that the contract was immoral, and held that the third plea had been overlooked, and while holding that in view of Act* 26 *of* 1894 *it had no jurisdiction to interfere with the finding of the Appeal Court upon the first two pleas, referred the matter back to the Resident Magistrate to take evidence on the third issue and give judgment thereon.*

This matter came on review of the proceedings of the Special Court constituted in the Transkeian territories, under Proclamation 391 of 1894, by which an Appeal Court is constituted on matters that arise between natives only.

The summons in the original action in the Resident Magistrate's Court, Elliot, stated that the plaintiff Ben, a Kafir, was married in January, 1895, to the daughter (Lisewi) of the defendant, Booi Lusiti; that the marriage was according to Kafir law and custom; that plaintiff paid the defendant as dowry for the said Lisewi seven head of cattle, of value of £35; that in November, 1895, the said Lisewi, without lawful cause, deserted the plaintiff and returned to defendant's kraal; and that according to Kafir law and custom, upon the faith of which the said cattle had been delivered to the defendant, the plaintiff is entitled to recover them back from the defendant.

The claim in the summons was that defendant be ordered to to restore the plaintiff, the said Lisewi, or seven head of cattle.

At the hearing before the Resident Magistrate defendant's attorney pleaded:

1. The general issue: if this be decmed insufficient, then specially defendant pleaded:

2. That the so-called marriage took place at a time when defendant was already married and had a wife still living; that the marriage mentioned in the summons is invalid, and that the dowry paid by plaintiff to defendant cannot be recovered, as the consideration is criminal.

3. That plaintiff agreed to pay as dowry ten head of cattle; that he has only delivered six: that defendant is ready to restore Lisewi to plaintiff upon the payment of the balance of the dowry.

Plaintiff's attorney joined issue on the first part of the plea, and excepted to the second part on the ground that it disclosed no defence to the claim; and joined issue on the last plea.

After hearing some evidence for the plaintiff, absolution from the instance, with costs of suit, was granted, the Resident Magistrate holding himself bound by the decision of the

Supreme Court in the case of *Nqabela* v. *Sihele* (10 Juta, 346). The plaintiff (Ben) appealed to the Native Appeal Court for the territories of Tembuland and Transkei. When the case came on appeal before the Appeal Court the judgment was that the second plea (that the marriage was invalid and that the cattle could be recovered as the consideration was invalid) could not be entertained. The Court held that there is nothing in either the Colonial Acts extended to these territories or in the proclamations issued for their government prohibiting polygamy among the natives. Proclamation 140 of 1885 (section 34) recognises the existence of polygamous marriages, in so much that it provides that the first wife so married may be registered in the office of the Resident Magistrate of the district, within the period of three months after the celebration of such marriage. Registration is optional and not compulsory, and no mention is made as to the fact that no other woman can be taken in marriage. As registration would place the woman so recorded in the light of a wife and reduce all others to the condition of concubines and disinherit all issue by them, registration is absolutely a dead letter in these territories, and this Court was created specially for the administration of native laws and customs, and wide powers are vested in it in so far that no appeal lies from its decisions. The marriage and passage of dowry in this case are admitted by both parties. Judgment is therefore for the woman to return to her husband within six weeks from date or, failing to return, the dowry (six head of cattle), or their value (£18) to be returned by respondent to appellant; respondent to pay costs in this Court and in the Court below.

The President of the Appeal Court gave the following further reasons:

Section 45 of Proclamation 140 of 1885, distinctly recognises polygamous marriages, inasmuch that it provides that in computing the liability of any persons for the payment of house or hut tax it shall be held that payment at the rate of 10s. per annum shall become due for each wife of any person residing in any such hut, whether a separate house or hut shall be erected for the use of each such wife or not. Therefore it follows that if others than the first wife are recognised as wives for the purpose of taxation, they must be recognised as such in every other sense of the term "wife" as it is understood in accordance with native laws and customs.

Subsequent legislation in the Gley Grey Act (which although not proclaimed in Tembuland, may be taken as a guide) in the sections as to the administration of estates and law as to succession (sections 19 to 24) recognises more than one marriage, especially in clause 3 of section 24 dealing with inheritance, which provides that failing issue of the principal house the heirship shall go to the next house and through their several houses, thus again recognising the legality of native polygamous marriages.

Mr. Schreiner, Q.C., for the appellant: The ground of review is the gross irregularity of the proceedings. Judgment should not have been given for the appellant because there was no opportunity given of taking evidence in support of the pleas. The reasons given by the Court of Appeal state that the marriage and passage of dowry are admitted by both parties. The plea, on the contrary, says that ten head of cattle were promised and only admits the delivery of six. That is the substantial question in dispute between the parties and no evidence was allowed to prove the plea. The decision as to the law is not in appeal. The appellant is placed in the position of either having to give his daughter for six head of cattle or return the six head and stand in the position of a person who has broken his contract. The judgment should have been for the return of the daughter on payment of four head of cattle or for return of the six.

Maasdorp, J.: Ought not this Court to refer the matter back to the Special Court to see whether this plea if proved would have any effect upon their judgment?

Mr. Schreiner: We want to go to the Court of first instance on this plea, and not until it has given a decision should the Special Court be asked to give its opinion.

Mr. Graham for the respondent: The record shows that the marriage was clearly admitted, and so was the passage of dowry. The Court must have felt that the number of cattle to be paid could not have any effect upon their judgment. They only took the number into account in adjudging the number to be returned. The appellant himself applied for absolution, so he cannot now object that he had not an opportunity of calling his evidence. The real dispute was whether the action could be brought or not. The Special Court held that it could be brought, and this is an attempt to bring against that judgment an appeal which could not by law be brought. *Pienaar* v. *Godden* (Juta 10, p. 129). There is here no irregularity palpable on the face of the summons or prejudicial to the appellant.

The Acting Chief Justice said: This case was first decided in the Magistrate's Court of the district of Elliot, and was a case between two parties who are natives. The question arose out of a dispute as to Kafir customs,

as to the liability of parties to repay dowry on failure of a contract of marriage. The Magistrate gave absolution from the instance. Reading over the reasons for the judgment, it is clear that the ground of the decision is the exception taken by the defendant to plaintiff's action, viz., that it was an immoral contract. Against this decision an appeal was had to the Court of Appeal for the Transkeian territories which reversed the Magistrate's decision. Act 26 of 1894 lays down that in any civil suit in which natives are concerned no appeal shall be allowed against the Magistrate's decision, except to the Court of the Chief Magistrate in the territory. With the decision of the Court of Appeal we have absolutely nothing to do. That decision, therefore, will stand as far as it reverses the judgment of the Resident Magistrate on the exception decided by him. The effect will be that the defence set up on the first and second pleas are overruled and no longer stand. The Court of Appeal unfortunately seems to have overlooked the fact that there was another issue raised upon which no evidence was given, and upon which the defendant had no opportunity to call witnesses, and gave final judgment for the appellant. This third plea has not yet been adjudicated upon. It is quite possible that it may afford a good defence. About that we can now say nothing. We think that the Appeal Court, instead of giving judgment absolutely for the plaintiff, should have referred the case back to the Magistrate to hear evidence on the third plea. There is only this third plea upon which the case may now be sent back to the Magistrate. The decision of the Court of Appeal is not interfered with as far as reversing the Magistrate's decision on the exception is concerned. It is only interfered with so far as it gives absolute judgment for the plaintiff. The case is referred back to the Magistrate to hear evidence both for the plaintiff and defendant on the third issue, and to give judgment thereon. We think that the question of costs in this appeal should abide the decision in the Magistrate's Court on the third issue.

Mr. Justice Maasdorp concurred.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorneys, Messrs. Reid & Nephew.]

WEBNER V. BAM. { 1897. June 4th.

Magistrate's jurisdiction — Lease — Future rights.

This was an appeal from a decision given by Mr. J. C. Faure, Resident Magistrate, Cape Town, on March 16 last. The plaintiff in the Court below claimed £16 as a month's rent of a certain store in St. George's-street, and the defendant excepted to the jurisdiction of the Magistrate, as the evidence disclosed that the claim was founded on an alleged agreement of lease for two years, which agreement was to be reduced to writing, which was not done. The agreement was therefore incomplete, and the matter was out of the Resident Magistrate's jurisdiction, rights in future being involved.

The Resident Magistrate overruled the exception, and gave judgment for the amount claimed and costs. Against this decision the appeal was now made.

Mr. Graham for the appellant.

The appeal was dismissed with costs.

The Acting Chief Justice: The plaintiff sued the defendant for one month's rent for occupation of premises. The summons says nothing about any lease, and there is no special plea; the plea being simply the general issue. No evidence was given as to a lease, though it appears there was a conversation about a lease. The lease was never executed, therefore the question is not before the Court whether the lease is valid or not. Under these circumstances the appeal must be dismissed with costs.

[Appellant's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and the Hon. Mr. Justice MAASDORP.]

HEYDENRYCH V. KIRBY. { 1897. June 8th.

This was an action for an account, delivery of tools, and interest.

Mr. Graham (with him Mr. Close) appeared for the plaintiff; Mr. MacLachlan for the defendant.

Evidence given by the plaintiff was heard during the last term, on Tuesday, March 2, after which it was agreed, on the suggestion of the Court, that the whole matter of accounts be referred to Mr. Lancaster for report.

Mr. Lancaster inquired into the matter, and reported in favour of defendant on all the items in dispute.

After argument,

The Acting Chief Justice: The plaintiff in this action agreed with defendant to do what was called the "financing," to enable defendant to perform certain contracts which he had entered into with the Town Council. The agreement was that plaintiff was to advance a sum not exceeding £200, in consideration whereof he was to receive one-third of the profits derived under the contracts, without being responsible for any losses. As security the defendant was to give plaintiff a power of attorney to receive from the Town Council all moneys payable under the contracts, and all the tools used to remain the plaintiff's property. It appears that the way in which the agreement was worked was that the defendant each week made out a pay-sheet, showing the amount of money required. This pay-sheet was submitted to plaintiff, who gave defendant a cheque for the amount, and afterwards received back the pay-sheet with whatever vouchers had been obtained; the plaintiff drawing the payments due monthly from the Council. The plaintiff's just claim is for an account, the agreement is silent as to who should keep the accounts, but as a matter of fact it was easier for the plaintiff to make out the account than for the defendant. Certain four of the pay-sheets were missing, and vouchers were not returned for all the payments made, and defendant claimed in reconvention an account from plaintiff. To ascertain the true state of matters, the disputed accounts were referred to an accountant, who was also directed to ascertain what profits, if any, resulted from the contracts. The accountant has had the parties before him and has taken evidence and gone fully into all questions raised, and he has now reported that the contracts did not result in any profit at all. Certain items of the accountant's report have been questioned. The only one of these items about which I had any doubt was the amount allowed for the "up-keep" of the roads, which amount was expended after the contract had been completed. This, however, seems to be a liability attaching to the contractor, and must be allowed. By the plaintiff's own showing he had a balance of £131 0s. 3d. in hand after deducting all payments made by him. From this amount the plaintiff is entitled to deduct the value of the tools, which by the original agreement were to remain his property. These are valued at £33 18s. 0d. The balance in plaintiff's hands the accountant shows cannot be regarded as profit, as the defendant has since paid considerably more than this amount for the "up-keep" of the roads. The plaintiff is not liable for any share of the loss which has resulted on the contract; but on the other hand there being no profits to set off against the balance in his hands he must pay on such balance to defendant. In convention judgment will be given for plaintiff for the tools, which were only tendered in the plea, with costs to date of tender as pleaded. In reconvention judgment will be for defendant for £147 2s. 3d., being the balance due after setting off the value of the tools, with costs incurred subsequently to date of tender.

Mr. Justice Maasdorp concurred.

[Plaintiff's Attorney, V. A. van der Byl; Defendant's Attorney, H. P. du Preez.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

MASKEW'S EXECUTORS V. VAN ZYL'S EXECUTORS. } 1897. June 12th.

Mr. Benjamin applied for provisional sentence on a mortgage bond for £300, and interest at 7 per cent., and that the property specially hypothecated be declared executable.

Granted.

MARSH V. SCHMIDT'S EXECUTORS.

Mr. Maskew applied for provisional sentence on a mortgage bond for £80, with interest at 8 per cent. from November 20, 1895, and that the property specially hypothecated be declared executable.

Granted, interest payable at 6 per cent., the amount fixed in the bond, 8 per cent. being the amount fixed in the cession of the bond.

WOOD V. MYBURGH.

This case was, on the application of Mr. Close, postponed till Monday.

ILLIQUID ROLL.

AUSTIN V. HAUSMANN.

Mr. McLachlan applied for judgment under rule 329D for the payment of the sum of £5, money lent.

Granted.

ALLENZENSKY V. GAERTNERS.

Mr. McGregor applied for judgment under rule 329D for transfer of the erf mentioned in the summons, and also for costs of suit.

Granted.

DE VILLIERS V. GRESSE.

Mr. Buchanan applied for judgment under rule 329D in the sum of £17 10s., with interest at 6 per cent. from 18th December, 1896.

Granted.

MASTER V. NEL'S EXECUTORS.—MASTER V HAYWARD'S EXECUTORS.

Mr. Sheil applied for an order directing accounts in these estates to be filed.

Granted.

HINTON V. HINTON.

This was the return day in this action for restitution of conjugal rights.

Mr. Searle, Q.C., who appeared for the plaintiff, stated that although, according to a telegram received, personal service of the citation had been effected upon the defendant in Bulawayo, process had not been actually returned, and applied that the case stand over until June 21.

The Court granted the application.

ADMISSIONS.

On the application of Mr. Jones, James Henry Chapman was admitted attorney and notary; oaths to be taken at Graham's Town.

On the application of Mr. Close, Edward Christiaan du Toit was admitted translator; oaths to be taken before the Resident Magistrate, Lady Grey.

REHABILITATIONS.

Mr. Jones applied for the rehabilitation of Christoffel Jacobus Beukman

Granted.

Mr. Gardiner applied for the rehabilitation of Frank Franzen and Johannes Franzen, formerly trading together.

Granted.

GENERAL MOTIONS.

BYL V. GREEN POINT AND SEA POINT TRAMWAY COMPANY.

Mr. Graham applied to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against the respondents for the recovery of damages sustained by reason of the negligence of the servants of the respondents in charge of one of their tram-cars, whereby applicant was personally injured.

Mr. Searle, Q.C., appeared for the respondent.

The Court made the rule absolute.

The Acting Chief Justice said: In all these cases where leave is applied for to sue *in forma pauperis*, the Court reserves to itself the right—if it is shown that the action is brought solely for the purpose of harassing the defendant of refusing leave to sue; but where it is simply a question of merits on a conflict between affidavits, the Court follows the guidance supplied to it by counsel to whom the matter is referred. Mr. Graham has inquired into the matter, and is satisfied the plaintiff has good cause of action; therefore the rule will be made absolute.

IN THE MATTER OF THE MINORS NEL.

Mr. Molteno applied for the appointment of a curator to represent the said minors in respect of the sub-division of the farm Weltevreden van de Valsch Rivier, in the district of Riversdale, of which certain portion has been transferred to them subject to a life interest in favour of their mother, the co-proprietors having demanded a sub-division, and the same being in the interest of the minors.

The Court granted the application.

THE PETITION OF FREDERICK W. BAKER.

Mr. Gardiner applied to make absolute the rule *nisi* for the issue to petitioner of a certified copy of certain mortgage bond for £1,200, passed by Margaret K. van der Hoven under hypothecation of certain land known as Bellevue, near Willowmore, it being alleged that the original bond is lost or mislaid.

The Court granted the application.

IN THE MATTER OF THE MINOR MAGDALENA JOHANNES.

Mr. McGregor applied for authority to the father and natural guardian of the said minor to exchange certain half-share of the erf No. 8 in the Wellsdale location, district of Stockenstrom, her property, for erf No. 4 in the Bergman's Hoek location, it being for the interest of the minor, and all costs being paid by the barterer of the said erf No. 4.

The Court granted the application in terms of the Master's report,

IN THE ESTATE OF THE LATE VAN NIEKERK AND SURVIVING SPOUSE.

Mr. McGregor applied for authority to the executrix testamentary to raise loan on further mortgage of the landed property of the estate, for the purpose of paying off certain liabilities omitted from the liquidation account and others since incurred for the benefit of the estate, all the persons interested having consented to the proposal.

The Court granted the application.

IN THE INSOLVENT ESTATE OF ADOLPH J. LANDMAN.

Mr. Benjamin applied for authority to the Master of the Supreme Court to call a meeting of creditors of the said estate for the election of a new trustee in place of John Wares, deceased, originally elected, in order that certain shares of the farms Stillefontein, Driefontein, and Olivenfontein, to which the said Landman had rights, may be transferred to the purchaser thereof.

The Court granted the application.

THE PETITION OF THE DUTCH REFORMED CHURCH AT DORDRECHT.

Mr. Searle, Q C., applied for authority to the Registrar of Deeds to cancel certain deed of transfer, passed by John F. Woodward in favour of Patrick Crowley, on the 1st November, 1864, of water erf No. 16, in the village of Dordrecht, the whereabouts of the purchaser and seller being unknown, and they never having paid quitrent or taxes thereon to the Consistory of the said church, on whose petition the transfer to Woodward was set aside.

The Court granted a rule *nisi* calling on Patrick Crowley and others to show cause, to be published as before.

BELL V. BELL.

Mr. Benjamin applied to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights.

The Court granted the application.

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and Hon. Mr. Justice MAASDORP.]

CLAREMONT SANATORIUM V. THE MUNICIPALITY. 1897. June 14th.

Act 45 of 1882, section 115—Immovable property—Municipal rates—Valuation—Procedure on objection—Hospital—Benevolent Asylum.

A body known as the Seventh Day Adventist Medical Missionary and Benevolent Association, carried on operations in the Colony in connection with the religious community known as the Seventh Day Adventists.

In connection with the association various institutions were started in the Colony, such as an Orphanage, Benevolent Home, Free Dispensary, and baths for medical treatment.

In addition to these a Sanatorium was established within the limits of the Claremont Municipality. The Sanatorium was erected out of contributions received, and it was provided that no person should receive any share in the profits of the institution, and that no portion of the sums contributed should ever be returned to the donors.

The work of the institution was alleged to consist of the training of medical missionary nurses, free lectures on health topics, and the care and nursing of the sick, a charge being made for the latter payable by those having the means to do so, though it was alleged that free treatment was given to deserving persons when there was accommodation. In addition to this it was alleged that there were practised specialists employed and general modes of medical and surgical treatment adopted, and that a large proportion of the patients had been dealt

with free of charge, and that other gratuitious medical work was done in deserving cases.

At an interim valuation of the property in the Claremont Municipality, the Sanatorium property was assessed at £5,000 for rating purposes. The Sanatorium Board of Management claimed exemption from rates on the ground that the property was used exclusively for the purposes of a hospital and benevolent asylum.

Surrounding the building was a large extent of land belonging to the institution, the balance of a much larger portion, which had gradually been sold off by the Board of Management.

The Valuation Board contended that the land retained was in excess of reasonable requirements, though no mention of the land was made in the account rendered to the institution, calling for the payment of rates on the value assessed.

The Valuation Board also contended that though the Sanatorium was partly devoted to benevolent objects, it was intended mainly for the reception and accommodation of paying patients and others, that there was a fixed high tariff therefor, and that there was a chemist's licence in connection with the institution, and that medical comforts were sold there.

On the matter coming before the Supreme Court, a preliminary exception was raised on the ground that the proper procedure under Act 45 of 1882 would have been to go before the Resident Magistrate to object to the valuation, and that applicants were not entitled to take the present course.

The Court held *that this objection could not be sustained, and that the building was entitled to the exemption claimed, the institution being a public one, not carried on for the sole purpose of profit to any individual, and being established by private donations, the donors whereof could derive no pecuniary profit from the institution.*

This was an application on notice of motion by the trustees of the Claremont Sanatorium calling on the Commissioners of the Municipality of Claremont to show cause why an order should not be granted striking out from the valuation roll of the Municipality the amount appearing against the said Sanatorium, and declaring that its property is not ratable pursuant to the provisions of the General Municipal Act of 1882, section 115, sub-section 4, and that respondents do pay the costs of the application.

Mr. Schreiner, Q.C., for applicants.

Mr. Searle, Q.C., appeared for the respondent Municipality.

The following affidavit was made by Mr. John James Wessels:

1. I am a member of the congregation of Seventh Day Adventists, and attend the Claremont Church, where I reside, and occupy myself in benevolent work, having sufficient private means to support me and my family without entering into business.

2. When on a visit to the United States in the year 1893, I joined my brother and others in taking steps for the establishment in South Africa of institutions connected with the Seventh Day Adventist Medical Missionary and Benevolent Association, which has been in operation since about the year 1866 in America, under the fostering care of the Seventh Day Adventists as a community.

3. I annex hereto an extract from the Year Book of the Seventh Day Adventist Medical Missionary and Benevolent Association from 1866 to 1896, which sets forth the objects and general plan of organisation of this association.

4. In order to establish a Medical Mission or Missionary Sanatorium in Cape Town or its immediate vicinity, my brother, myself, and others on or about the 24th June, 1893, entered into an agreement with the Executive Board of the parent association at Battle Creek, Michigan, in the United States, a copy of which is hereunto annexed for the information of the Court [see extract annexed].

5. In due course, my brother, myself, and others interested returned to this country, and having collected sums amounting in the aggregate to £10,000, more or less, purchased land at Claremont and elsewhere, and commenced building what is known as the Claremont Sanatorium

in addition to other properties under the control of the association and the congregation of the Seventh Day Adventists.

6. A local Board was duly appointed to manage and transact the affairs of the association in South Africa, of whom I am one, and managers were appointed to supervise the several institutions under the direction of the Board in this country, and to me was entrusted the duty of attending to the business affairs connected with the Sanatorium at Claremont.

7. Early in the present year the Municipality of Claremont, at an interim valuation assessed the property of the Sanatorium, for rating purposes, at the sum of £5,000, notwithstanding the objections raised both verbally, and in writing by myself and others connected with the institution.

8. Our claim for exemption is founded upon the provisions of section 115, sub-section (*b*) of the General Municipal Act, No. 45 of 1882, as the Board contend that the Claremont Sanatorium is used exclusively as a hospital and benevolent asylum.

9. For the information of the Court, I might mention that the work carried on in connection with the Sanatorium itself, which was formally opened about the 12th January, 1897, consists of:

(*a*) A training school for medical missionary nurses.

(*b*) Giving, free of charge, lectures on medical and other health topics.

(*c*) The care and nursing of the sick, for which a charge is made, payable by those who have the means so to do, but deserving persons are taken in free of charge, if there is accommodation for them.

(*d*) Electric, hydropathic and general medical treatment of patients, a large proportion of whom have been dealt with free of charge; surgical operations have been performed upon needy patients; medicines, dressings and bandages distributed to persons outside the institution itself, who are, if need be, attended gratuitously as out door patients.

(*e*) Baths and massage attendants with the requisite provision therefor, and for exercises calculated to develop and strengthen the limbs of the patients.

10. At the Claremont Sanatorium, a staff of some thirty-six persons are employed at very small salaries; in some instances the helpers, being persons of independent means, make no charge for their services; in order to meet this outlay a charge is made for boarding and attending upon such of the inmates of the Sanatorium as are in a position to pay.

11. On reference to the books of the institution I find that since its opening on the 12th January, 1897, the total number of patients who have been attended up to the 31st March number 56, and 2,229 treatments given, for fully one-fourth of which no charge has been made. Surgical operations have been performed without any charge, which according to the recognised scale of charges would have brought in about £70, whilst for paid cases only £40 have been recovered; £5 worth of medicines, dressings, bandages, &c., have been distributed as charity, and 2,000 out-patients attended free of charge by the medical gentlemen resident in the institution. Thirty-two free lectures on hygiene and general health topics have been delivered, in addition to 168 connected with the classes for nurses undergoing training with a view to missionary work under the auspices of the association, in some place or other. All this in addition to charity work of a miscellaneous character, equivalent at the ordinary scale of charges to £1,150, done through the agency of the association.

12. Under the auspices of the Seventh Day Adventist Medical Missionary and Benevolent Association there exist, besides the Claremont Sanatorium, the following institutions in South Africa, namely:

(*a*) The Diamond-fields Benevolent Home at Kimberley, where at present some hundred needy men are lodged each month and helped to find employment, and supplied with food and clothing in the interim.

The Kimberley Town Council has shown its appreciation of the work done by granting the Home a yearly allowance.

(*b*) The Plumstead Orphanage, where twenty-five children of all churches and creeds indiscriminately are educated and supported.

(*c*) The Cape Town Medical Mission and Free Dispensary in Roeland-street, Cape Town.

(*d*) Baths, also in Roeland-street, Cape Town, where 660 cases have been treated since the opening.

13. All these institutions are controlled by a Board of trustees in South Africa, whose chief centre is at the Claremont Sanatorium, and any persons recommended to the managers of whatever denomination, who are in need of assistance, will be received by any of the institutions of the association, none of which are confined to members of the congregation of Seventh Day Adventists, but have been started with a view to the extension of missionary, reformatory, and philanthropic work, and should the Claremont Sanatorium ever happen to be in the position of having a surplus after paying expenses, such balance will be spent upon more needy institu-

tions under the same association, in order that the work and scope of the association may be extended therewith.

14. If this Honourable Court should desire further particulars, regarding the work carried on at the Claremont Sanatorium, I am directed by the Board to invite their lordships to inspect the premises, or otherwise to depute some competent person to make a report thereon, and to tender the oral evidence of myself and my colleagues.

[The extract from agreement referred to in the foregoing affidavit was as follow: Third.—"It is mutually agreed that no individual, either those contributing to the funds of the proposed Missionary Sanatorium, nor any other person, shall receive any share in the profits or earnings of the institution, excepting in cases of charity under the direction and approval of the authorised officers of the institution. And it is also agreed that in case of the dissolution of the institution as a Medical Mission or Missionary Sanatorium, any portion of the original sum contributed and of th earnings of the institution, providing there have been such, shall be devoted to medical missionary work of some sort in the interest of needy cases in Africa under the direction of the Seventh Day Adventist Medical Missionary and Benevolent Association, and that no portion shall be returned to the original donors nor distributed otherwise than in the manner indicated."]

The following was the answering affidavit of Mr. Charles Selwyn Powrie:

1. That he is Mayor of the Claremont Municipality, and was chairman of the Valuation Court.

2. That he has perused the notice of motion given by the above applicants, and the affidavit of John James Wessels sworn to on the 31st May, 1897.

3. That the applicants originally purchased from one Frederick Baker, two pieces of land, together in extent about fifty-four morgen, situate in the Claremont Municipality, and received transfer thereof on the 13th April, 1894. They have since sold off considerable portions, but still retain about sixteen morgen.

4. The Valuation Court were of opinion that the land retained was far in excess of the reasonable requirements of the institution, and that the institution itself did not fall within the definition of a hospital or benevolent asylum, although to a limited extent devoted to the latter objects.

5. From advertisements published by the applicants, it appears that the institution is mainly for the reception and accommodation of persons prepared to pay for their board, lodging, and attendance.

6. There are further resident therein, persons who are carrying on their ordinary avocations outside the limits of the institution.

7. Deponent annexes hereto one of the advertisements issued by the applicants.

The respondents also filed an affidavit by Mr. John Samuel Merrington, of Claremont, who stated:

1. That he is secretary to the Claremont Municipality.

2. That he has perused the notice of motion given by the above applicants, and the affidavits of John James Wessels, sworn to on the 31st May, 1897.

3. That he is well acquainted with the value of land situated on the Claremont Flats, in and about the vicinity of the Lansdowne-road and the above Sanatorium.

4. That land thus situated is being sold at the rate of about four hundred pounds (£400) sterling per acre, and upwards.

5. Deponent annexes an account rendered to him by applicants, in connection with one or two visits by him to the said Sanatorium, from which it will be observed that various medical comforts were purchased by him there.

6. Deponent was informed that a chemist's licence had been taken out in connection with the institution.

The following replying affidavit was made by Mr. John James Wessels:

1. He has read the affidavit of Charles Selwyn Powrie, sworn to at Cape Town on the 9th instant.

2. The land and buildings upon which the applicants claim exemption of taxation, are used exclusively for the purposes of the Sanatorium, and for no other purpose whatsoever.

3. Deponent distinctly and emphatically denies the statement that persons resident in the institution are carrying on their ordinary avocations outside the limits, except for the benefit of the institution, and any funds obtained thereby, if any are obtained, are devoted towards the funds of the association, and not for their personal use or benefit.

The account rendered to the Sanatorium Board ran as follows:

Municipal Office, Claremont.

Claremont Municipality,
25th May, 1897.

Trustees, Sanatorium.

Dr. to Claremont Municipal Council.

(Being an owner's rate of 2d. in the £ upon the following landed property, situate in the Claremont Municipality.)

Description.	Situation.	Value.	Amount.
The Sanatorium	Off Belvedere Road	£5,000	£41 13 4
Tenant's rate on same...	...		10 0 0
			£51 13 4

being 2d. in the £ on annual value.

Please take notice that the above amount was due and payable on the 30th day of March, 1897; and I am instructed to request an early settlement.

I have the honour to be, Sir,
Your obedient servant,
J. S. MERRINGTON,
Municipal Clerk.

Mr. Searle, Q.C., for the respondents: I wish to take the preliminary objection that the Court cannot under the Act decide this question. Early in the year a Valuation Court assessed this property at £5,000, and an account was sent in later. No proceedings were taken after the holding of the Valuation Court, in terms of sub-section, 122, 123, 124, which lay down the procedure to be followed. The question of this exemption was raised only after the account annexed had been sent in.

Buchanan, J.: Does not the Valuation Court consider only the valuation and not the question of ratability? We cannot discuss the valuation now.

Mr. Searle: The two grounds we take are, first, that this place is not a hospital, and secondly, that even if it is a hospital, there are sixteen morgen of land attached to it which at any rate the Council has a right to put a rate upon. But this case should certainly go before the Resident Magistrate, because there is a principle of law arising, namely, whether hospitals are free or not.

Buchanan, J.: The principle contemplated in section 124 is a principle of law touching the valuation.

Mr. Searle: Supposing a person has a proper valuation of his property made, and afterwards turns the property into a place which is exempted from valuation he cannot get the valuation taken off then. See *King William's Town Borough Council* v. *Yates* (Juta 7, p. 136). There the Magistrate had entertained an appeal from a Valuation Court, and this Court held that he had no jurisdiction because it had not been prosecuted in due time.

Mr. Schreiner, Q.C.: As to the preliminary objection, we are not aggrieved by the valuation put on the property, and so we could not appeal to the Magistrate.

Maasdorp, J.: Under section 116 only ratable property can be valued. If you sit still while they value your property, can you afterwards say it is not ratable property?

Mr. Schreiner: We could not afterwards appeal to the Magistrate's Court, but we are not debarred from going to a higher Court. This has been done in many previous cases. This land, it is clear from the affidavits, is land used exclusively for hospital purposes, no matter what the title deed may say as to the ownership. The sixteen morgen are all used in connection with the institution. The institution itself is purely charitable. There may be treatment of out-patients, but that is part of the work of all large hospitals.

Mr. Searle: The principal feature of this establishment is the boarding of persons who go there for treatment. The prospectus makes a great point of this, setting out a tariff of charges for meals, treatment, &c. It says nothing about gratuitous treatment. They must contemplate making a profit; otherwise these charges would not be made. The principle allowing exemptions in the case of hospitals is that they are charitable institutions. They are classed in the same sub-section as other charitable institutions. Poor persons can only come in here when there is room for them; the principal object is not the treatment of the poor. The trustees can sell the land for any purposes and make large profits; they have sold from time to time, and the land is valuable. The institution is not supported by voluntary contributions, its object is to be self-supporting. *Needham* v. *Barnes* (21 Q B.D., p. 436) defines a "hospital" for the purposes of income tax and house-duty. The provisions of English Acts, very similar to Act 45 of 1892, were held not to apply to self-supporting institutions. In hospitals the bulk of the treatment is for non-paying patients. This is a sanatorium, and the principle is reversed; the treatment of non-paying patients is subordinate to that of paying and wealthy patients. An elaborate scientific method is prepared for them. Although the building alone appears to have been valued, the Mayor states that the Valuation Court took into consideration the land attached.

Buchanan, J.: The question whether the land was necessary for the institution, or used for it, is a matter of fact which should go before the Magistrate for decision.

Mr. Searle: The preliminary objection is a good one, the Act intended all these questions to go before the Magistrate.

The Court granted the application with costs.

The Acting Chief Justice said: The applicants in this case, the trustees of the Claremont Sanatorium, apply to the Court to have it declared that their property is exempt from valuation for ratable purposes under the 115th

section of the Municipal Act of 1882. Preliminary objection has been taken on behalf of the respondents on the ground that the application should have been made to the Resident Magistrate after the sitting of the Municipal Valuation Court. Sections 116 to 124 of the Act allow any person feeling aggrieved with the valuation of the Municipal Court to appeal to the Resident Magistrate. These sections apply only to the question of the amount of the valuation. This is not an appeal against the amount of valuation but whether, under the 115th section, the property is ratable at all. The preliminary objection now taken, can not therefore be sustained. It is claimed that this property is a hospital, and therefore exempted. Reference has been made to an English case where the Court held that the word "hospital" coupled with the words "charity school or house" meant an institution for the relief of poor persons and supported by charity. But the case cited depends on the construction of the English statute, whereas we have to construe the different language of our own statute. I am not prepared to say that, under the Colonial Act, a hospital which is carried on solely for profit would be excluded from valuation for ratable purposes. It is sufficient in this case to show that this particular institution is of such a charitable nature as to be excluded by the section. It has been proved by affidavits that it is a public institution; that it is an institution not carried on for the sole purpose of profit to any individual; that it has been established by private donations, and that the persons who have made these donations do not and cannot derive any pecuniary profit from the institution. It has also been shown that although charges are made for some of the patients, a great many others are relieved free of charge, and that a number of persons at the hospital give their services gratuitously. Under all the circumstances we think that this is an institution which comes under the exemption referred to in the 115th section of the Municipal Act. One other point raised in the argument was whether the whole of the land surrounding the hospital would be exempted with the building. This depends on whether it is used exclusively for hospital purposes or not. Looking at the account for rates sent in by the Municipality it would appear that the Council only rated the Sanatorium building. It does not appear that the Valuation Court intended to rate the land as well as the building; though they might have put this valuation upon the Sanatorium in consequence of the large extent of land around it. As far as the documents before us go the land does not appear in the valuation. The Municipality may, if that is the case, at an interim valuation, value the land not used for hospital purposes for ratable purposes. We must now, however, simply confine our attention to the building, and we hold this is a hospital within the exemption stated in the Act. The application will, therefore, be granted with costs.

[Applicants' Attorneys, Van Zyl & Buissinné: Respondent's Attorneys, Tredgold, McIntyre & Bisset.]

ELDERS' EXECUTORS v. COXHEAD. { 1897. June 14th.

Ejectment — Lease — Motion — Procedure.

C. held certain premises on lease. E. the landlord sought to eject him on the grounds that the rent had not been regularly paid, and that there had been a breach of covenant as to the conduct of the hotel. C. filed affidavits denying E.'s *allegations. The application for an order of ejectment was made upon motion.*

The Court held *that though an order of ejectment can be granted on motion this is not a proper form of procedure where the facts are in dispute and refused to grant the order prayed for.*

This was an application on behalf of Andrew Manson, in his capacity as the sole surviving executor of the estate of the late Julius Elders, for an order requiring respondent to remove from the house and premises, situate at Newlands, known as the Bricklayers' Arms Hotel, occupied by him, and to deliver up the licence relating thereto, duly endorsed to applicant, on the ground that he has contravened the provision of the agreement under which he holds the same.

The applicant deposed on affidavit:

1. That he is the sole surviving executor testamentary of the estate of the late Julius Elders, and as such the proprietor of the hotel and furniture aftermentioned.

2. By memorandum of agreement dated 17th April, 1893, a copy of which is annexed hereto, the applicant and his then co-executor leased to the respondent for a period of five years, reckoned from the 1st day of March, 1893, certain house and furniture situate at Newlands, known as the Bricklayer's Arms Hotel, together with the furniture therein as specified in the inventory annexed to the said memorandum of agreement, at a monthly rent of £12, payable on the 1st day of each month.

3. That it was a condition of the said agreement, that should the respondent contravene any of the Licensing Regulations or fail to pay the rent when it fell due, the applicant should be entitled to terminate the same summarily.

4. That on account of the unsatisfactory manner in which the business carried on by the applicant in the said hotel was being conducted, the licence, which at the time the respondent took possession of the premises was a licence with full privileges, was reduced to a nine o'clock one in March last.

5. That although regularly requested to pay each month the rent as it fell due, the respondent during the months of January, February and March last failed to do so, and was until, the 13th day of April three months in arrear with the payment of the rent of the said hotel.

6. That in consequence of the licence of the hotel having been reduced from one with midnight privileges to a nine o'clock one, the premises let the respondent have greatly deteriorated in value, and his failure to pay the rent as it becomes due has caused much inconvenience to the applicant, who has to provide for the maintenance, education, and support of certain minors interested in the estate out of the said rent.

7. That in consequence of the contravention of the memorandum of agreement on the part of the respondent, the applicant on the 1st day of April last sent a letter to him requesting him to remove from the said hotel and other premises on the 1st day of May current, and subsequently entered into an agreement whereby a new tenant was to take possession of the hotel on last mentioned date.

8. That the respondent has failed to remove from the said premises, and refuses to give up possession thereof, and the applicant is under the necessity of applying to this Honourable Court for an order to compel him to do so.

The respondent deposed:

1. That he is the lessee of the Bricklayer's Arms and furniture therein at Newlands, and the respondent in the above case.

2. That deponent has been summoned to show cause why he shall not be ordered to remove from the said Bricklayer's Arms, and to deliver up the wine and spirit licence under which deponent conducts his business on the premises.

3. And deponent saith that he has read the affidavit of the applicant, and replies thereto as follows:—That he admits paragraphs 1, 2, 3.

4. And deponent saith in reply to paragraph 4 that at the Licensing Court held at Wynberg in March last, his licence was reduced to the hour of nine p.m., but that such reduction did not take place through any conviction by the Licensing Court, but simply upon written complaint and by a narrow majority, and also upon the understanding made known to deponent at the time that he could apply again for his privileges at the half-yearly Board.

5. And in reply to paragraph 5, deponent saith that in the month of February, 1897, he left the sum of £12 sterling at the residence of the applicant, the said Andrew Manson, at Rondebosch with his housekeeper, being the rent for January, 1897, for the aforesaid Bricklayer's Arms. That deponent was told that the receipt would be sent or that deponent could call for it.

6. And deponent saith that he did call again for the receipt, when the said Manson, whom deponent saw, said, "I can't take the money. I want to get out of the executorship. You will get a notice." Deponent thereupon took the money but never got any notice until Messrs. J. & H. Reid & Nephew in the beginning of April demanded the three months' rent for January, February and March, 1897.

7. And deponent saith that on the 12th April, 1897, he paid the rent up to 31st March, 1897, to the said J. & H. Reid & Nephew. That as soon as April, 1897, expired, deponent received a summons at the instance of the present applicant to appear before the Magistrate's Court at Wynberg on the 4th of May, 1897, for the sum of £15, also for ejectment, being rent for April, 1897, and £3 arrears.

8. And deponent said that he appeared before the said Court to defend the case and to prove that £12 only was due, whereupon the applicant's attorney accepted the £12 for April, 1897, and paid all deponent's costs.

9. And deponent respectfully submits that the reduction of his selling hours under his licence was exercised by the Board under its discretion, and that he has done nothing justifying the cancellation of his lease or giving the said applicant the right to eject him from the premises now in his occupation.

There were further affidavits corroborating respondent's allegations.

Mr. Buchanan, for the respondent, took the preliminary point that the case was not a proper one to hear on motion.

Mr. Graham, for the applicant, cited *Olivier* v. *Potgieter* (6 Sheil, 314).

The Court refused the application with costs.

The Acting Chief Justice said: This is an application on motion for the ejectment of respondent on two grounds; first, that the rent has not been regularly paid, and secondly, that there has been a breach of the covenant of the lease as to the conduct of the hotel. The Court laid down the principle in the case of *Olivier* v. *Potgieter* (6 Sheil, 312), that it is not usual to

grant ejectment on motion; it also laid down that there might be cases in which the Court might depart from such practice; but this must be a case where there are no facts in dispute. In this case the respondent alleges that it was his custom to pay rent at his convenience; and he paid the rent and it was accepted. The breach of covenant is disputed, and this is a matter impossible to decide without going into evidence. There is also the singular fact that immediately on the last month's rent becoming due, the applicant sued the respondent in the Court of the Resident Magistrate for the month's rent. The rent was subsequently paid and accepted, and the action for ejectment was withdrawn. Under these circumstances the application will be refused with costs.

[Applicant's Attorneys, Messrs. Reid & Nephew; Respondent's Attorney, J. Ayliff.]

NIEUWOUDT V. THE REGISTRAR OF DEEDS. } 1897. June 14th.

Transfer—Fidei-commissum—Restraint on alienation—Fulfilment of condition—Descendant—Community of property.

V. *by will bequeathed certain property subject to a condition restraining alienation to any persons, except lawful descendants of* V.

N. *who married in community a descendant of* V., *purchased a portion of the property, but the Registrar of Deeds refused to pass transfer to* N. *on the ground that he was not himself a descendant of* V.

The Court ordered transfer to be passed.

This was an application, on notice, calling upon the respondent to show cause why he should not be ordered to pass transfer to the applicant of certain one-fourth share of the farm Pardenpoort, situate in the division of Jansenville, purchased by the applicant from Hester Petronella Snyman, and also why he (the respondent) should not be ordered to pay the costs of the applicant.

The applicant's attorney annexed a deed of transfer in favour of Hester Petronella Snyman on 2nd March, 1897. He alleged that the property mentioned in the transfer was sold to the applicant, who is married in community to a lawful descendant of Hester Johanna Viljoen, from whose estate Hester Petronella Snyman received transfer.

That the respondent was aware of the applicant's marriage in community.

That on the 22nd May, 1897, he (deponent) tendered for registration a deed of transfer by Hester Petronella Snyman in favour of the applicant.

That the Registrar of Deeds refused to register the deed, on the ground that the applicant was not a descendant of Hester Johanna Viljoen, and was therefore barred from taking transfer by the conditions on which the land was transferred to Hester Petronella Snyman.

Under the will of her mother (H. J. Viljoen) Hester Petronella Snyman became entitled to the portion of the farm in question, and it was transferred to her by the executors dative, subject, in terms of her mother's will, to the following special condition: That it (the farm) shall not be sold, bequeathed, exchanged, let, or in any way disposed of except only to or among the lawful descendants of the said Hester Johanna Viljoen.

The Registrar of Deeds, in his report, admitted the correctness of the facts as stated, but he held that as the special condition upon the property barred any one but a descendant from purchasing, &c., and as the applicant was not such a one he did not feel justified in allowing the transfer to pass without an order of Court.

Mr. Searle, Q.C.: Applicant is married in community of property to one of the descendants of Hester Johanna Viljoen. It is on record in the Deeds Office that his wife is such descendant. Therefore he is entitled to transfer.

Mr. Sheil: It may be that applicant is entitled to transfer if it were clear that he is married to one of those descendants in community, but the deed of transfer is silent on the subject.

Mr. Searle: That is not the position which the Registrar of Deeds has taken up; his objection was not an objection to the form of the transfer deed; his position is that he cannot allow transfer at all without an order of Court.

The Acting Chief Justice: You may take an order authorising the Registrar of Deeds to pass transfer to Nieuwoudt on its appearing in the transfer deed that he is married in community to a descendant of Hester Johanna Viljoen. The applicant must however pay the costs incurred by the Registrar of Deeds.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Government Attorneys, Messrs. J. & H. Reid & Nephew.]

BOUGARD V. JONES'S EXECUTORS AND THE MASTER. { 1897. June 14th.

Executors—Will —Joint estate — Remarriage—Distribution of assets.

This was an application on notice for an order on the Master (1) to grant letters of administration to Messrs. D. Bougard and James G. Jones, as executors testamentary of the joint estate of the late George Jones and his predeceased spouse. Johanna Jones (born Holm), and (2. for an order that an account be framed awarding to the applicants and James G. Jones, the whole of the net proceeds of the joint estate of George Jones and his wife Johanna Jones (born Holm), or for such other relief as the Court might be pleased to grant, with costs.

The applicants were Emma E. Bougard and Magdalena Bridges, daughters of the late George and Johanna Jones, who were married in this colony in community of property.

The respondents were Cornelia M. C. Jones (widow and executrix testamentary), Wm. A. Currey (assumed executor of the estate of the late George Jones), and the Master of the Supreme Court.

The affidavit in support of the notice of motion alleged that the applicants' parents, by their joint will dated December 29, 1886, massed their joint estate, leaving the survivor of them the usufruct thereof, bequeathing to Magdalena Bridges certain articles of furniture, and appointing their two daughters mentioned above and James P. Jones, their son. joint heirs of the residue of the joint estate.

On 22nd January, 1887, Johanna Jones died, and on the 2nd February, 1888, George Jones, as executor, filed an account of the administration of the joint estate with the Master, awarding to each of the heirs £30 7s. 8d. He did not pay the heirs the amounts due to them, nor the interest, nor did he execute a deed of repudiation of the usufruct, but continued to enjoy the whole usufruct of the estate during his lifetime.

The applicants were not aware that their father had filed an account until after his death.

George Jones contracted a second marriage with the first respondent without community of goods, and acquired certain land at Diep River.

On the 23th May, 1896, George Jones died, leaving the first respondent him surviving, having executed with her a joint will on the 18th February, 1896.

The Master refused to grant letters of administration to William D. Bougard and James G. Jones, who, under the will of George and Johanna Jones, were appointed executors testamentary of the joint estate after the death of the survivor, but he granted letters of administration to them as executors of Johanna Jones, and to the first respondent as executrix of George Jones.

The respondents delivered to the applicant, Magdaleña Bridges, the furniture bequeathed to her, and framed an account in which they dealt with the assets of the joint estate of George and Johaana Jones, in which they brought up the applicants ascreditors of the estate. for the sum of £30 7s. 8d. and interest to the 23nd May, 1894, retaining the balance to be administered under the joint will of George Jones and his surviving spouse.

The applicants claimed:

(*a*) That Wm. D. Bougard and James G. Jones should be granted letters of administration as executors testamentary of the joint estate of George and Johanna Jones.

(*b*) That the whole of the net proceeds of the landed property at Woodstock and the rents thereof are the property of the applicants and their brother James G. Jones.

The joint estate of George and Johanna Jones consisted of certain furniture as above mentioned and some landed property at Woodstock.

Under the joint will of George Jones and his second wife, the survivor was appointed executor.

After the death of George Jones, the first two respondents sold the landed property at Woodstock with, they alleged, the applicants' consent, and they framed an account of the administration of the estate of George Jones.

In this account all the assets left at the date of the death of George Jones and his predeceased spouse were dealt with, and the usufruct of the net amount, after deducting all liabilities, was awarded to the first-named respondent in terms of the second will.

Mr. Schreiner, Q.C., was heard in support of the application.

Mr. Searle Q.C., for the respondents.

Mr. Sheil for the Master of the Supreme Court.

[In view of *Brand's case* (4 Juta, 320) counsel for the applicant admitted that the first part of the application could not be pressed.]

After argument,

The Acting Chief Justice said: There are two prayers in this application. The first is for the appointment of an executor in the joint estate, this has been properly abandoned, as the Court has already laid down the practice, therefore there will be no order on that part of the application. The decision of the second question depends on the question of adiation. The

proper course will be for the executors of the late George Jones to pay over the net proceeds of the property in their hands to the executors of the wife's estate for distribution amongst the heirs: costs to come out of the estate.

[Applicants' Attorneys, Messrs. W. E. Moore & Son; Respondents' Attorneys, Messrs Van Zyl & Buissinné; Attorneys for the Master, Messrs. Reid & Nephew]

WOOD V. MYBURGH.

Mr. Close applied in this case (which stood over from Saturday) for provisional sentence for £32 due on a bill of exchange, with interest and costs.

Granted.

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and Hon. Mr. Justice MAASDORP.]

IN THE MATTER OF THE ANTE-NUPTIAL CONTRACT OF SCOTT AND WIFE. { 1897. June 15th.

Ante-nuptial contract—Intention to execute—Oversight.

This was an application for an order authorising the Registrar of Deeds to register a post-nuptial contract between William H. Scott and his wife Maude Elizabeth Scott, to have the effect of an ante-nuptial contract as against all creditors who shall become such after the date of registration.

Mr. Searle, Q.C., applied.

Applicants' petition set forth that the parties were married at Burghersdorp on the 3rd June, 1897.

That it was petitioners' intention to execute an ante-nuptial contract containing the usual clauses, *inter alia*, excluding community of property, and settling a life-policy on the wife.

That at the time of marriage William Scott resided at Pretoria, S.A.R., and the petitioner, Maude Scott, resided in the Cape Division.

That in view of the illness of W. Scott shortly before the marriage it was not definitely decided till shortly before the marriage that the parties should be married at Burghersdorp, where the bride's parents are resident; that little time then remained for making the necessary arrangements, and as a result the fact that no ante-nuptial contract had been executed was overlooked,

That petitioners now desire to execute a post-nuptial contract, and of having the same registered; that a document has been drawn up, but cannot be registered without the consent of the Court.

The Court granted the application, subject to the rights of creditors, as prayed.

[Applicants' Attorneys, Messrs. Tredgold McIntyre & Bisset.]

VILJOEN V. HAMMAN. { 1897. June 15th, 16th, 17th.

Interdict — Water rights — Perennial stream — Arbitrators' Award—Construction—Restrictive interpretation—Flow of water—Interference—Onus—Joinder of parties—Costs—Witness expenses.

By an award of arbitrators it was provided that the water of a certain perennial stream should be used by the proprietors of the upper farm, De Doorns, in such a manner that there should always be at least two-thirds of the water in the stream flowing down to the lower proprietors.

In terms of the award a dam was constructed to retain the entire water of the river; the dam had four equal outlets, one of which was to be always closed; one (on the west side) was to be always running for the purposes of a mill belonging to P., *the then proprietor of De Doorns, and* P. *was entitled to the sole use thereof.* P., *however, had the right to take water out of the river on the eastern side, to irrigate his "corn and arable lands," provided he returned to the river from the mill as much water as he used on the eastern side.*

The farm De Doorns was afterwards sub-divided and H. *and* D. *acquired sub-divisions.*

Thereafter disputes arose as to the use of the water. Some of the owners on the sub-divided portions used only the western furrow, others used only the eastern furrow. These proprietors made agreements between them-

selves as to their hours of waterleading, but the lower proprietors were not parties thereto.

H. *was sued by* V., *the lower proprietors, for an interdict and damages for deprivation of water.* H. *argued that* D., *a co-proprietor, should have been joined as co-defendant, but it was proved that on two occasions at least* H. *by his diversion of water in the eastern furrow had been alone responsible for* V.'s *deprivation.*

The Court held *that each owner of sub-divided lots of De Doorns was responsible for seeing on diversion by himself through the eastern furrow, that the proper quantity of water was returned to the river by the western furrow, the onus being thrown on him (by his interference with the automatic division of the water as effected by the outlets at the dam), to see that the lower proprietors are not deprived of their rights: and granted an interdict with costs.*

The Court held *also that* D. *had properly not been joined as co-defendant: but that* H. *was entitled to irrigate vineyards on the eastern side, although the award only said that the proprietor of De Doorns might irrigate* "corn and arable lands," *it not being clear that the award intended to restrict the use of the water to such lands.*

This was an action brought by Phillipus Daniel Viljoen, Willem Jacobus Viljoen, Hendrik Christoffel Viljoen (in his capacity as executor of the estate of the late Johannes Frangois Viljoen), Daniel Fredrik Viljoen, D.A.son, Hendrik Andries Viljoen, D.A.son, Daniel Fredrik Viljoen, J.son, Carl Stephanus Viljoen, J.son, as plaintiffs, against Johannes Nicolaas Hamman and Abraham Paul Hamman, for damages and an interdict.

The plaintiffs' declaration alleged:

1. The plaintiffs, Phillipus Daniel Viljoen, Willem Jacobus Viljoen, and Hendrik Christoffel Viljoen in his capacity as executor of the estate of the late Johannes Frangois Viljoen, are the owners in undivided and undefined shares of the farm In het Midden van de Doorn River; the said plaintiffs, Phillipus Daniel Viljoen and Hendrik Christoffel Viljoen in his capacity as executor of the estate of the late Johannes Frangois Viljoen, are also the owners of defined and divided shares of the farm Aan de Doorn River; the plaintiffs, Daniel Fredrik Viljoen, D.A.son, and Hendrik Andries Viljoen, D.A.son, are owners in undivided and undefined shares of a defined and separate portion of the farm Aan de Doorn River; and the plaintiffs, Daniel Fredrik Viljoen, J.son, and Carl Stephanus Viljoen, J.son, are also owners in undivided and undefined shares of a separate portion of the farm Aan de Doorn River.

The defendant Johannes Nicolaas Hamman is the owner of a certain defined and separate share of the farm De Doorns, and the defendant Abraham Paul Hamman is the owner of a certain sub-share of a defined and separate portion of the said farm. All of which farms are situate in the division of Worcester.

A plan of the said farm De Doorns as now divided is hereunto annexed, marked A, and the plaintiffs pray that it may be regarded as inserted and forming part of the declaration.

2. A perennial river or stream known as the Doorn River traverses the three farms aforementioned.

3. By an order bearing date the 26th November, 1849, of the Circuit Court, holden at Worcester, certain disputes between the owners of the three aforesaid farms were referred to certain arbitrators, who subsequently made their award on the 21st January, 1850, and the said award was on the 14th February, 1850, made a rule or order of the Supreme Court. The said award was, and is still, binding upon each and every proprietor of the whole or any portion of the said farms, and upon the defendants as owners of the above portions of the farm De Doorns.

4. A copy of the said award is hereunto annexed, marked B, and the plaintiffs pray that the said annexure may be read as though herein fully set forth.

5. One William Hendrik du Plessis, the late owner of the said farm De Doorns, was in virtue of such ownership the predecessor in title to the portions of the said farms by the said defendants respectively owned; and one Hendrik Christoffel Viljoen and one Jacobus Albertus van Reden were respectively the predecessors in title to the farms In het Midden van de Doorn River and Aan de Doorn River, now owned by the plaintiffs respectively as above set forth.

6. Under and by virtue of the said award the water of the said stream was and became and still is duly apportioned between the owners of the said farms respectively in manner following,

to wit: to the owner of the farm De Doorns was apportioned one-third share of the said stream, and to the owners of the farms In het Midden van de Doorn River and Aan de Doorn River were apportioned the two remaining third shares, and the several owners of the several farms were, and the plaintiffs now are, and the defendants in respect and in right of their said shares of the farm De Doorns now are, entitled to the use and enjoyment of the said water in the shares hereinbefore in this paragraph set forth.

7. Under and by virtue of the same award the then defendant Viljoen and the then plaintiff Van Eeden were, and the present plaintiffs now are, entitled to lead and take their two-thirds share of the water of this said river or stream into and over their said farms, and the then defendant Du Plessis had, and the present defendants in respect of their shares of the said farm De Doorns now have, the right of taking and leading the aforesaid third share of the said water to them pertaining and for their use over a certain furrow or watercourse on the west side of the aforesaid stream as in the said award determined and appointed.

8. It was further provided by the said award that in order to enable the said defendant Du Plessis to irrigate his corn or arable land lying on the east side of the said river or stream, he should then and in that case be entitled, and the present defendants in respect of their ownership as aforesaid now are entitled, only to lead and draw off as much water from the said river on the east side thereof as should be allowed to run and be diverted out of the furrow of the then defendant Du Plessis on the west side of the river in paragraph 7 mentioned into stream conveying the water pertaining and flowing to the said farms now belonging to the present plaintiffs as aforesaid.

9. Notwithstanding the premises the defendants have continually and at divers times wrongfully diverted the water of the said river or stream, and more particularly:

(*a*) On or about the 12th of February, 1897, the defendant Abraham Paul Hamman, and

(*b*) On or about the 2nd day of March, 1897, the defendant Johannes Nicolaas Hamman, did each of them wrongfully, and in breach of the said award, and in infringement of the plaintiffs' rights thereunder, turn and divert one-third share, or thereabouts, of the water of the said river into a furrow on the east side of the aforesaid river, and thence on to their respective shares of the said farm, likewise respectively on the said east side situate, notwithstanding that they, and each of them respectively, had not then turned off, or caused to be turned off as hereinbefore set forth, an equivalent third part of the water of the said river out of the aforesaid furrow on the west side of the said river for the use and enjoyment of the plaintiffs, and notwithstanding that the water so diverted was not by them employed for irrigating corn or arable lands, all of which, as by the said award, was determined and ordered.

And the plaintiffs say that they are thereby damnified.

10. And the plaintiffs further with respect to such damage more particularly say that during the last three months the water of the said stream has not, owing to such acts of diversion, reached their homesteads for the last three months, and they have been prevented from distilling, and not been able to water their cattle properly, and have been compelled to dig in the bed of the said river for water for domestic purposes, and have otherwise suffered damage.

The plaintiffs claimed:

(*a*) The sum of £2 0 as and for damages by them sustained in the premises.

(*b*) An order interdicting the defendants from taking out and leading on the eastern side of the said river or stream any water whatsoever, save only when an equivalent amount of water has been and is returned and led into the plaintiffs' stream or furrow aforesaid, for the sole use and enjoyment of the said plaintiffs, and furthermore save only for irrigating corn or arable lands on the eastern side of the said river situated.

(*c*) Alternative relief and costs of suit.

For a plea to the declaration, the defendants said as follows:

. They admit the allegations in the 1st, 2nd, 3rd, 4th, and 5th paragraphs of the declaration.

2. As to the 6th, 7th, and 8th paragraphs, they refer the Honourable Court to the terms of the said award for the true meaning and effect thereof; they admit that the said terms are binding upon all the present owners of the aforesaid farms.

3. They do not admit that they are obliged to take or use the share of water to which they are entitled, solely upon the west side of the river; but they say that they and the other owners of the farm De Doorns are entitled, subject to the conditions mentioned in the said award, to use the water to which they are entitled, either upon the east or the west side of the said river.

4. They say that they and the other owners of De Doorns are entitled, for the general purpose of their farm, to lead as much water from the river on the east side thereof, as they at the same time shall divert into the said river from the furrow on the western side,

5. They deny the allegations in the 9th paragraph; and they say especially that they have never let water from the river on the eastern side, without at the same time diverting from the western furrow into the said river for the use of the plaintiffs an equivalent quantity of water; nor has such an occurrence happened with their knowledge and consent.

6. As to the 10th paragraph, they say that if at any time the water of the said stream has not reached the homesteads of the plaintiffs, such failure has not been caused by any unlawful act on the part of the defendants. Subject to the above they deny the allegations in the said paragraph.

Therefore, they pray that the plaintiffs' claim may be dismissed with costs.

The replication was general.

On these pleadings issue was joined.

Mr. McGregor (with him Mr. Buchanan) for the plaintiffs.

Mr. Schreiner, Q.C. (with him Mr. Benjamin), for the defendants.

The facts appear sufficiently from his lordship's judgment.

The Acting Chief Justice said: The rights of the parties have been already determined by the award of the arbitrators, which was made a rule of Court, which resulted from the action between the former proprietors of these three farms. It is the application of that award to the user of the water by the present proprietors that we have to deal with in this case. Before 1849 the then proprietor of the upper farm De Doorns, had a farm on the river De Doorn near his upper boundary. At this dam all the water was taken out of the river by means of a furrow which cut off a loop of the river and rejoined the stream a little lower down. For the purposes of this case, this furrow may be regarded as the course of the river. The arbitrators, in 1849, fixed a spot on the stream at which by their directions a properly masoned dam was constructed, having four equal sized outlets, one on the west side of the river, two in the main channel, and one on the east side of the river. One of these outlets was always to remain closed, so that the water was thus divided into three equal parts. By the award one-third of the water was always to flow in the furrow on the west side of the river for the use of the upper dam, and the whole and sole right to this furrow was given to the then defendant Du Plessis, as owner of the upper farm, De Doorns. The remaining two-thirds of the water was to flow down the main stream, and was allotted to the proprietors of the two lower farms In het Midden van De Doorn, and Aan de Doorn River now represented by the plaintiffs. On the western furrow was a mill, then owned by Du Plessis, which explains why the one-third water in this furrow should be allowed always to flow. The award then went on to say, "that in order and for the purpose of enabling the then defendant Du Plessis to irrigate corn and arable lands situated on the east or left side of the river, he shall be entitled to turn off and use for this purpose so much water from the river, conducting the water of the lower proprietors as he the said Du Plessis shall, at the time he so uses the said water, allow to run over his mill and into the river for the use of the said lower proprietors." So that whenever the upper proprietor required water on the eastern side of the river, he might take at Rabie's Dam as much of the water allotted to the lower proprietors as he returned to the river out of his furrow on the western side, after such water had passed his mill. In this way there would always be two-thirds of the water flowing down in the main stream. This arrangement was simple enough as long as the upper farm remained in the possession of one person, but since then the farm has been subdivided among a number of co-proprietors, some of whom use only the western furrow and some the eastern. These co-proprietors have made several contracts between themselves as to their turns of water-leading, but to these contracts the lower proprietors are no parties, and are not bound thereby. It is clear from the evidence, that the use of the water by the upper proprietors has been such as to deprive the lower proprietors of a portion of their two-thirds of the stream. The question is who is at fault, and who is answerable for this deprivation. The defendants and the Du Toits, who are co-proprietors with them, formerly used the eastern furrow. The Du Toits recently abandoned their use of this furrow and confined their use to the western furrow, and disputes have arisen between them and the defendants. The defendants allege that the Du Toits are the chief culprits, and complain they are not joined as co-defendants. It is quite possible, and seems very probable, that others of the upper proprietors have contributed in depriving plaintiffs of their water, and this may affect the question of damages, but it is no answer to the complaint the plaintiffs make against the defendants. The plaintiffs have fixed upon two occasions when they have shown that the defendants were taking water by the eastern furrow when no equivalent was being returned from the western furrow. The defendants contend that it is their co-proprietors, and not themselves who are answerable for this. But the construction I put upon the award is, that as regards the lower proprietors,

no upper proprietor can take any portion of the two-thirds water allotted to the lower proprietors, and lead it out on the eastern side, unless such upper proprietor sees that at the same time the lower proprietors get an equivalent quantity returned to them out of the western furrow. By the masoned dam there was an automatic division of the water, and when this division is interfered with, the onus is thrown on the upper proprietor so interfering, to see that the lower proprietors are not thereby deprived of any of their water. It is difficult to see how the plaintiffs could join as co-defendants any of the upper proprietors who only used the western furrow, which by the award was to have a perpetual flow. As the use of the water on the eastern side is optional and no time fixed by the award when water may be taken on that side, it would be altogether unreasonable that the lower proprietors should go up the stream and see that their quantity of water was coming down to them whenever any upper proprietor avails himself of the option so given. As the defendants led out water on the eastern side of the stream when at the same time they did not see that an equivalent quantity was being returned out of the western furrow, and as they practically claim the right to do so during their turn of water-leading, an interdict will be granted. The plaintiffs, however, claim more in the interdict than I am of opinion they are entitled to. They ask that the defendants shall be interdicted from using water on the eastern side of the river for irrigating their vineyards, and shall be confined to the irrigation of corn lands only. It is true "corn or arable lands" are mentioned in the award, but I do not think that it was intended to put a restrictive interpretation on those words. One-third of the water was given absolutely to the upper proprietor for the purposes of irrigation, and I am not prepared to interdict the irrigation of the vineyards under this clause. As to damages, the defendants can only be held answerable for such injury as can be traced to their acts. All that has been proved is, that on two occasions they wrongfully used this water, so that the damages in this case will only be nominal. Judgment will therefore be for the plaintiffs for an interdict, and for £5 damages. As to costs, the plaintiffs have not succeeded to the full extent of their claim, but they have been substantially successful, and therefore the judgment will carry costs. This will, however, not include the expenses of those witnesses called by the plaintiffs to give evidence solely with respect to the irrigation of the vineyards.

[Plaintiffs' Attorney, Van der Byl; Defendants' Attorneys, Van Zyl & Buissinné.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and the Hon. Mr. Justice MAASDORP.]

MCLOUGHLIN V. LIBERMAN AND ANOTHER. { 1897. June 18th.

Interdict—Party wall—Ancient lights.

This was the return day to a rule *nisi* granted in Chambers operating as an interim interdict restraining the respondents, Messrs. Liberman & Buirski from the further making of holes in a certain wall, alleged to be a party wall.

The rule was granted upon the following petition by Patrick McLoughlin:

1. The petitioner is the registered owner of certain piece of ground with the buildings thereon, in Long-street, Cape Town, being portion of Lot 80, Block 4, No. 12, and now marked as No. 1.

2. That Hyman Liberman and Abraham Buirski, carrying on business as Liberman & Buirski, are the registered proprietors of Lot No. 4, adjoining petitioner's premises, and being at the back thereof.

3. That a party-wall, common to both proprietors, separates the said properties.

4. That Lot No. 4 was only acquired recently by the said Liberman & Buirski.

5. That since they acquired the said Lot No. 4, they have been the cause of great trouble, loss, and inconvenience to your petitioner by excavating on Lot No. 4, whereby the party-wall has settled, and they have also repeatedly broken through the party-wall and knocked holes therein, whereby the said wall has been further injured.

6. That petitioner has repeatedly effected repairs to the said wall and blocked up the holes, but the said Liberman & Buirski have broken through the wall as aforesaid, the last occasion being on the 17th instant.

7. That petitioner has consulted Mr. Ransome the architect, who has examined the said wall. He annexes hereto his report, marked A.

8. That petitioner has caused a letter to be written to the said firm warning them not to cause any damage to the said wall, but the said firm are acting in disregard thereof.

9. That besides the loss and damaged petitioner is constantly sustaining, the action of the said Liberman & Buirski tends to put him to great inconvenience, and he is at present deprived of the privacy to which he is entitled, the said holes looking into his yard and workshop.

10. That unless the said Liberman & Buirski are interdicted from interfering with the said wall, great loss and damage will be sustained by petitioner, especially as the winter is rapidly approaching.

Wherefore your petitioner prays that your lordships may be pleased to grant an interdict, restraining the said Liberman & Buirski from in any way damaging the said wall and from knocking holes into the same, or from disturbing petitioner from the peaceful enjoyment of his property, and that the said Liberman & Buirski be ordered to pay the costs of this application.

Annexure A referred to in the petition was as follows:

I have examined the party-wall between Lot No. 1 and Lot No. 4.

This wall has been allowed to settle through work of excavation on Lot No. 4, and I advise that the owner of Lot No. 4 should be called upon to rebuild this party-wall in a substantial manner at his expense.

Certain holes which have been knocked through this wall, evidently for ventilation, I advise should be built up with brick and cement, and notice should be given to the owner of Lot No. 4, that he has no rights whatever over this wall, except as a party-wall, and the right of the down pipe from roof to discharge into yard of Lot No. 1.

(Signed) G. RANSOME, A.I.B.A.

The respondent deposed in reply:

1. I am a partner in the firm of Liberman & Buirski.

2. I annex hereto a copy of a transfer, and the diagram of my property adjoining the applicants, and would refer this Honourable Court to the conditions noted therein.

3. I deny that I have at any time broken through the party-wall, and knocked holes therein, as stated by the applicant in his petition. There are holes in the party-wall for the purpose of admitting light and air. These have been there I am told for years. The applicant on two occasions blocked up these holes, and I then caused the obstructions placed on the holes to be removed. I have not dealt with the party-wall in any other way, except in so far as the excavations hereinafter mentioned are concerned.

4. I use the property now in question as a produce store. If I am compelled to close the holes now in the party-wall, I shall be seriously inconvenienced, as I shall have great difficulty in getting air and light for my store.

5. The party-wall before referred to encloses one side of my store, and supports the roof of it. Any damage done to it would seriously affect my property. This wall is not of much value to the applicant. It forms the boundary of a yard in his property, but he has no buildings on it or adjoining it closely.

6. I admit having made certain excavations. When I bought the property it was and had been for years used as a stable by the Tramway Company. In order to render it possible to use the property as a produce store I was obliged to remove about four feet of earth in the inside of the store. I did not touch the foundations of the property in any way. They are much deeper than any excavations I had made. I had the foundations all plastered with cement when the excavations had laid them bare.

7. I am quite prepared to remedy any defects in the wall which are agreed upon by Messrs. Ransome and Parker. I have never had any opportunity of inspecting the wall properly, as the applicant has refused to allow the architect or myself to examine the side enclosing his yard.

8. If there has been any settling of the wall it is quite possible, it has been caused by the applicant allowing the water from his yard to ooze through the wall. I wrote to him about this in March last, as will be seen from the letters annexed hereto.

9. I annex hereto a report on the party-wall by Mr. John Parker, an architect.

10. I say that I have never annoyed the applicant in any way. I am perfectly willing to meet him in any reasonable way, but I cannot allow him to interfere with my lights.

The annoyance in this matter has really been caused by the applicant, who has tried to deprive me of my lights.

A further affidavit was filed in which a man, for eighteen years in the employ of the previous occupiers of respondents' property, stated that the holes for light and air in the wall, adjoining the property owned by petitioner were in the same position all the time he was in the said employ.

The petitioner in his replying affidavit denied that at any time since the commencement of his occupation in 1892 were there any holes in the wall.

He admitted having blocked up the openings made by respondents, but denied that the respondents would be deprived of light and air thereby, and alleged that the lights referred to in respondents' transfer deed are those looking into the passage, common to both properties and others, and alleged that his property would be damaged by reason of the fact that his privacy was destroyed, and that he would be prevented from extending his property.

Mr. Graham, for the applicant: It does seem extraordinary, at first sight, that there should be this discrepancy in the evidence, as to whether these holes were in the party-wall at a certain date. But this can easily be explained by the fact that the different deponents are not talking about the same wall. The tramway employé must be referring to the holes in the common passage. Several of our witnesses say that there never were any holes in the party-wall. We do not object to the holes in the common passage. It is much more probable that these are the holes the respondents' witnesses speak of. It would be a most extraordinary thing to have lights between the stable and the yard. Mrs. Day lived on the property from 1882 to 1889, and says there were no holes there then. We say the respondents made the holes, and they say they are necessary for their purposes, and therefore it is probable that they did put them there.

Mr. Searle, Q.C., for the respondents: Under the circumstances now disclosed this is not a case for an interdict regarding the closing of the apertures. There never was any dispute regarding the windows in the common passage. Mr. Matheson must be referring to the holes in the stable. Mr. Douglas' report is not on oath.

Buchanan, J.: If this were an action would not the onus be on you of showing that the holes were there originally?

Mr. Searle: It seems conclusive that when we came upon the premises the holes were there, and that they were afterwards built up; this appears from the correspondence. Mr. Parker says the holes are as old as the diagram.

The applicant, if he has a right, should be put to establish it by action. We do not propose to make any further holes; we should be quite satisfied if they are left as they are at present, pending an action. We are prepared to repair at our own expense whatever damage has been caused by us.

Buchanan, J.: Supposing this rule is made absolute there will be nothing to prevent the applicant closing the holes.

Mr. Graham: The respondents do not effect these repairs although they declare that they are willing to do so. Mr. Parker does not say that it is from the appearance of these holes that he thinks they are as old as the diagram. It is merely because he thinks they are mentioned in the diagram, whereas they are not.

The Court granted the application, with costs.

The Acting Chief Justice said: In this case there is a party-wall standing between the properties of applicant and respondents. In this party-wall the respondents have knocked certain holes. The applicant objects to this, and obtained an interim interdict restraining respondents from making further holes. The respondents now attempt to justify the making of these holes, on the ground that they are ancient lights reserved to them by their title deed. This is denied by the applicant, who shows that from 1882 to 1889, again in 1892, and in 1894, there were no holes in this wall. In reply the respondents produce the affidavit of one Matheson who was in the employ of the Tramway Company, which owned the property before it came into the hands of the respondents. It is not clear on these loose affidavits whether these are the holes in dispute, but even taking that to be so, the rights appear to be with the applicant in this case. However, we will not now decide this question absolutely. The disputed facts must be settled by action. We will make the rule absolute with costs, restraining the respondents from the further making of holes in the alleged party-wall. This leaves the applicant free to close these holes. If the applicant closes these holes, we will reserve to the respondents the right to bring an action to establish their alleged right. In the meantime the rule will be made absolute with costs.

[Petitioner's Attorney, P M. Brink; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and the Hon. Mr. Justice MAASDORP.]

WOLHUTER v. MADDISON. } 1897. June 21st.

Mandatory—Lien—Husband's liability—Separation—Misconduct of wife—Advances to wife—Knowledge of lender—Recovery from husband.

W. sued M. (1) for an account of moneys received, and disbursed by the latter on W.'s account, and (2) for delivery of all deeds and documents in his possession.

M. annexed to his plea an account showing a balance against plaintiff; the amount of this balance he claimed in reconvention. It was alleged that

the only document belonging to W *in his possession was a lease of certain sheep entered into between* W. *and* V.; M. *being in the habit of receiving the moneys on* W.'s *behalf.*

M. *claimed the right of lien in regard to the deed of lease for payment of the balance shown in the account annexed to the plea: which balance was arrived at by virtue of claims against* W. *for moneys advanced to* W.'s *wife at a time when she was separated from her husband, and when* M. *had been informed by* W. *that he had ordered her out of his house for her misconduct, and that he intended to sue for divorce.*

W. *did subsequently sue for and obtain a divorce.*

The Court held that *there was no right of lien vested in* M., *and that* M. *was not entitled to claim from* W. *payment of the amounts advanced to* W.'s *wife at a time when she had no implied authority to pledge her husband's credit; and that* M. *having knowledge at the time of the separation, and of the husband's repudiation, made the advances at his own risk.*

This was an action brought by Andreas Jacobus Wolhuter against Thos. W. Maddison for an account of moneys received and disbursed by the latter, and for delivery of documents.

The plaintiff's declaration was as follows:

1. That plaintiff lives at Beaconsfield; the defendant resides at Beaufort West.

2. The defendant has for some years past represented the plaintiff at Beaufort West under general power of attorney, and has received and paid money for him; as his agent has had charge of certain sheep, the property of the plaintiff; has arranged for leasing the said sheep, received the rent for them, invested money for the plaintiff, and generally managed and transacted his affairs at Beaufort West aforesaid.

3. The defendant from time to time rendered statements of account to the plaintiff, showing his money transactions on plaintiff's behalf, and the said accounts were accepted as satisfactory.

The last of such accounts was rendered in or about the month of June, 1895, and in or about the month of December, 1896, the plaintiff cancelled the said power of attorney.

4. It has become and is the duty of the said defendant to render to the plaintiff a statement of account showing all moneys received and disbursed by him between the months of June, 1895, and December, 1896, supported by proper vouchers.

5. After due settlement of the balance of the said account when debated it is further the duty of defendant to hand up and deliver to the plaintiff all deeds and documents belonging to the plaintiff, and now in the defendant's possession, and also to render an account of all sheep entrusted by plaintiff to him, and to deliver up any of the said sheep which are in his possession or under his control.

6. Notwithstanding the premises the defendant wrongfully neglects and refuses to render to the plaintiff a due statement of account as aforesaid, supported by vouchers, or to hand up the deeds and documents aforesaid, which are in his possession; or to deliver or account for the sheep belonging to the plaintiff which are in his possession or under his control.

The plaintiff claimed:

(*a*) A true and correct account supported by vouchers of all moneys received and disbursed by the defendant on account of the plaintiff between the months of July, 1895, and December, 1896, inclusive.

(*b*) Payment of any balance which may be found due to the plaintiff after debate of the said account.

(*c*) Delivery of all deeds and documents belonging to the plaintiff which are in defendant's possession, and an account of all sheep entrusted to his care the property of the plaintiff, and delivery of such of them as may be under defendant's control.

(*d*) Alternative relief with costs.

The defendant's plea was as follows:

1. He admits paragraph 1 of the declaration.

2. As regards paragraph 2, he denies that he ever held any written power of attorney for plaintiff, but he admits that he was asked by plaintiff to receive certain moneys from time to time on his behalf, and to transact other business for him, and that he consented so to act for and on behalf of the plaintiff, and did act without making any charge for commission.

3. In or about 1886, the plaintiff was possessed of about 100 sheep which he hired to one Verster, and the plaintiff requested defendant to receive the hire on his behalf, which defendant consented to do.

4. In or about 1892, the said Verster terminated the lease, whereupon at the plaintiff's request one Jacobus Olivier was substituted for Verster as lessee by the defendant, and thereu-

after on January 28, 1896, one Nicolaas Olivier was substituted upon the same terms for Jacobus Olivier.

5. The defendant continued to receive the rents, and from time to time remitted them to plaintiff.

6. Defendant denies that he ever invested any moneys on plaintiff's behalf, and says that he has duly accounted to plaintiff for all moneys received by him on plaintiff's behalf.

7. He admits the allegations in paragraph 3, save that he denies that he ever held any power of attorney from the plaintiff.

8. As to paragraph 4. he says that he has rendered to plaintiff an account of moneys disbursed by him on plaintiff's behalf, and he annexes hereto an account showing a balance due by plaintiff to defendant of £67 9s. 7d.

9. As to paragraph 5, he says that he has no deeds or documents in his possession belonging to plaintiff, save the lease hereinbefore referred to.

10. He denies that he is liable to deliver any sheep to plaintiff, and says that none were entrusted to him.

11. He denies the allegations in paragraph 6, and says that he is willing to hand up the said lease on payment of the said balance of £67 9s. 7d.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

And for a claim in reconvention the defendant (now plaintiff) says:

1. He craves leave to refer to the matters above pleaded.

2. Between August, 1895, and December. 1896, the defendant in reconvention became indebted to the plaintiff in reconvention in the sum of £67 9s. 7d. for moneys disbursed for and on behalf of the defendant as more fully appears from the account annexed marked A.

3. The defendant has neglected and refused to pay the said amount or any portion thereof, though requested so to do.

The plaintiff in reconvention claims payment of the said sum of £69 9s. 7d., with interest and costs.

The account annexed showed among other things payment of an account to Cleghorn & Harris (£11 7s. 7d.); cash advanced Mrs. Wolhuter (£5), and four months' house rent (£36 4s.).

For a replication the plaintiff admitted that the defendant rendered the account annexed, but denied its sufficiency, truth, and accuracy, and while admitting the correctness of the claim for £8 18s. 7d., disputed the remainder of the account (viz., the amounts specially detailed above). The plaintiff denied that the defendant was authorised to make the payments alleged and disputed, they being moneys paid and advanced for and on account of plaintiff's wife, at a time when she was wrongfully living apart from him to defendant's knowledge, and when defendant knew that plaintiff was unwilling that such payments and advances should be made.

Otherwise the replication was general.

The plea in reconvention admitted liability for the £8 18s. 7d., and tendered the said sum with costs to date but denied liability for the remainder.

The rejoinder and replication in reconvention were general.

On these pleadings issue was joined.

Mr. Innes, Q.C., for the plaintiff.

Mr. Searle, Q.C., for the defendant.

For the plaintiff the following evidence was called.

John Johannes Michau stated that he was an attorney of the High Court and partner of Haarhoff, and was plaintiff's attorney, and was so in July, 1896. On July 28. 1896, defendant called at witnesse's office and said his mission was to see if a reconciliation could not be brought about between plaintiff and his wife. Witness told him plaintiff had strong evidence against his wife, and that there would be no chance of reconciliation. and he had better leave matters alone. He left to see plaintiff. Witness did not go into the details of the evidence. Summons was issued on 13th October, and the case went to trial on 1st December. Witness was collecting evidence in the meantime. At the trial the adultery was admitted, and the trial was shortened. Plaintiff obtained a divorce and damages against the co-respondent. In November, the day before the trial witness drafted a telegram from plaintiff to defendant.

Andreas Jacobus Wolhuter, the plaintiff, stated that he lived at Beaconsfield. Maddison used to manage his affairs at Beaufort West. He is an old friend. He rendered accounts from time to time which were sent in to June, 1895. There is no dispute up to that date. Witness had sheep at Beaufort West on lease. After June, 1895, witness received no account. These were sheep he had had for years. They were first let to Verster and then to Olivier. Defendant managed the matter for plaintiff. Defendant never charged plaintiff commission. Witness never knew of sheep being let to Nicolaas Olivier. He left the matter entirely with defendant. He heard now that Nicolaas Olivier took them over on 28th January, 1896. Witness never saw the lease. He knew of no other documents in defendant's possession. Plaintiff's wife was at Somerset and returned to

Beaconsfield in April, 1896. In July, 1896, witness broke the journey at Beaufort, and saw defendant, and told him about witness's wife's conduct. Witness said he would never live with her again. He said nothing about coming up to Beaconsfield. Witness received further information about his wife relating to Lippiatt, who was co-defendant. His wife left his house on 22nd or 23rd July, 1896. He had seen Maddison in Beaufort just before this. Defendant came up to plaintiff's house at end of July. Plaintiff's brother and plaintiff himself were sitting on the stoep. Defendant tried to reconcile plaintiff and his wife. Plaintiff said "Don't you interfere; you will make things worse." He came again, and again urged reconciliation. Plaintiff said he would make things worse, that he had it in black and white that his wife had been unfaithful—having found a letter from Lippiatt. There was a picture of plaintiff's wife in the drawing-room. Witness took defendant to it and asked him to take it down. It was a portrait on glass. Witness smashed it up in his presence and said it would be just as possible for witness and his wife to come together as to put the picture together again. Defendant left and plaintiff did not see him again. This was end of July o beginning of August. Witness received letter 19th August; there was no reference to his wife in it. Plaintiff heard from his brother towards end of November that Maddison had made certain advances. Witness sent the telegrams put in. He was much surprised. Defendant had never asked witness for authority to advance money to his wife. He had before asked defendant to make advances to his wife. Defendant made an advance to plaintiff's sister and wrote to witness at once. Witness paid it. Witness saw defendant again about the middle of December, 1896. After the action he asked defendant to give up the sheep contract and settle up. He said, "Unless you pay my account I will not do so." Witness said, "I have not any account from you." Witness got the accounts now annexed to pleadings. Defendant said unless witness paid he would give witness no information. This was at defendant's shop.

Cross-examined: Witness had known defendant thirty-five years, and had been on terms of great intimacy—being connected by marriage. Plaintiff had been married about ten years. He usually stayed with defendant when in Beaufort. He did so last in August, 1895. Defendant called plaintiff's wife by her christian name. For years past if plaintiff wrote or telegraphed to Maddison, he used to advance money for any member of plaintiff's family.

Witness made the contract with Verster, and signed it. But he never gave the cessions. Verstér sometimes wrote to plaintiff and sent his letters to defendant. Witness knew defendant had let the sheep to one of the Oliviers, but did not know which. He was quite satisfied with defendant handing the sheep over. He did not authorise the payment to Cleghorn & Harris. He knew nothing of his wife incurring a debt in May. An account was sent to his brother in August. His wife never communicated with him about it. He knew his wife was pregnant in May. His wife returned to Beaconsfield about the end of May. She finally left his house in July. From July to December she lived in Kimberley with the children. She lived one month in a boarding-house with the children. Witness paid the board of the children. He paid nothing for his wife after July. He paid old accounts for his wife, and he paid accounts for his children. He saw the children from time to time. His wife went to their next-door neighbour, and she afterwards got clothing and bedding. They were married by ante-nuptial contract, and he settled some shares on her. They varied in value. He allowed her £20 a month. The house and furniture were settled also on her. Defendant came up at end of July, and saw witness two or three times. Plaintiff remained on good terms with defendant after he left Kimberley. After December witness got the children, and went to Beaufort. Mrs. Wolhuter had been living with them at Kimberley. He knew his wife was confined. He did not claim that child. He denied the paternity.

Re-examined: He recovered nothing from Lippiatt.

Willem Johannes Wolhuter, brother of plaintiff, stated that he lived at Beaconsfield. He gave his brother information about Lippiatt and plaintiff's wife. After that in July, he saw defendant. He came round, and witness told him the best thing was to leave matters alone. Nothing was said about the hiring a house. He told defendant about Lippiatt. They saw Lippiatt and witness said he was the man. Witness was present at the second interview. He was down at the Strand, he gave her money for his brother.

This closed the plaintiff's case.

For the defence.

Thos. Watson Maddison, the defendant, stated that he lived at Beaufort West, and was intimate with plaintiff, and acted for him in all sorts of transactions for many years as a friend. The lease came into witness's possession a long time ago. He got it from Pritchard, who was then agent of plaintiff. Since June, 1895, witness had not received any rent. From March

1895, Olivier gave up the sheep. Plaintiff left it in witness's hands, and the latter did the best he could. The sheep were never in his possession. In August, 1895, there was a conversation as to the sheep. Defendant's son handed the sheep over to N. Olivier, the father of Jacobus, and living on the same farm. The rent was to begin in March, 1896. In December, 1896, defendant's power was cancelled, and he never received any more rent. It was tendered to him, and he refused it. He had no other documents except the lease. He gave defendant an account in December. The account put in, is a copy of the account rendered. In July, plaintiff told defendant at Beaufort West there was unpleasantness with his wife, and he would make it hell on earth for her. Defendant went up to Kimberley, as plaintiff's wife telegraphed for him. He saw plaintiff three times. He got into plaintiff's house by a fluke. Plaintiff was not sober. He would not agree to anything. His wife was then living with Holtzhausen with the children. Defendant paid the item of £11 7s. 7d. Mrs. Wolhuter wrote to him asking him to pay it. It was on September 9, 1896. Mrs. Wolhuter was in a boarding-house, as she was expecting her confinement. The agent asked if defendant would stand security and witness consented. Mrs. Wolhuter asked witness to advance her a little money, which he did, giving her £5 He had been accustomed to make advances to her even before her marriage. Plaintiff authorised him to pay £3 a month to plaintiff's sister, which he did. He hoped and expected plaintiff and defendant would be reconciled. He was very friendly with them. He did not think plaintiff would repudiate the debt. Witness had the house still on his hands. Witness paid the amounts on the account.

Cross-examined: When he got the letter of separation he knew Lippiatt was the co-respondent.

Re-examined: He did not believe Mrs. Wolhuter was guilty.

Jacoba Hendrina Wolhuter, plaintiff's wife, stated that she was married to plaintiff about ten years. She left her husband in July, 1896, being turned out at night without any means. She took her children with her, she was destitute, she hired a house as she was going to be confined. Her husband would not agree to her hiring the house. She got the £5 to pay the hospital nurse. She communicated with her husband before she incurred the debt Her husband retained the management of the separate estate.

Cross-examined: "George" is Lippiatt's name. He came on business to the house witness lived in.

George Maddison, defendant's son, stated that at the end of 1895 he had the contract of lease handed to him, and he went out to young Olivier's and took the sheep over from the son and handed them over to the father. The sheep were not in witness's possession. That is all witness had to do. He was willing to take charge of the sheep till a new lease could be got.

Cross-examined: Nicolaas had not paid witness any rent. Witness never communicated with plaintiff.

This closed the defendant's case.

Mr. Searle Q.C.: The wife was left by night—destitute—she appealed to defendant. Anyone who advances money to a wife under these circumstance is entitled to recover from the husband. She had to live somewhere. He knew she had this house at Kimberley. She had the children under her control. He never attempted to get the custody of them. He must have known that some one was supporting them. The advances were made *bona fide* by the defendant, and to refuse on this ground to repay them now is a discreditable defence to take. In *Coetzee* v. *Higgins* (5 E.D.C., p. 352) the Court held the husband liable for a midwife's charges for attending his wife, after she had been forced to leave his house; it was held these were necessary. There is no difference in principle where the wife is living apart from her husband. I can find no authorities in Roman-Dutch law for a difference. The husband, *Stante matrimonio* is compelled to provide his wife with necessaries. Does it make any difference that at that date he had charged her with adultery?

Buchanan, J.: Is not the principle that a wife has an implied authority to pledge her husband's credit for necessaries?

Mr. Searle: Only because they are husband and wife; not because he is willing that she shou'd; to take away the authority there must be some express notification that he will not be responsible for any debts of his wife. Nothing of that kind was said, and the defendant might very reasonably presume that the plaintiff would be willing to pay him for what he expended upon his wife. (*Voet* 23, 2, 46), lays down the general law relating to the duty of the husband. Unless he had interdicted his wife publicly, he is liable for necessaries for household use. The interdict must be by order of Court. The money advanced by defendant was spent on necessaries; it was necessary that she should live in a house and the hospital nurse was a necessary. Mr. Wolhuter never made any public notification. The marriage was still in existence, and she was entitled in

law to pledge his credit, no matter where she lived. He has the administration of the whole property in his hands, and therefore he is liable. The landlord could have sued Wolhuter and Mr. Maddison is in the same position as the landlord. *Sande, Fris. Decis.* (*II.* 4), gives the circumstances under which a wife may bind her husband. One of the circumstances is nourishing and sustaining the family—provided it is reasonably necessary.

Buchanan, J. : All the authorities say that he is liable for necessaries only while she is his wife and living with him. Can he be liable in this case after he has said he would not be liable for her debt ?

Mr. Searle : But he never gave notice that he would not be liable for her debt. I can find nothing in Roman-Dutch law to show that if the parties are living apart and no interdict has been obtained that a party providing necessaries cannot recover. *Censura Forensis II.* (I, II, 7). As to Cleghorn & Harris's account, that is on a different footing but a stronger one. That was a debt incurred when the parties were living together, and at a date when no separation was thought of. Wolhuter was liable. Maddison was his general agent to deal with his affairs. They say he had a general power of attorney. He had not a written one, but supposing he had, Wolhuter was liable. The wife says she had his express authority to incur liability. The fact that Maddison was a general agent, and paid the account *bona fide*, gives him power to recover it. Although it was paid after the parties were living apart, that makes no difference. The debt was incurred before, and he did not require a special authority to pay it. Wolhuter does not take up the position that Maddison could do nothing without special instructions. He says "I adopted everything he did." *Fraser on Husband and Wife* (page 853). A wife can only get decrees for a limit until proved guilty. The Court has frequently granted such decrees. *Burge* (Vol. I., 226). All the equity of the case is with defendant, because he has done all this with the best of intentions towards Wolhuter. He has not got a penny of advantage out of the matter.

The Acting Chief Justice, in giving judgment, said : This action was brought by the plaintiff for an account of all moneys received and disbursed on his account by the defendant, who was formerly plaintiff's agent at Beaufort West. The defendant annexed to his plea an account showing a balance against the plaintiff of £67 9s. 7d. In replication the plaintiff admitted items amounting to £8 18s. which he tendered with costs to date, but disputed the rest of the account. The plaintiff also claimed a delivery of all deeds and documents belonging to him which were in the defendant's possession. It appeared that the plaintiff had leased certain sheep to one Verster, who paid the rent to defendant. Subsequently others were substituted for the lessee and the sheep were now in the possession of one Olivier. The only document belonging to plaintiff which the defendant had was the lease of these sheep, and defendant claimed a lien on this document till paid his account. No such lien, however, exists, and defendant must be ordered to give up this lease to plaintiff. This disposes of the claim in convention. The defendant claims in reconvention the amount of his account. The items to which plaintiff objects in this account are three in number, namely, an amount paid by defendant to Cleghorn & Harris, a cash advance made to Mrs. Wolhuter, and house rent paid for Mrs. Wolhuter. Mr. and Mrs. Wolhuter were friends of the defendant, and he acted very kindly and with generosity to Mrs. Wolhuter, but the question is whether he has any legal claim against plaintiff for the moneys paid for his wife. It appears that in consequence of his wife's misconduct, plaintiff told her to leave his house, which she did, taking her children with her. Defendant went to Kimberley and tried to reconcile the parties, but was told by plaintiff that it was no use, and that he had clear proofs and intended to proceed for a divorce. This plaintiff did, joining a co-respondent in the action, and eventually obtained a divorce for adultery, custody of the children, and damages against the co-respondent. After the interview with plaintiff, but before the divorce was granted and while the wife was living apart from her husband, the defendant at her request advanced her money, and paid an account which she had owed before the separation to Messrs. Cleghorn & Harris. The wife hired a house, the rent of which defendant at her instance guaranteed. The defendant said he did not believe that Mrs. Wolhuter was guilty. But as he had been informed of the charge, which was afterwards established, and of plaintiff's repudiation and separation from his wife, he paid these amounts at his own risk. The wife had at the time no implied authority to pledge her husband's credit to defendant. As to Cleghorn & Harris's account the plaintiff may or may not be made responsible yet for that amount, if a cession of action is obtained, but we cannot hold in this case that this was money paid at the instance and request of plaintiff. Judgment will be for plaintiff in convention for the delivery of the lease; and for the defendant,

plaintiff in reconvention, for £3 18s. with costs to date of tender, defendant to pay the costs incurred after that date.

Mr. Justice Maasdorp concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorney, C. C. Silberbauer.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and Hon. Mr. Justice MAASDORP.]

MARICO BOARD OF EXECUTORS v. AURET. } 1897. June 24th.

This was an application by the trustees of the Marico Board of Executors for a commission to take the evidence on commission of certain persons at Zeerust, Marico District, Transvaal, in connection with an action pending against Elsie Maria Auret individually, and in her capacity as executrix in the estate of the late Charles Pritchard Auret.

The Court granted the application, notice to be given to the respondents of the names of the witnesses, to be examined ten days before the day fixed for the sitting of the commission. Mr. Advocate Stoney appointed commissioner.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

PINKER V. GILL. { 1897. June 24th. „ 25th.

Trespass—Lawful business—Malicious arrest—Reasonable and proper cause.

P., a builder and contractor, agreed to erect certain houses for G. Thereafter, as P. alleged, additional work was performed in connection with the building for which P. claimed extra payment.

For the purpose of coming to a settlement with G., P. called at G.'s house, as he had previously done, to request payment of an alleged balance due to him.

G. called a policeman and ordered him to arrest P., and on the constable refusing to do so without a written order, G. gave such a written order. Thereupon P. was arrested and taken in custody along the principal public street to the lock-up where he was detained in custody till bail was found. On the matter coming before the Resident Magistrate for trial, P. was acquitted. At the trial G. conducted the case and cross-examined the witnesses.

The Court held *that G. was responsible for the arrest, that the arrest was not made on reasonable and proper grounds and awarded damages to P.*

This was an action brought by Charles Pinker against James Gill, to recover £48 15s., balance of an amount due for the erection of a house and £500 as damages for malicious arrest.

The plaintiff's declaration alleged:

1. The plaintiff is a builder and contractor, and resides at Muizenberg. The defendant also resides at Muizenberg.

2. In or about the month of October, 1896, the plaintiff agreed to erect two semi-detached houses for the defendant at Muizenberg for the sum of £320, which the defendant agreed and undertook to pay the plaintiff. The houses were to be erected according to plans and specifications prepared by Henry J. Smith.

3. In or about the month of December, 1896, the defendant requested the plaintiff to make certain additions to the said houses, and in consideration therefore agreed to pay the plaintiff a further sum of £175, and to grant him the lease for a period of twelve months of a certain piece of land owned by the defendant at Muizenberg.

4. Thereafter the defendant requested the plaintiff to do other and further work in connection with the said buildings, and to perform certain work in and upon the defendant's dwelling-house, the defendant agreeing to pay for the said work as "extras."

5. The plaintiff forthwith proceeded to execute the said work, and annexes an account to this declaration, from which it appears that the defendant is indebted to the plaintiff in the sum of £48 15s., being £15 due upon the contracts referred to in paragraphs 2 and 3 of this declara-

tion, and £33 15s. due under the contracts referred to in paragraph 4 of this declaration, which the plaintiff says are fair and reasonable charges for the work and labour performed and material supplied.

6. The plaintiff has duly performed his work under the said contracts and has demanded payment of the said sums of £15 and £33 15s., but the defendant wrongfully and unlawfully refuses to pay the same or any portion thereof.

The plaintiff prays.

(*a*) For judgment in the said sum of £48 15s. as aforesaid.

(*b*) Alternative relief.

(*c*) Costs of suit.

7. The plaintiff further says that on or about the 21st day of April, 1897, at Muizenberg, the defendant wrongfully, unlawfully and maliciously, and without reasonable and probable cause, gave the plaintiff in charge of a constable and wrongfu ly, unlawfully, falsely, and maliciously and without reasonable and probable cause charged the plaintiff with committing the crime of trespass and caused the plaintiff to be imprisoned at a police office for three hours, and thereaf er upon the 23rd day of April, 1897, the defendant caused the plaintiff to be charged before the Resident Magistrate of Simon's Town with the said crime of trespass, but the said Magistrate after hearing the said case discharged the plaintiff.

8. The plaintiff has, by reason of the above conduct of the defendant been injured in his character and has sustained damages in the sum of £500.

The plaintiff prays:

(*a*) For judgment in the sum of £500 as and for damages as aforesaid.

(*b*) Alternative relief.

(*c*) Costs of suit.

The account annexed to the declaration was as follows:

Professor Gill, debtor to Chas. Pinker, builder, Muizenberg.

To amount due on original contract	£320	0	0
„ „ „ supplementary contract	175	0	0
„ hand rail as agreed	9	0	0
„ extra hand rail down steps with gate to same	3	10	0
„ two corner cupboards with folding doors, £1 5s. each	2	10	0
„ eight corner cupboards without doors at 10s. each...	4	0	0
„ two folding tables at £1 each ...	2	0	0
„ filling up back yards as agreed ..	10	0	0
„ sixty feet run of shelving in pantries	2	10	0
To colouring bed room at your own house (labour only)	0	10	0
„ repairing roof at your own house	0	15	0
	£523	15	0
By cash received on account ...	480	0	0
	£48	15	0

The defendant's plea and claim in reconvention were as follows.

For a plea to the declaration, the defendant said:

1. He admits the first four paragraphs but, save as hereinafter set forth, denies paragraphs 5 and 6; but he craves leave to refer to the contracts themselves for the terms thereof.

2. He has paid to plaintiff the sum of £519 7s. 6d. in respect of the contracts in paragraphs 2 and 3 referred to and the additional work in paragraph 4 referred to.

3. He denies the correctness of the account for £48 15s., inasmuch as:

(*a*) There is no balance due on the contract.

(*b*) It was agreed that the prices of the hand-rail should be £6 and £1 respectively; not nine pounds and three pounds ten shillings respectively.

(*c*) There is only 30 feet of shelving in the pantry, and not 60 feet; the price of the said shelving should be reduced to £1 5s.

(*d*) The plaintiff is not entitled to recover the sum of fifteen shillings for repairing roof, as the said work was not properly done.

There will therefore be the sum of £1 17s. 6d. due by the defendant to the plaintiff when the work under the said contracts is properly completed, and according to the plans and specifications.

4. The work is at present incomplete, according to the plans and specifications, and improperly done in the following respects:

(*a*) The foundation walls are built in clay mortar instead of lime, and the brick piers in clay instead of in cement.

(*b*) The outside face of the stonework is not pointed as specified.

(*c*) The stoep wall is out of plumb and has given way, causing the stoep to crack.

(*d*) The floors of the closets are of wood instead of concrete, and one of the roofs thereof is unfinished.

(*e*) The sinks specified have not been supplied.

(*f*) The verandah has not been flashed with lead.

(*g*) Certain of the gutters are improperly constructed and fixed.

(*h*) Certain of the iron used is damaged, and in some cases the iron does not reach to the ground.

5. The value of the work to be done as aforesaid is considerably more than the amount due to plaintiff, as above set forth, and the plaintiff, although he has been called upon to complete the said work, has neglected and refused to do so.

6. As to paragraph 7, the defendant says that on or about April 21st, plaintiff came on to defendant's premises and refused to leave after having been repeatedly warned so to do, whereupon defendant called a constable and requested him to remove plaintiff from the said premises.

7. The said constable did so remove the plaintiff, upon a written charge thereupon made by defendant. He denies that he acted wrongfully, unlawfully and maliciously, or without reasonable or probable cause, or that he caused plaintiff to be imprisoned as alleged, and he denies the other allegations in the said paragraph, save that he admits that plaintiff was discharged.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

And for a claim in reconvention, the defendant, now plaintiff in reconvention, says:

1. He craves leave to refer to the matters pleaded in paragraphs 1 to 5 above.

2. The plaintiff, in reconvention, is entitled to call on the defendant, in reconvention, to complete the said buildings in accordance with the plans and specifications, or to pay him the difference in value of materials improperly used, as the case may be: the defendant has refused to complete the said buildings.

3. The defendant is further indebted to the plaintiff in the sum of £67 10s. in respect of penalties due under the contracts in paragraphs 2 and 3 set forth as therein provided, and for goods and materials belonging to the plaintiff used or destroyed by the defendant, and for repairs to work improperly done by the defendant, according to the account annexed marked "A."

The plaintiff, in reconvention, claims:

(*i*) That the defendant be ordered to complete the said buildings, or to pay to plaintiff the value of the work required to be done by him to complete the said building, and the difference in value in case of materials improperly used, as set forth in (*a*) and (*d*) of paragraph 4 of the claim in convention.

(*ii.*) Payment of the sum of £67 10s., with interest *a tempore moræ*.

(*iii.*) Alternative relief.

(*iv.*) Costs of suit.

Annexure A to the plea was:

Penalty for non-fulfilment of contract in time at 10s. per day.

Lower cottage, from December 18th, 1896, to 31st January, 1897 ...	£22	0	0
Upper cottage, from December 28th, 1896, to 5th March, 1897	33	0	0
Garden bench destroyed	1	10	0
Large bath destroyed	1	0	0
Stone taken from ground of plaintiff in reconvention	5	0	0
Repairs to be effected to stone tank	5	0	0
	£67	10	0

For a replication to the defendant's plea the plaintiff said:

1. He admits the allegations contained in subsections (*a*), (*b*), (*c*), (*d*), (*e*), (*f*) of paragraph 4 of the said plea, and says the said work was so executed at the request of the defendant, who desired the plaintiff to do other work in lieu thereof. With regard to the allegations in subsection (*c*), he says that the work upon the said wall was properly executed, but that the defendant negligently allowed a considerable quantity of water to accumulate at the base of the said wall, which caused the said wall to become out of plumb after its erection. The plaintiff says he warned the defendant of the accumulation of the said water, and requested him to take steps to prevent the same.

With regard to sub-secution (*f*) the plaintiff admits the facts therein contained, but says that he was not bound to flash the said verandah with lead. He admits that some of the iron does not reach the ground as referred to in subsection (*h*), but says he is in no way responsible for this.

2. With reference to paragraph 7 he admits that a written charge was made by the defendant, but he denies the other allegations in the said paragraph contained.

[Otherwise the replication was general.]

For a plea to the claim in reconvention the plaintiff said that he denied the allegations in paragraphs 1, 2 and 3, and prayed that defendant's claim in reconvention might be dismissed with costs.

The defendant's rejoinder was general.

On these pleadings issue was joined.

Mr. Graham (with him Mr Buchanan) for the plaintiff.

Mr. Searle (with him Mr. Molteno) for the defendant.

For the plaintiff the following evidence was called:

Charles Pinker, plaintiff, stated that he was a builder and contractor at Muizenberg. In October, 1896, he agreed to erect a house for

defendant for £320. There were no plans and specifications except rough ones supplied by plaintiff. Mr. Smith after the contract was made supplied specifications. He agreed to erect a house for defendant according to Smith's specifications. This plan was filed at the Municipal offices. Subsequently on 26th November, after the work had been begun, defendant proposed to make two houses instead of one, and said he would get Smith to make a plan. Plaintiff was to get £ 75 for this and the lease of a piece of land. The first contract was signed and then a supplementary contract was signed. There were alterations made thereafter from time to time. The outside verandah was done away with, and additions made inside. The plan put in shows the alteration. The kitchen was changed from W to V, a fire-place put in. The doorway was changed from W to V. The doorway was made and had been blocked up and a new doorway had to be made. A partition had to be taken down and put up at T. Other doors, and the steps, had to be altered. Plaintiff was asked to do all these. The whole outside was painted with two coats of paint, and that was not in the contract. All the alterations *were mad* with defendant's agreement and at his request. The alterations made were to take the place of work left undone. The use of lime instead of cement, and of clay instead of lime was agreed to when the second contract for £175 was agreed to, to bring down the cost. Defendant was there nearly every day and knew clay was being used Smith was there also. No objection was raised to the using of clay. These alterations caused delay, and also delay took place while the defendant was making up his mind what change should be made. Plaintiff borrowed £10 when he was building a house for defendant's son-in-law. He repaid it within a week. He subsequently borrowed £25 and repaid that. Plaintiff gave an I O U for the £10 When plaintiff repaid the £25 defendant said it was not very business-like to ask for the I O U. He said he could not lay his hands on it then, but would destroy it. £9 was a fair charge for the hand rail. He told defendant this would be £9. The amount for repairing house (15s.) was about six months ago. Plaintiff had no complaint about it. The wood would cost quite as much as concrete. It was agreed that the floors should be changed. As to the sinks—that item was one of the things set off against the alterations. He was not to "flash" the verandah. It was not on the weather side. Smith said it would not be at all necessary. It is not in the specification. Plaintiff would have charged it as an extra if he had done it. The gutterings were properly constructed. No complaint was made about them till this case arose. He used no damaged iron. The whole building was galvanized iron, and the sheets came below the floor but in places not down to the ground, as the ground is not level. The stoep wall was properly constructed. It is not out of plumb, but defendant allowed water to run under the foundation, and plaintiff was not answerable. Defendant did not complain till March. One house was finished early in January, and the other in February. Defendant went to Durban, and left a letter with Mr. Smith, which was shown to plaintiff by Smith. It said that Smith would look at the work while defendant was away, and if he thought plaintiff was entitled to the money he could give plaintiff an order or the defendant's attorneys. Smith looked at the work and gave plaintiff an order for £30. That was the last amount received. Plaintiff thought it left £15. When defendant came back, plaintiff asked him for a settlement. He said, "You know everything is not finished," but he made no complaint. A few days after defendant sent a letter. Plaintiff called several times at defendant's house, but did not catch him in On 2 st April plaintiff went to his house He had previously built a house for Mr. Smith behind defendant s. The ground leased to him is below Smith's, and between it and Captain Brooke-Smith's house. When plaintiff leased the ground defendant took him up the road leading up to Malcolm Smith. The road goes between defendant's and the Table View Hotel. The road is fenced on one side and partly on the other Plaintiff had the right to use the road passing the hotel by the lease and defendant gave it to him. On 21st April plaintiff left his house at five minutes past nine o'clock, and when he got to defendant's he saw him on the stoep. Defendant said plaintiff had not answered his letter. Plaintiff said, "I came several times and have come to answer it." Defendant said he wanted an answer in writing Plaintiff went back and wrote the letter produced, took the letter to defendant's house, saw the servant and asked for an answer. The servant said her master said he would answer it later. Plaintiff left and met defendant on the road. He said he would answer the letter through an attorney. Plaintiff said, "Then I will get my attorney to pay what you owe." He said, "Get off of my place and don't let me catch you here again." Plaintiff said," I came for my own and will come for a settlement." Defendant said he would soon settle that. He sent for a constable and gave plaintiff in charge. Plaintiff pointed out to the constable that he (plaintiff) was on his right of way. The constable would not take witness in charge

without a written charge, and defendant gave this writing. Plaintiff said to defendant, "If you lock me up I will make you sit up for it." Witness was taken by the constable from Muizenberg to Kalk Bay, and detained there two or three hours waiting for bail. The sergeant was away. King came and bailed witness out. Plaintiff was not in defendant's place altogether more than a quarter of an hour. All the conversation took place on the road. Witness was taken in custody through St. James to Kalk Bay; the police-station is near Kalk Bay Station. He suffered harm, people saw him in custody.

Cross-examined: Unfortunately, in this case he did not keep a record of what was paid to him. Defendant treated plaintiff very well as to money. He assisted witness twice with loans, when witness was building for defendant's son-in-law. Generally he saw defendant in his study. He paid defendant back the £10 within a week, out of the first moneys received from defendant's son-in-law. Witness and defendant talked about the good-for when the £25 was repaid. Witness gave a good-for for that also, and did not get it back either. He commenced Malcolm Smith's house late in August or beginning of September. It may have been in July. He had begun building the house for Malcolm Smith before signing this "good-for." He had no record about the £10. He did not consider defendant paid more than was due under the contract. Smith came to see how much witness was entitled to. Smith several times said he did not think the building could be done in time. Witness thought it could. The first time he saw Smith was after the foundations were in and the frame work was up. Defendant was urging to get the work done. People got into the first house on 16th January. The second house was occupied in February. Witness thought he had seen Smith only once in January while defendant was away. Defendant came back in February. Witness did the main part of the work in January. The alterations took time in December. Smith told him in his office that he was so disgusted with defendant locking witness up, that he washed his hands of it altogether. Both defendant and Smith complained of the delay. Smith only saw plaintiff once. He said he thought plaintiff would have had it finished by then. Plaintiff wanted more money than Smith paid. He did not ask Smith for more than he thought he was entitled to. There were a number of doorways altered. He considered the alterations were more in defendant's favour than in his own. He denied that Smith said he ought to make a considerable reduction for the alterations. Smith said something about putting a flashing along, and witness said it was not necessary. There was some talk about a flashing, but he did not undertake to do it. It would have been an extra. The foundations were finished when Henry Smith came down. The second contract was written some considerable time afterwards. The iron could not possibly go down to the ground as there was a space of three feet. Smith suggested some wood being put in there before the filling up was done. That has now been filled up. Plaintiff was not responsible for the iron not going to the ground. In March witness sent a man to see to the leak round the chimney. He did not employ Cox. He employed Rhymer. He did several little things as to bolts and the locks. He sent Rhymer to go and see if any doors wanted easing, and to do any little thing that might be wanted. He sent a man to see about the leaking after he got defendant's letter. Witness said he would endeavour to get some old pipes. He did not contract to do it. The fencing is not old or damaged iron. It is all new iron bought at Findlay's or Arderne's. He had no old iron. He took some stone from the hillside. Defendant said plaintiff could take what stone he wanted at 4d. a load. He paid defendant £2 10s. for it. He had none after. What he used he had from Malcolm Smith's. He never had a claim made for the beach, but witness was willing to pay for it. He built a stone tank outside this contract for £15. It was 18 months ago, and defendant paid for it at the time. He had nothing to do with the bath. He recollected promising Smith he would not charge for putting in the shelving. He made a mistake about that item and reduced it to £1 5s. The joists were 1½ inches thick at Smith's consent. There was no thought of any shelving then. On the 21st April, he was going home when he met defendant coming up from the road. He met defendant on the road. Defendant spoke first. Witness said he would come as often as he liked till he got paid. He may have said "and stay as long as I like." They were a few yards from defendant's gate. Witness had a right of way on that road. He stepped up to defendant and said, "I don't want to get out of it." He considered defendant had no right to order him away. The constable refused to take witness without a written charge, and witness said if defendant had him locked up witness would make him sit up for it. He was detained in the charge-office. He was not put in the cells. The handrail could not possibly be done for £6. It was cheap at £9. No price was agreed for the other. He put up a gate ordered by defendant. The gate is included in the £3 10s. He did not think anything was said about the gate at first.

Re-examined: Witness thought he drew the £30 two days after Smith showed him the letter from defendant. Smith came down on purpose and went over the whole building on that day. The work was done under defendant's guidance.

James Catmol, police constable at Kalk Bay, stated that he was on duty at Muizenberg on 21st April. Defendant came to him and said there was a man on his premises who would not leave, and he wanted witness to go up along with him. Witness asked where the boy was? Defendant pointed to plaintiff, who was standing in the middle of the road. Plaintiff said, "Remember, constable I am on my own right of way." Defendant said, "You want to get out of it in that way." Plaintiff said "No. He only wanted his money and he would come as often as he liked till he was paid." Defendant said he owed no money and said, "Constable, take that man in charge. Witness said he wanted a written charge. Plaintiff said he would make him sit up for it if he gave him in charge. Defendant went in and wrote out a charge, and witness took plaintiff in charge and took him to Kalk Bay. They went down the main road. Defendant was in custody about three hours in the police-station, till he was bailed out. He was brought before the Magistrate on the Friday after and was acquitted. Plaintiff behaved himself and did not speak loudly. He was in the road when witness took him in charge. The road was a sandy road then, it is being gravelled now.

Cross-examined: Plaintiff stepped a couple of feet, he was standing about three yards from witness. Plaintiff stepped out of where the traffic was to where witness was, but did not go under the fence. Witness did not see defendant again till the case came on. He would not let the plaintiff out till the sergeant came. He would have locked plaintiff up if the sergeant had not returned.

Re-examined: Plaintiff was not violent or aggressive. He was very quiet all through and never said an angry word.

Postea (June 25th).

Johannes Albertus Vixseboxse, said he had examined the buildings in question at Muizenberg, and he considered that they had been built according to specifications. He, however, did not approve of everything that had been done.

Henrique Clarkson deposed that he had not examined the buildings in question very carefully, but he had seen the plans and specifications of the building. He agreed that the prices of various pieces of work in the contract were low.

Cross-examined by Mr. Searle: He knew nothing about a special contract entered into between the parties.

This closed the plaintiff's case.

For the defence,

James Gill, the defendant, stated that he engaged the defendant to build a house for him at Muizenberg. The work was begun, and it was then decided to alter the plans so as to make the one house into two houses. A second contract was entered into. The plaintiff then asked for an extension of time, and the time was extended, and Mr. Smith at the time warned Pinker to be in time, the plaintiff declaring that he would be well within the times specified, viz., 18th December for the one house, and 28th December for the other. It was not before the 17th February in one case that the house was occupied, and 14th March in the other. Pinker had done work for witness before, and witness had advanced him money, although at the time Pinker was not working for him. One amount was £10, for which witness took a "good-for," and that amount had not been repaid. It was not true that Pinker had repaid the £10. The "good-for" was placed on a file in witness's study. All the transactions took place in the study, and had the money been repaid the "good-for" could easily have been handed back. It was false to say that he (Professor Gill) got the £10 and promised to destroy the "good-for." There were alterations made in regard to the houses, including the shifting of the kitchens and a change in regard to the stoeps. About January 25 witness went to Natal, and was absent for twenty-one days. At that time there were no tenants in the houses. There were three men, he thought, employed by Pinker, who lived in one of the houses, and witness had to ask Pinker to remove them. On 20th March, witness saw Pinker, who asked for a settlement. Witness drew his attention to various bits of work not completed, and said that when the work was completed was the time to speak about a settlement. On 21st April, Pinker came to witness's house, and witness said that he must have a written reply to a letter witness sent him as to the work and payment. He left plaintiff, but afterwards a servant informed him that Pinker was still there. Pinker refused to leave, and after a time witness said that unless he left he would have him removed. Witness went for a policeman, found one, and on returning Pinker was standing on witness's property, at a spot which was intended to form part of a roadway to the house of witness's son-in-law. The policeman refused to do anything without a written charge, and witness wrote the charge. Pinker and the policeman walked off to-

gether. Witness afterwards learned that Pinker had been detained at the police-station, and that a big case had been made of it. The case was duly tried and the charge against Pinker was dismissed. When witness asked the policeman to remove Pinker, he had no idea that he would be detained and that a case would be made of it. Various articles at witness's house had been destroyed or damaged by Pinker, and Pinker had also taken stones from his (defendant's) ground. The guttering of the new house was defective, the levels very wrong, and the stoep had been cracking ever since it was erected. The lime and cement had been washed out of th walls, and witness had had to call for tenders to put the house in thorough order.

Mr. Graham cross-examined: You have a large experience as a litigant, Mr. Gill?

Mr. Gill: I am not aware that I have.

Mr. Graham: Have you not had any number of cases, assault cases, libel cases, water cases, land cases, slander cases?

Mr. Gill: Nothing of the kind.

Mr. Graham: Do you mean to say you have not had, say, for instance, assault cases, in which you were either the plaintiff or the assailant?

Mr. Gill: I cannot recall a single one.

Mr. Graham: Not a single one! No libel, no slander, no land, no water cases?

Mr. Gill: I have had some experience.

Mr. Graham: Very considerable?

Mr. Gill: Some experience.

Mr. Graham: And yet you did not know what was going on in the Magistrate's Court at Kalk Bay in regard to this matter.

Mr. Gill: I only asked the policeman to take Pinker outside my grounds.

In answer to Mr. Graham, witness said he frequently visited and inspected the buildings at Muizenberg. Very often Pinker was not there. Until he went to Natal witness saw the kind of material used and the workmanship. Witness had found that he gave Pinker an advance of £10, which Pinker had not repaid. He had only discovered the counterfoil the preceding evening. Pinker signed the counterfoil, and that counterfoil witness had. (Counterfoil produced.) He believed the advance of £10 was for the purchase of pipes for the new houses. Pinker was constantly doing odd jobs for witness, and the amount of £10 was held over against the account for that work. When he called the policeman, witness did not intend that Pinker should be taken in charge; he merely wanted him removed.

Mr. Justice Buchanan: The policeman has stated that what you said was "Constable, take this man in charge."

Witness admitted that at the trial he conducted his own case and cross-examined the witnesses. Witness intended to ask the Magistrate to discharge Pinker. He did not, however, make that request. Witness wrote to Pinker about the damage to the bath. He did not speak about the stones. He did not know of the plaintiff's proceedings at the time when Pinker removed the stones. Pinker removed the stones without the knowledge of witness. It was a piece of imagination on the part of Pinker to say that he (Gill) gave Pinker permission to use the road from which Pinker was taken into custody.

Re-examined by Mr. Searle: Witness left the inspection of the buildings principally to Mr. Smith. Witness did not see Pinker often as a rule; only when he (Pinker) wanted money.

Henry Joshua Smith said he was in the Government service. Malcolm Smith was a friend of his, and at his request he had prepared plans and specifications for Mr. Gill's houses. Witness also at times went to Muizenberg and inspected the buildings. Witness considered that Pinker was very generously treated by Mr. Gill. Mr Gill always paid what witness recommended, and even he knew something more. Witness feared that Pinker could not finish the contract in time, but Pinker always contended that he could. The alterations made, witness considered, were a saving to Pinker. The buildings had not been built according to the plans.

Cross-examined by Mr. Graham: Witness was not an architect, but he prepared plans for the houses. He also examined the work, and informed Mr. Gill when Mr. Pinker was entitled to receive payments. Witness had washed his hands of the whole affair, and that owing to the manner Pinker had behaved towards him (Smith).

By Mr. Justice Buchanan: Being in the Government service, witness did not wish to have anything to do with the matter.

John Parker, architect, stated that he had examined the two houses in question, and had read the specifications. He made a list of the various things that were not according to specification, and he estimated the value of work not done. He estimated that the saving to Pinker by not carrying out the plans amounted to £19, and the amount that would now be required to make the necessary additions would be £25.

By Mr. Justice Buchanan: Witness knew nothing about the original plans having been altered.

Witness (continuing) said that various works, such as guttering, would have to be put right before the building could be considered finished.

Cross-examined by Mr. Graham, witness said that judging by the plans, portions which plaintiff claimed should be iron should actually have been stone. That was going by the plans alone.

Richard Henry Morris stated that he also examined the building with the object of discovering what had and had not been done in keeping with the specifications. He corroborated the previous witness (Parker) as to the amounts.

This closed the case for the defence.

Mr. Graham, for the plaintiff, said that there were two questions in the plaintiff's claim before the Court: the amount if any due to plaintiff under the contract, and the amount due as damages for the arrest. As to the claim in reconvention the penalty in the original contract was not brought up in the second contract, and in any case the delay in completing the work was due to the alterations in the plans and specifications mutually agreed upon subsequent to the contract. There was clearly a waiver of the right to the penalty. As to the claim on the trespass, the defendant knew at the time that his written charge was an order to arrest. yet his attitude is that after giving the written order to the constable, he washed his hands of the matter. The charge was wild, false and misleading, and the defendant is liable for everything that ensued. Substantial damages should be given.

Mr. Searle, Q.C., for defendant, argued that clearly the penalty provision was imported into the second contract, for an extension of time was expressly allowed. This would not have been required if a penalty were not in view. The intention seems clear, in fact the second contract specifically imports into it all the conditions of the first. The question is, was there a waiver by conduct? The facts are against this. As to the arrest, see Act 27 of 1882, section 7, sub-section 12. Even though the plaintiff is held to have come originally to defendant's house for a lawful purpose, yet he put himself completely in the wrong by refusing to go when defendant ordered him off. Besides, defendant was not the prosecutor in the case.

Mr. Graham in reply referred to *Willemse* v. *Lategaan* (5 Sheil. 350; 12 Juta, 335) and *Rademeyer* v. *Van der Merwe* (5 Sheil, 475; 12 Juta. 451).

Judgment was given on the first count of the declaration for £10 2s. 6d., and £20 for damages, with costs.

The Acting Chief Justice said: In view of the evidence upon the various items in plaintiff's claim on the first count in his declaration, the Court finds that additional work will have to be done on the houses, which will reduce the balance due to plaintiff to £10 2s. 6d., and for this amount judgment for plaintiff will be given. The question of the £10 which defendant stated he had lent to the plaintiff was not raised until the case came into court, and cannot be taken into account. As to the defendant's counterclaim for 10s. per day as penalty for non-completion of the contract within the specified time, the first contract, it is true, provided for such a penalty, but the first contract was departed from, and in the second contract no penalty clause was introduced. Everything was altered by the second contract, and in addition, the defendant requested alterations to be made from time to time. In a time contract parties must be careful not subsequently to vary the contract materially; if they varied, the builder would be justified in taking up the position that the time penalty could not be enforced. The whole of the first part of the claim could very well have been settled in a Magistrate's Court, but the reason that the case has been brought into this Court is because of the action of the defendant. As to the arrest, there is not evidence to support the defendant's charge that the plaintiff had been hanging about his premises, and had used offensive language. The plaintiff had a right to be where he was, upon the lawful business for which he went there. The defendant now tries to make it appear that he did not give plaintiff in charge. But the facts are entirely against that assertion. The fact that the policeman refused to do anything until he received a written charge from the defendant proves that a charge was made, and the plaintiff's warning that if the defendant gave him into custody he would make him "sit up" for it also supports that view. The matter was trifling on the one side, but it was not trifling for a respectable tradesman to be arrested and marched through Muizenberg and St. James to Kalk Bay as plaintiff had been, and to be detained there until bail could be found. Now, in actions for malicious arrest the law presumes malice if the arrest is made without reasonable and probable cause. The defendant in this case had no probable or reasonable cause for giving the plaintiff into custody, and at the time he must have known that he had no right to give him into custody. Not only so, but the defendant attended the Magistrate's Court, gave evidence, cross-examined witnesses, and did his best to get the plaintiff convicted, but the Magistrate rightly dismissed the case. I think this is a case in

which the damages should be sufficiently substantial, to prevent one man recklessly interfering with the liberties of another. I think that £20 will be sufficient to vindicate the character of the plaintiff. Judgment will be for plaintiff for that amount with costs.

Mr. Justice Maasdorp concurred.

[Plaintiff's Attorneys, C. C. Silberbauer; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and the Hon. Mr. Justice SOLOMON.]

IN THE ESTATE OF THE LATE ABDOL ARNOLDS

Mr. Close applied on behalf of the executors testamentary for leave to raise a further sum of £200 on mortgage, or a total mortgage of £350, for the purpose of paying the creditors of the estate.

The Master had reported favourably on the application.

The Court granted an order in terms of the Master's report.

GIFFORD V. HARE. { 1897. June 3th. July 1st.

Nuisance - Brick kilns – Smoke—Injury to life or property – Personal comfort.

H. had some land on which for many years a brickmaking business was carried on. No particular nuisance was complained of by the neighbours for many years.

T., a predecessor of H., *owned a house on land adjoining the brickfields, and after some years' occupancy, complained of nuisance caused by the smoke from the kilns, which had gradually been moved considerably nearer than before to his house. Till the date of this complaint,* T. *acknowledged he had nothing to complain of.*

H. *thereupon agreed not to erect his kilns on any portion of his land beyond a certain fixed line.*

Thereafter, although H. *carried out his part of the agreement,* G., *who purchased from* T., *complained that the nuisance still existed, and that damage had been done to his furniture and trees, and that injury to the health of his family had also resulted.*

The Court *gave absolution from the instance in an action brought by* G. *for damages and for a perpetual interdict restraining* H. *from making bricks so as to cause a nuisance.*

This was an action brought by John Gifford against Edward John Hare for abatement of an alleged nuisance caused by the burning of bricks, and for £100 damages.

The plaintiff's declaration set forth:

1. The plaintiff is a proprietor of a certain dwelling-house with outhouses situate upon the main road at Mowbray in the Cape Division.

2. The defendant is a Councillor of the Municipality of Mowbray, and is a proprietor of certain brickfields near to the plaintiff's property aforesaid and situate in the said municipality.

3. Upon the said brickfields the defendant has during the year 1896, and also during the year 1897, before the commencement of this suit burned or caused to be burned large quantities of bricks in such a manner as by means of smoke from his furnaces wrongfully and unlawfully to cause an intolerable nuisance to the public, and specially to the plaintiff as owner and occupier of the aforesaid property, by which nuisance the plaintiff has sustained loss and damage in respect of his fruit trees, in respect of his movable property in the house aforesaid, and in respect of the quiet and comfortable use and enjoyment of his aforesaid property to which he is by law entitled.

4. The damages so sustained amount to the sum of £ 00 sterling.

5. The plaintiff has complained of the said nuisance to the defendant, and also to the Municipal Council of Mowbray, and the said Council, on behalf of the plaintiff and other members of the public and after due inquiry, did in or about November, 18 , call upon and require the defendant to abate the said nuisance, and the defendant undertook to abate the same but has failed and neglected to effect such abatement.

The plaintiff prayed:

(*a*) For a perpetual interdict restraining the defendant from so burning bricks upon his brickfields aforesaid as to cause a nuisance to the plaintiff,

(b) Judgment for the sum of £100 sterling as and for damages sustained as aforesaid.

(c) General relief and costs.

The defendant in his plea set forth:

1. He admits the 1st and 2nd paragraphs of the declaration.

2. As to the 3rd paragraph, defendant admits that he has during the period mentioned, and for many years previously burned bricks upon his said property, but he denies all the other allegations in the said paragraph, and in the 4th paragraph.

3. The said brickfields have been in use and bricks have been burned upon them by the various owners of the property, ever since the year 1835; the property now owned by plaintiff was built on in 1874, and plaintiff has occupied it for thirteen years.

4. As to the 5th paragraph, he admits that the plaintiff complained to him about the said brickfields in or about November, 1896, for the first time, and that the plaintiff and certain other members of the public presented a petition to the Municipal Council on this subject. The Council desired the defendant to move the kilns to a site indicated by it near the southern boundary of the said property. The defendant did so remove the said kilns, and he has since the said date burnt bricks only at the spot indicated by the Council as suitable for the purpose in view of the plaintiff's objection. But he does not admit that either before or after the month of November, 1896, he has been guilty of any nuisance in law, either as regards the plaintiff or his property or the general public.

Wherefore he prays that plaintiff's claim be dismissed with costs.

In his replication plaintiff said:

1. He admits that the said brickfields now owned by defendant were used as such before he (plaintiff) purchased the property, upon which his house is situated but he says that formerly only two "pug mills" for making bricks were used upon the said brickfields, whereas seven are now used by the defendant thereupon, and the nuisance complained of has been thereby increased.

2. He admits that the Municipal Council decided that defendant should confine his brick-making operations within a certain area, but he denies that the defendant has completely carried out the order of the said Council, inasmuch as he has erected certain brick kilns outside the area defined by the said Council.

3. He says that the nuisance has not been abated by the steps taken by defendant, subsequent to the order of the said Council.

The rest of the replication was general.

The defendant's rejoinder was general.

On these pleadings issue was joined.

Mr. Schreiner, Q.C. (with him Mr. Searle, Q.C.), appeared for the plaintiff; Mr. Graham (with him Mr. Buchanan) for the defendant.

John Gifford, the plaintiff, said he lived at Mowbray, on the main road. On the east of his property was the property of the defendant, which formerly belonged to Mr. Tregidga. He occupied his property in 1881, and at that time bricks were being made on the brickfield, but they were burned further up the slope of the mountain than at present. Afterwards there was an increase in the number of pug-mills, and there were at present seven working. In November, 1896, the defendant was burning bricks near plaintiff's property, and a petition to the Council was got up to stop the burning of bricks there. A line was fixed by the Council beyond which bricks should not be burnt. The defendant had since built a kiln beyond the line fixed by the Council. The kilns had been shifted from place to place all the time witness had been there, always, however, getting a little nearer to witness's property. When he took the property there were fruit trees growing all round, but at the back of his property nearest to the brickfields they had all gone, and in his opinion that was due to the brick-burning. There were apple trees, quinces, pears, and plums. The leaves of other trees in other parts of his property also had withered off. When the bricks were being burnt, it was impossible to keep the windows on the south and west sides of his house open, owing to the smoke. He had noticed brass rods turn black through the smoke, and other articles of a like nature. Mrs. Gifford and the children had complained of ill-health owing to the smell. Altogether, he estimated the damage he had sustained during 1896 and 1897 as very substantial, but he brought the action chiefly to prevent the nuisance caused by the smoke. The nuisance had not been abated in the least since the action was brought. He should say that bricks were burnt during eight or nine months of the year and whether it was calm or whether the south-easter blew, the smoke came his way.

Cross examined: He bought his property from Mr. William Hare, and he would not sell it for the price he gave for it. He did think of buying Mr. Tregidga's property, between his property and the brickfields, but he never offered £4 00 for it. The brickfields had been a nuisance to him for more than ten years. He read something in an English newspaper about chemical works damaging trees, and he then realised that it was a nuisance, and took steps accordingly. The trees had withered for over ten years. He did not know whether all

the peach-trees were covered with scale, and had not noticed wheth r the pear-trees had been infested by the pear-slug. The big tree in front of his house, which withered, was about three times as big as himself, viz., about eighteen or twenty-five feet.

Dr. P. D. Hahn professor of chemistry, stated that the effect of burning the sulphur contained in the coal was poisonous to vegetable life. The carbolic products were mainly injurious to animal life. The effect of the sulphur compounds on metal would be to tarnish it.

Cross-examined: You are familiar with the effects of the south-easter?—Oh, yes. The south-easter would not kill trees straight off like these fumes did.

By the Court: He would expect people living in the neighbourhood of the fumes to be unhealthy. The fumes undoubtedly had a bad influence on the health.

Thomas Tregidga, a Councillor of the Mowbray Municipality, s id he was originally the owner of the defendant's property, which he sold to him early in this year for £4 0 0. He was not desirous of selling it, but did not like living so near the brickfields, and that was his only reason for selling. When he was there first, nineteen years ago, there was no brickmaking going on. Since the defendant commenced brickmaking the process had been steadily on the increase till about four years ago. About three years ago the nuisance became so bad that he spoke to Mr. Hare, who agreed to keep the kilns further off, but he subsequently repudiated his agreement. Witness told him he would get an interdict, and he went round and got up a petition. He wanted the Council to take action in the matter, and a boundary was fixed by resolution of the Council. The effect of the fumes was to destroy all the trees in the garden, which were either dead or dying. He never opened his back windows on account of the smoke.

Cross-examined: He believed the defendant had obeyed the Council's resolution. The nuisance was not so bad after that, but they were still affected by the smoke. He spoke to Mr. Gifford on the subject of the sale of his property, and told him what he had offered the property to Mr. Hare for. Mr. Gifford offered him £4,(00 for it, but witness believed he was a little excited that day and did not know what he did say for he afterwards denied making the offer.

Re-examined: His vines did not die from phylloxera. He had the Government expert to see them, and he certified that there was no phylloxera. He should not have sold his property but for the nuisance,

Mrs. Gifford corroborated her husband's evidence. The nuisance, she said, had got worse lately. The drawing-room window had not been open for years, because, if opened, the room would be full of smoke. The metal-work might be cleaned one day and would be tarnished the next. Sometimes it was impossible to sit on the stoep. When they first went to the house they had beautiful fruit-trees and lovely fruit of every description, but now many of the trees were dead, and the rest did not bear fruit. She herself had suffered in health, and the smoke affected the eyes of the children. The nuisance was quite as bad since the kilns had been put further back in compliance with the order of the Mowbray Council.

George Weinman, formerly coachman to Mr. Tregidga, stated that the fruit-trees died, but he could not tell whether that was due to the smoke or the insects, with which they were covered. He had been summoned as a witness by both sides in this case.

Cross-examined: He himself never found the smoke a nuisance, although his house was within a few yards of Mr. Tregidga's house. He signed the petition because Mr. Tregidga asked him to, and he did it as a favour.

W. E. Moore, attorney, stated that about a month ago he particularly noticed the nuisance at Mr. Gifford's house. He went into the dining-room, and owing to the smell he was obliged to close the window. He denied that the condition of the trees was due to the south-easter.

Mr Schreiner then closed the case for the plaintiff.

For the defence,

Charles Lea Allnutt, dental surgeon, stated that he had lived for some months in the vicinity of plaintiff's property, and had never suffered any inconvenience from the brickfields.

Chas. Marais, surveyor, gave evidence as to making a survey of the property.

Edward John Hare, the defendant, said that the brickfields had been established for thirty-five years, during which period they had been worked continuously. Work was usually carried on from August 15 to April 15, and since the last witness but one had occupied his house over a million bricks had been burnt. There were several brickfields between Cape Town and Mowbray, all of which were making bricks in a manner similar to his own. Up to the year 1893 he had had no complaints, but Mr. Tregidga then came to him and asked him to move his kilns further back, which he did. Prior to the complaint made by Mr. Tregidga, the plaintiff had never complained to him at all, although he had frequently seen him. Last

year he manufactured 5½ millions of bricks and paid £70 a week in wages. his total payments being about £3,0 0 a year.

Edward Thomas Ashley, manager for Mr. Hare, corroborated the latter, and admitted an encroachment on the line fixed by the Town Council, but said that it was only a yard or two, and was done without the knowledge of Mr. Hare or himself. He was daily on the works, and nobody had made any complaint except Mr. Tregidga in 1892. Witness described Mr. Gifford as a man who was always finding fault with everybody, but said he never complained of the smoke.

William Colley Harman, a nursery gardener of Claremont, stated that on February 9 he examined plaintiff's fruit-trees, and found them to be all badly diseased. The peach trees were covered with white scale, and the apple trees had the American bug. The trees appeared to have been absolutely neglected, but the shrubs in the garden looked very healthy. In his opinion the trees were not affected by the brick kiln, but by scale and neglect. He knew of cases where one side of a tree might be green and the other side scorched by a south-easter. The past summer had been a particularly dry one, and several people in the suburbs had lost a lot of trees. He himself had lost a number through the drought.

James Wilesmith, gardener at Groot Schuur, said that on February 18 he inspected some fruit trees in Mr. Gifford's garden, and found them covered with scale. The pear trees also were suffering from the pear slug, and from the appearance of the soil it had not been much cultivated, and the ground was very dry. The shrubs and flowers in the garden were looking very healthy. He had been planting oaks on some property above the plaintiff's property, and had found it necessary to replace 200 of them this year, the situation being exposed, and the soil very poor.

In reply to the Acting Chief Justice, Mr. Graham said that he still had about twenty more witnesses to call for the defence.

Postea (July 1st).

Dr. Mathew Hewat, Health Officer of the Mowbray Municipality, said he was acquainted with defendant's brickfields. He had attended the families living in the vicinity of the brickfields, and had found that the people were as healthy as others in the Municipality.

Cross-examined: He had never attended Mr. Tregidga or Mr. Gifford.

William Hare said he was born near the brickfields, and had known them all his life. He had worked them with his father and also with Charles Bennett, and after the dissolution of partnership he carried on the business. Tregidga's property belonged to the partnership, and Mr. Bennett lived there. Subsequently it was sold to Mr. Tregidga for £1,100. Brickmaking had been going on continuously, and in the same way as at the present. He bought Gifford's house at one time and lived in it. He planted most of the trees, and during the time he lived there he burnt a considerable quantity of bricks the whole year round, and found no nuisance from them.

By the Court: He did not observe any smoke coming into the house when he lived there. He never had any complaint from the neighbours.

Charles Bennett, a member of the Mowbray Municipal Council, said he was at one time part-owner of the brickfields with the last witness. He had known the brickfields since 1863. He lived in the house recently bought by the defendant from Tregidga for three years, and during that time neither he nor his family suffered from the fumes; in fact, they thrived on it. No complaint was ever made by the neighbours. He remembered a petition being received from Mr. Tregidga, and the Council at once inspected the property. He did not notice any damage done by the kilns. Whatever damage was done was, in his opinion, due to the south-easter. On the receipt of a letter from the plaintiff's attorney the Council made a second inspection, and decided that there was no nuisance.

Cross-examined: He was a brother-in-law of Mr. Hare's. He differed from the rest of the Council on the question of the supposed nuisance at the time of the first inspection.

John Edward Hare said he was the defendant's manager during the years from 1878 to 1891. During that time no complaints were received at all, and the bricks were burned in front of the Scotch kiln.

Cross-examined: Bricks were burned by the Scotch kiln up to 1888. Mr. Gifford showed him his trees a month ago, and he then noticed that all the tops of them were dead on the side nearest to the brickfields. He was not aware that any nuisance existed at present.

William John Hancock, a Councillor of the Mowbray Municipality, said he accompanied the Council on the first inspection, when Messrs. Tregidga and Hare acted as guides. Mr. Tregidga pointed out certain trees which were affected, and certain kitchen utensils in his

kitchen which were blackened owing, he said, to the kilns having been moved nearer than they were before. He noticed that the trees on the south-east side were much worse than the others, but, as far as he saw, the trees on Mr. Gifford's property were perfectly healthy. The Council asked Mr. Hare to move his kilns back and erect a fence as a result of the inspection. On the second inspection a strong south-easter was blowing, but he could not see or smell anything of the kilns from Mr. Tregidga's property, and the Council decided that there was no nuisance to Mr. Gifford Since then he had seen nothing at all to alter that opinion.

Cross-examined by Mr. Searle: On the first inspection he came to the conclusion that there was a certain amount of nuisance. They did not go on to Mr. Gifford's property, because Mr. Tregidga's property was the nearest to the kilns. His impression after the second inspection was that the nuisance had been abated, on account of the kilns having been moved back.

Samuel Tonkin, Mayor of Mowbray, said he had lived at Mowbray thirty-eight years, and the brickfields were in existence when he came to the Colony in 1842. On the occasion of the inspection an agreement was made between Tregidga and Hare regarding moving the kilns back, with which the former was satisfied. None of the trees on the north side of the property showed any sign of being affected. On the second occasion when an inspection was made the kilns had been put back beyond the line agreed upon, and only at one spot, on the extreme boundary of Tregidga's property, could he find the least trace of smell from the kilns.

Cross-examined: He had never been to Mr. Gifford's property in connection with this matter. The Council decided that if there was no nuisance to Tregidga, there could not be to Gifford.

By the Court: The Council only considered the question of health and sanitation.

George William Tearman, a member of the Mowbray Council, said he had resided at Mowbray since 1860. He lived on the north side of Mr. Gifford's property, and had suffered no inconvenience from the brickfields during the seventeen years he had been living there. There were certain holes on the brickfields, however, which were offensive and dangerous to health. He generally agreed with what Mr. Tonkin had said. He knew Mr. Gifford very well, and his children were strong and healthy.

Cross-examined: He was one of those who signed the petition, on the ground that the brickfields were a nuisance to Mr. Tregidga and, at times, to Mr. Gifford He took the petition round to his tenants because they had complained of the smell from holes on the brickfields. He admitted that there was a nuisance at one time, but, in his opinion, it had been abated. He knew that one of Mr. Gifford's children had been taken away from school owing to sore eyes, but he did not know how that was caused.

By the Court: Mr. Tregidga brought him the petition to sign, and he looked on him all through as being the complainant.

Henry John Collis, employed by Mr. Allnutt, who gave evidence yesterday, said he lived in the stables on that gentleman's property, and had been in no way incommoded by the fumes from the brickfields.

James Scott, living next door to Mr. Tearman and a tenant of his, said he would not know there was a kiln there.

William McCann, another tenant of Mr. Tearman's, said he signed the petition on account of the smell from the clay-holes, but he was not affected by the smell from the kilns.

William Sleep, William Tareton, Edward Albert Williams, Abbas Adams, John David Lehy, residents in the locality, all gave similar evidence. The last named, a compositor, said he signed the petition because of the clay-holes, but he did not want the brickfields removed.

Mr. Searle: Then why did you sign the petition?—Witness: To please the landlord.

Who was the landlord?—Mr. Tregidga.

And the landlord is now Mr. Hare; so you think the brickfields a good thing.

A brother of the last witness, William Lees, April, and others also corroborated.

April, a coloured man, said the brickfields did not bother him at all.

Mr. Searle: You like it?—Witness: It seems to agree with me, sir.

William Schroeder, seventy-nine years of age, said he had known the brickfields sixty-five or sixty-six years, and during the whole of that time they had been worked.

Moos Coenraad, a Malay, seventy-six years of age, had known them fifty-seven or fifty-eight years.

William Brown, Inspector of Mowbray Municipality, stated that he was instructed of the resolution of the Council, and had found that that resolution was carried out according to his instructions.

This closed the case for he defence.

Mr. Schreiner. Q.C., for the plaintiff, cited *Du Toit* v. *De Bot* (2 Juta, 218); *Garrett* (Law of Nuisances, p. 146, Ed 1890). The whole law in this matter is discussed in the latter work. There is not much difference between the English law and our law: *Garrett on Nuisances* (p. 151) and the cases there cited, viz., *Sturgiss* v. *Bridgman* (11 Ch. D., 852); *Beardmore* v. *Treadwell* (3 Gifford, 683); *Bamford* v. *Turnby* (31 L.J., 286); see also *Broadbent* v. *Imperial Gaslight Co.* (26 L.J., N S., 226); *Pollock* v. *Lester* (11 Hare, 266); *Sholt's Iron Co.* v. *Inglis* (7 App. Cases, 518); *St. Helens Smelting Co.* v. *Tipping* (25 L.J., N.S., Q.B, 66). In all the cases regarding brickburning and calcining the expert evidence clearly shows that the fumes and smoke are detrimental. See also *Holland* v. *Scott* (2 E.D., 307), which was only a question of noise, not injury to health. The principles which would govern a Court are clearly laid down. No prescription in our law can be acquired by a mere thirty years' habit as against any one who has had no opportunity of doing any positive act to stop such habit. In any case the present user is quite different to what it was when plaintiff came there. Defendant does about four times as much brickmaking as before. Besides, the kilns have been shifted all over the ground, and now are being burnt much nearer to plaintiff. The mere fact that a number of people are not affected by any nuisance is immaterial if we produce witnesses who swear directly and positively that there is a nuisance, as we have done.

The defence is that the nuisance has been satisfactorily abated. There clearly was a nuisance, but the abatement has not been proved in the least; the defendant depends greatly on the inspections by the Council; but the inspections were on two occasions only—when there was no wind, just the times when the nuisance would not be noticed. The plaintiff complains of the nuisance as occurring on windy days.

On the authority of the cases cited, unless defendant can show that it is impossible for the bricks to be burnt elsewhere, then he must remove his kilns and burn higher up.

Mr. Graham, for the defendant, said that he had referred to a large number of English cases, and could not differ very much from the law as laid down by plaintiff's counsel. But the facts elicited in evidence show that a large number of neighbours find no inconvenience from the brickburning: and the plaintiff has not made out such a case as would justify the Court in giving the interdict prayed. Counsel cited *Du Toit* v. *Bot* (2 Juta, 213), *Garrett on Nuisances* (pp. 8 and 9, and 142); *Sturges* v. *Bridgman* (11, Ch.D., 865); *St. Helens Smelting Co.* v. *Tipping* (11 H.L.C., 642); *Walter* v. *Selfe* (20 L.J., Ch. 433). In most of the cases quoted by plaintiff, the nuisance was in *close* proximity to the plaintiff, much more so than in the present case.

Mr. Schreiner in reply.

The Acting Chief Justice: The defendant Hare has a brickfield on the west side of the main road at Mowbray, which is separated on the north from the plaintiff's property, first by a street and then by property formerly owned by Mr Tregidga, but which, since proceedings have been taken, has been bought by the defendant. Mr. Gilford in his declaration alleges that the defendant, in burning bricks during 1896 and 1897, did so in such a manner as to cause, by means of smoke from his furnaces, an intolerable nuisance to the public and especially to the plaintiff, by which nuisance the plaintiff has sustained damages in respect of his fruit-trees and in other respects. For these damages he claims first a perpetual interdict and then £100. The plea denies that any nuisance was created, and then goes on to aver that these brickfields have been in use for a great number of years. I do not see that the plea is so framed as to claim that this fact gives the defendant a right at law to commit a nuisance. I quite agree with Mr. Schreiner that where a nuisance is proved to cause injuries noxious to life or property prescription cannot be relied on to prevent such a nuisance being abated. A distinction, however, must be drawn between injuries noxious to life and property and those which are detrimental only to personal comfort. In this case it is alleged that injury has been caused to property as well as to the comfortable and quiet enjoyment thereof by the plaintiff, but it appears that when defendant took persons to inspect the injury the plaintiff said the inconvenience was only a matter of a little dust, and confined his complaint solely to the damage done to his fruit-trees. Now as to the cause of the injuries to these fruit-trees, the evidence is not conclusive. We have the evidence of Mr. Harman and Mr. Wilesmith, who say that the injury to the fruit-trees was due to neglect. As a question of fact I find it difficult to say that these fruit-trees were injured in this or in some other way, and I therefore cannot hold that the evidence before us proves that the plaintiff has suffered damages to his property on account of anything that the defendant has done. Now as to the quiet and comfortable enjoyment, this property has been used for a great number of years as a brickfield, and it appears that these fields were used for a great many years before the present defendant became the owner. The house

between the plaintiff's and the brickfields was occupied by Mr. Tregidga, who came there after the brickfields were in use, and he said in his evidence—and I think he gave that very fairly—that until four or five years ago he had nothing to complain of in respect of these brickfields. About that time the kilns had been gradually removed from the southern part of the fields to the northern boundary of the brickfields and the kilns erected during 1892 abutted close on the road which separated the property of Mr. Tregidga from the brickfields. He then complained to the defendant, who thereupon agreed to remove the kilns beyond a certain line of old stumps which ran across the paddock, and Mr. Tregidga said that as long as the defendant kept to that line he would be satisfied. The defendant having encroached on that line, Mr. Tregidga complained to the Municipal Council of the nuisance. An inspection took place, and the chairman tells us that on the ground Tregidga and the defendant agreed that the kilns should not go further north than a boundary line then fixed in a line with Hare's own house. Now Mr. Tregidga has stated that until four or five years ago he had nothing to complain of. It appears that from 1881 to 1887 kilns of bricks were made and burnt near the spot marked on the plan as the old Scotch kiln. It is also an important point that the Mowbray Council, after inspection, found that no nuisance now existed. They say that the ground of complaint would be done away with by the removal of the kilns beyond the line pointed out on the ground. After the kilns were so removed the plaintiff complained that the nuisances still existed, but after a second inspection the Council found that, as Hare had carried out their orders, no nuisance remained. I think this is very strong evidence in favour of the fact that the nuisance does not now exist. In this matter the Council seem to have done their duty, and to have tried to rectify whatever was wrong in the Municipality. This does not necessarily dispose of the case, for we have still to decide whether the present position of the brick-kilns constitutes a nuisance or not. The case put forward for the plaintiff is, that the brick-kilns are not so far removed that the noxious gases given off can be dissipated in the air before they reach the plaintiff's property. On the evidence I feel bound to come to the conclusion that the air is not of such a kind as to be still noxious. I would not give judgment absolutely against the plaintiff. I would only give absolution from the instance, so that it may be left open to the plaintiff, if as a fact the nuisance continues and he can get better evidence, to bring a further case. Under these circumstances, whether a nuisance existed formerly or not, at present the evide ce shows that the nuisance does not now exist, and that no damage has been proved. Absolution from the instance will be granted with costs.

Mr. Justice Solomon also gave judgment. He said that he also was of opinion that the plaintiff had failed to substantiate his case. As regarded the question of injury to the health of himself and his family, the evidence certainly was of the flimsiest character, and as regarded the injury to the plaintiff's property, he thought that the evidence on that part of the case had also broken down. The evidence as regarded the fruit-trees showed that the trees had been grossly neglected, and he was satisfied that the death of the fruit-trees had not been caused by the fumes from the brickfield more than by the neglect of the plaintiff in cultivating them. The substantial case which the plaintiff has brought was that there was an interference with his comfortable enjoyment of his property, but he thought in a case of that sort regard must be had to the fact that the plaintiff, when he went to reside there, knew that there were brickfields there, and must have known that some inconvenience would be caused. The alleged nuisance had for many years continued, but the plaintiff had taken no steps to abate it; the result was that the defendant was encouraged to go on with his brickfields and invest a large amount of capital without a word of complaint from the plaintiff or anyone else residing in the neighbourhood, and he could not help thinking that, if the grievance was really so serious as it had been represented, the plaintiff would not have lain by all those years and allowed so serious a nuisance to continue. The same remark applied to Mr. Tregidga, who allowed the nuisance to continue, and it was not until the kilns were brought quite close to his house that he made any complaint, and in consequence of that complaint the kilns were removed some distance from the house, but not nearly so far away as they were at present, and he was then quite satisfied. It was not until November, 1896, that the plaintiff himself made any complaint whatever, and then it was by signing the petition which was brought to him by Mr. Tregidga. On the whole he was satisfied that the plaintiff had failed to prove that there had been any substantial or material interference with his propes enjoyment of his property, and therefore he quite agreed with the judgment.

[Plaintiff's Attorneys, Messrs. W. E. Moore & Son; Defendant's Attorney, C. W. Herold.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice) and the Hon. Mr. Justice SOLOMON.]

MAGISTRATE'S SENTENCE REVIEWED. { 1897. July 2nd.

Mr. Justice Solomon said that a case had come before him as Judge of the week from the Resident Magistrate of Worcester, in which two persons were charged with contravening the Vagrancy Act. There were two counts in the charge. In the first count the two prisoners were jointly charged with wandering over the farm of Mr. Viljoen, and on the second count one of them was separately charged with loitering. Of course that was an irregularity, but no objection was taken at the trial, and no prejudice seemed to have arisen to the accused, and the prisoners were very properly convicted. The sentence passed on each prisoner on the first count was a fine of £2, or a month's imprisonment with hard labour. That was quite correct, but the one prisoner was then found guilty on the second count and was fined £5 or two months' imprisonment with hard labour, with spare diet on Thursdays and Tuesdays. The Magistrate, however, appeared to have treated the conviction on the first count as a previous conviction, and the fine of £5 must therefore be reduced, in accordance with the provisions of the Act, to £2, and the term of imprisonment from two months to a month. Moreover, under the Act, when a person was fined, the only alternative was imprisonment with or without hard labour, and consequently the spare diet must also be struck out.

PETITION OF MICHAEL FRIEDMAN.

Mr. Searle, Q.C., applied on behalf of the petitioner for a rule *nisi* restraining Louis and Mary Weinthrop from parting with certain partnership property at the Paarl, pending an action to be instituted by the petitioner.

The Court granted a rule *nisi*, to operate as an interim interdict, to restrain the respondents from parting with the property of the partnership pending an action to be forthwith instituted by the petitioner, leave being reserved to the respondents to apply to have the rule set aside, the costs of the application to be costs in the cause.

SEDGWICK AND CO. v. PLUMBLY. { 1897. July 2nd.

Principal and agent—Commercial traveller—Travelling and board expenses—Hotelkeeper's.

S. *sued* P. *for an amount alleged to be due for goods supplied.* P. *admitted that he had bought the goods, but claimed to set off against the amount due, another amount due to him for hotel and cart expenses incurred by one* J.

The goods for which the claim for payment was made by S. *were sold to* P. *by* J., *a commercial traveller in the employ of* S.; *the cart and hotel expenses were also incurred by* J. *while in the employ of* S.

In terms of his agreement J. *was entitled to have his travelling and hotel expenses paid by his employer, but*

The Court held *that there was no reason for* P. *to infer an implied authority in* J. *to bind* S., *as in previous transactions between the parties* S. *had warned* P. *that in dealing with* J. *he did so at his own risk.*

This was an action instituted by Messrs. Sedgwick & Co., wine and spirit merchants, of Cape Town, against the defendant Horatio Hurst Plumbly, an hotelkeeper, of Piquetberg-road, to recover a sum of £109 13s. 10d., for wines and spirits supplied between September 4, 1895, and May 9, 1896.

The plaintiffs' declaration alleged that between the months of September, 1895, and May, 1896, the defendant became indebted to plaintiffs in the sum of £109 13s. 10d. for goods sold to defendant by plaintiffs, as per account annexed to the declaration, and that the plaintiffs refused to pay this amount.

The defendant in his plea admitted that he had bought the goods and had refused to pay the whole sum due, and said further:

3. The goods sold as aforesaid were sold to defendant by the plaintiffs through their duly authorised agent, Mr. W J. Jameson, who at the date of the sale and thereafter was employed by the plaintiffs as a commercial traveller,

4. The defendant further says that the plaintiffs are indebted to him in the sum of £68 0s. 6d. for hotel accommodation, cart-hire, &c., as supplied to the plaintiffs' said agent with the knowledge and consent of the plaintiffs, and for which said sum of £68 0s. 6d. the plaintiffs are liable to defendant.

5. The defendant annexed copy of the said account for £68 0s. 6d., and says that he is entitled to set off the said sum of £68 0s. 6d. against the plaintiffs' said claim, and the defendant tenders to the plaintiffs the sum of £41 13s. 4d., with costs to date of tender. Otherwise he prays that the claim be dismissed with costs.

In their replication plaintiffs admitted that the goods were supplied through Jameson, who was at the time a commercial traveller in the employ of plaintiffs' firm.

The plaintiffs deny that the liability in paragraph 4 of the plea was contracted with their knowledge and consent, or that Jameson had at any time any authority to contract any liability on their behalf. The plaintiffs say that they are not responsible for Jameson's debts, and do not admit the correctness of the account annexed to the plea.

Otherwise the replication was general.

On these pleadings issue was joined.

Mr. Searle, Q.C. (with him Mr. Molteno), appeared for the plaintiffs; Mr. Graham (with him Mr. Close) for the defendant.

The counsel for defendant acknowledged that the onus of proving the set-off lay on the defendant, and the evidence for the defence was therefore taken first.

Horatio Hirst Plumbly, a hotelkeeper, residing at Piquetberg-road, said that prior to his present employment he had been in Government employ, and he had dealings with the plaintiff, given through their agent, Mr. Jameson, who came to his hotel in September, 1895. Witness gave Jameson an order for wines and spirits, and let to him a cart and horses. Jameson agreed that the cart-hire should be a set-off against the amounts due for the liquors ordered from the firm through him. Jameson was away fourteen or fifteen days, and the cart and horses were returned to witness from Beaufort, the horses having been considerably overdriven, and being useless for their work afterwards. A month or six weeks afterwards he saw Jameson, and he made the whole account out, and sent it to him to the care of the plaintiffs firm. Jameson said it would be a matter for the firm to settle whether witness could charge him for the full twenty-four days, because he had overdriven the horses, and done the twenty-four days' journey in fifteen days. Jameson stopped at his hotel a few days, being laid up with illness there. Witness then gave him another order. The account was ultimately settled—early in November—and the twenty-four days' cart-hire was credited to him. In conversation with Mr. Sedgwick in arriving at this settlement the latter said he was sorry the horses were overdriven, and that he had made inquiries, and found that the journey from Piquetberg-road to Beaufort West would take twenty-four days. He told Mr. Sedgwick he did not want the payment cash, but he was prepared to take it out in goods, and he then received a credit-note. Mr. Sedgwick said he supposed witness would not let Jameson have a cart again: witness said yes, but he would send a capable driver next time. Jameson came to him twice again on January 15, and bought several things for the road, such as a cooking-pot, &c. He hired a cart on January 17, and said he was going to travel the whole district through from Piquetberg-road to Kenhardt. He was to pay 3s. a day, deducting 2s. a day for the driver, and also deducting cost of forage. He was away forty-two days, when the cart and horses were returned from Beaufort West as before. Jameson submitted a forage account of £21 3s. 6d., which included everything he had paid out, including the driver, tolls, &c. He neither paid nor tendered any money. Witness sent in the account to Jameson, care of the firm, as on the previous occasion. This was at Jameson's request, as before. About May 9 witness came to town, and inquired of a clerk at Sedgwick's if Jameson was in. The clerk said he had better see Mr. Powis, the manager, and on seeing him he was informed that Jameson had left the previous Friday for New Zealand. Witness said, "I suppose it's all right about the account?" Powis said, "What account?" and being told "For the cart and horses," he replied that they did not acknowledge any further liability, and had settled up with Jameson. He said he did not intend to pay the account, but if witness sent in the account he would submit it to Mr. Sedgwick, who was in England. He sent in the account, and while he presumed his account was travelling to England several demands for payment was made by Sedgwick & Co., and threats of legal proceedings were held out, which culminated in the present case.

Cross-examined: Jameson did not pay him for board and lodging—the only thing he paid for was liquor.

This closed the case for the defence.

For the plaintiffs, George Trigance Powis, manager of Sedgwick & Co., said that Jameson

entered their employ about June, 895 He was employed purely as a commercial traveller to solicit orders. He had no authority to incur debts for the firm. He had a salary of £12 and his expenses were paid. When he came back from a journey he would make a statement, and matters would be settled up In November, 1895, Jameson came back from a journey, and said he had a disputed account with Plumbly, which he had not settled. Witness told him that he had better settle up, and after that he (witness) had authority from Mr. Sedgwick to credit Plumbly with £23 5s., and debit it against Jameson. On May 1 he gave Jameson a month's notice, and a few days afterwards he heard that he had cleared out. He did not know the circumstances of his disappearance. At the end of April his accounts had been settled up. On that trip he had been supplied with £150 altogether He supplied Jameson with funds and left him to make his own arrangements. After Jameson had left, Plumbly called on him, and said he had an account against Jameson. Witness told him that had nothing to do with the firm, and that he must go to Jameson for payment.

Cross-examined: Witness never asked Jameson for any vouchers He thought £150 would cover his expenses for the trip. He was informed that he had gone to New Zealand, but he had no personal knowledge of where he had gone to.

Mr. Graham: What was it you split about?

Witness: He was not doing sufficient business to justify the expenditure.

Charles Frederick Sedgwick, managing partner of the plaintiff firm said he acted as mediator between Plumbly and Jameson, and emphatically told the former not to give Jameson any credit. After that he instructed the manager to make the cross-entry in the books, crediting Plumbly and debiting Jameson with the amount. Witness went to England in 1896 and returned in March of this year, when he had an interview with Plumbly, and repudiated the contra claim for cart-hire, reminding him that he had previously warned him not to give Jameson credit.

This closed the case for the plaintiff firm.

Mr. Graham, for the defendant, argued that the commercial traveller in the employ of the plaintiffs had an implied authority to incur whatever expenses were necessary, for the proper discharge of his duty as such traveller. He cited the case (decided in the American courts) of *Huntly* v. *Mathias* (47 Amer. Reports, 516). Plaintiffs had not warned defendant that they would not be liable for Jameson's debts, but had actually paid Jameson's expenses on a previous occasion when a similar dispute had arisen, and defendant had claimed from plaintiffs.

The Acting Chief Justice gave judgment without calling upon counsel for the plaintiff firm. He said: The plaintiff in this case sues the defendant for the purchase price of certain wines and spirits sold through his agent Jameson, amounting to £109 18s. 10d. This amount the defendant admits is due, but he alleges he has a right to set off £68 0s. 6d. for hotel accommodation and cart-hire, which had been supplied to Jameson with the knowledge and consent of the plaintiff. Jameson was the plaintiff's commercial traveller, and according to the agreement between himself and Mr. Sedgwick, he had no right to pledge the plaintiff's credit or to incur any debts on behalf of the plaintiff. The question, however, is whether the defendant might reasonably infer an implied authority. It appears that on a previous occasion Jameson hired a cart from Plumbly, and that this cart was sent back before the time anticipated, and a dispute arose between Jameson and Plumbly as to the amount to be charged. Plumbly sent the account to Jameson, and he told Sedgwick that there was a dispute Sedgwick made inquiries, and came to the conclusion that Plumbly was entitled to the amount charged. Plumbly came to town and interviewed Sedgwick, who agreed to allow the amount of the account, but at the time this took place, Plumbly admits that Sedgwick said to him that, without admitting any liability of the firm he would pay this amount on Jameson's account. Sedgwick says that he told Plumbly that he would deal with Jameson at his own risk, and that he (Sedgwick) would not incur any liability for anything Jameson might do. Whether this took place or not, is a question of fact. It is not disputed that something of the kind did take place, and I think that Mr. Sedgwick's evidence is supported by Mr. Powis when he detailed the conversation on a second occasion when the two parties came together. Sedgwick then distinctly said to Plumbly that he warned him not to give credit to Jameson, and Plumbly made no reply. This is a question of fact which, would settle the case in favour of the plaintiff. Taking this view of the facts, it is unnecessary to go into the question as to how far a traveller has an implied authority to pledge his principal's credit. It is a difficult case in which to imply authority, and a clear case would have to be made out in the absence of express contract. In my opinion in this case there is nothing from which to imply an

authority to defendant's commercial traveller to justify him in pledging the credit of his principals. We have no option in this case but to give judgment for the amount claimed, £109 13s. 10d., with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret; Defendant's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN, (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSIONS. { 1897. July 12th.

On the application of Mr. Close, Richard Booth Walker was admitted to practise as an attorney and notary; the oaths to be taken before the Registrar of the Eastern Districts Court, Graham's Town.

On the application of Mr. Close, George Copland was admitted to practise as a Circuit Court attorney; the oaths to be taken before the Resident Magistrate, Port Elizabeth.

On the application of Mr. Graham, Mr. Frank Holland was admitted to practise as a conveyancer.

PROVISIONAL ROLL.

THE MASTER V. STEENKAMP'S EXECUTOR.

Mr. Sheil applied for an order calling upon the defendant to file an account.

Granted.

KENNIE V. MUSTARD. { 1897. July 12th.

Resident Magistrate's Court—Superannuated judgment—Revival—Process in aid—Provisional sentence

Provisional sentence on a Resident Magistrate's Court judgment which had become superannuated refused.

Application for provisional sentence for £10 6s. 8d., being the balance due to the plaintiff under a judgment obtained by him on the 5th May, 1896, in the Magistrate's Court, Elliot.

The amount of the original judgment was £30 5s. 2d., and in satisfaction of a writ of execution against the defendant's movables a sum of £19 18s. 6d. was recovered, leaving the balance now sued for.

The judgment had become superannuated and had not been revived.

Application was also made to declare certain landed property belonging to the defendant executable.*

Mr. Graham moved.

The Court made no order.

The Acting Chief Justice said: This is an application to grant process in aid of a judgment in the Magistrate's Court which has lapsed. Objection is, however, taken that there is no valid judgment upon which execution can be taken out. Before any process can be taken out the judgment in the Magistrate's Court must be revived. As soon as this has been done, application can be made to this Court for process in aid.

THE MASTER V. TALBOT'S SURETIES. { 1897. July 12th.

Sureties—Bond—Rule 329 (*d*)—Judgment.

On the 2nd November, 1896, the Court refused to grant provisional sentence against the defendants, who were sued on a bond executed by them as sureties, and joint principal debtors with one T., *for the due administration of an estate.*

Thereafter an illiquid summons claiming the amount of the bond was issued against them, and they failed to enter appearance.

Held, *on motion for judgment under* Rule 329 (*d*) *that the Master was entitled to judgment.*

This was an application for judgment under Rule 329 (*d*) for the sum of £180, being the amount of a bond executed by the defendants as sureties and joint principal debtors with John Talbot, sen., who was appointed executor dative of the estate of the late John Talbot, jun., on the 25th July, 1894, for the due administration of the estate in terms of Ordinance 104, section 27.

Mr. Sheil, Assistant Law Adviser, in moving for judgment, directed the attention of the

* Vide *De Vos* v. *Voersee* (3 Juta, 79); *Hopefield D. R. Church* v. *Bok* (7 Juta, 65). REP.

Court to the case of *The Master* v. *Talbot's Sureties* (6 Sheil, 392), and contended that as the defendants had neither entered appearance, nor raised any defence to the claim, the Master was now entitled to judgment under the rule without leading evidence.

The Court granted judgment as prayed with costs.

The Acting Chief Justice said: The defendants have been sued on an illiquid summons for the amount of the bond, £180. They have failed to enter appearance, and, in our opinion, the Master is now entitled under Rule No. 329, to judgment in terms of the prayer of the summons.

[Government Attorneys, Messrs. J. & H. Reid & Nephew.]

ILLIQUID ROLL.

FAURE V. GILLIE.

Mr. Close applied for judgment under rule 329 (*d*) for a sum of £30 5s., the price of fruit sold, with interest and costs.

Granted.

ROBERTSON AND BAIN V. CAROLUS.

Mr. Close applied for judgment under rule 329 (*d*) for a sum of £11 10s., due for goods sold, with interest and costs.

Granted.

DIVISIONAL COUNCIL OF STELLENBOSCH V. MYBURGH.

Mr. Jones applied for judgment under rule 329 (*d*) for a sum of £15 13s. 4d., road rates due.

Granted.

PERRINS V. NEWLANDS.

Mr. Benjamin applied for judgment under rule 319 and for an account.

The Court ordered an account to be rendered within fourteen days.

REHABILITATIONS.

Re GEORGE LEVYNO AND LOUIS LEVYNO.

Mr. Benjamin applied for the rehabilitation of George Levyno and Louis Levyno, formerly trading together.

The Acting Chief Justice: In this case undue preference had been given to certain creditors. Traders must learn to deal in a thoroughly honest manner. The application is refused, with leave to apply again in twelve months. The insolvents, however, will be rehabilitated as to their private estates in view of the Master's certificate.

Re CORNELIUS ANTONIE RAUTENBACH.

Mr. Buchanan applied for the rehabilitation of Cornelius Antonie Rautenbach.

Granted.

HINTON V. HINTON.

Mr. Searle, Q.C., appeared for the the plaintiff.

This was an action for restitution of conjugal rights, and failing such restitution for divorce. The parties were married at Oxford on August 28, 1896. In October, 1896, defendant deserted the plaintiff in Cape Town.

Ethel Hinton, residing in Cape Town, said the defendant Edgar Hinton was her husband. They were married on August 28, 1896, at Oxford. Witness's mother and aunt were present at the marriage, which took place before the Registrar. The certificate produced was the certificate of the marriage. They left for Cape Town the day after they were married. Defendant intended to live in Cape Town. Her husband was a bank clerk, but was discharged from the bank before the marriage. On the way out her husband was never sober from morning till night. The captain stopped his getting liquor from the bar. Her husband was never sober. Witness had never seen her husband drunk before marriage. The first night in Cape Town they went to Claridge's and stayed a few days. He said he had £300 or £400 at the Standard Bank. There was no money at all. After leaving Claridge's they went to the Strand Hotel, Woodstock. He was still drinking. Witness had money her mother had given her, and from time to time her husband took it from her. Her husband had introductions, one to the Metropolitan. Her husband went away because witness would not give him more money. She did not know her husband was going to Bulawayo. When he went away witness was left at the Strand Hotel, Woodstock. Witness had sent money to him at Bulawayo. Her mother had sent out money to keep her. Her father, Richard Harwick, of Woodhay Park, Cheshire, had recently died, and she expected money out of the estate.

The Court made an order for defendant to return or receive the plaintiff on or before August 31, failing which, to show cause on September 12 why decree of divorce should not be granted.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

GENERAL MOTIONS.

THE PETITION OF THE DUTCH REFORMED CHURCH, DORDRECHT.

Mr. Searle, Q.C., applied to make absolute the rule *nisi* for cancellation by the Registrar of Deeds of certain transfer, dated November 11, 1864, by John F. Woodward to Patrick Crowley, of water erf No. 16, in the village of Dordrecht, and for making valid the transfer thereof by petitioners to Johannes C. Theron.

The Court made the rule absolute.

DUSSEAU V. DE BEER.

Mr. Benjamin applied to make the award of the arbitrator in the matter in dispute between the parties an order of this Court, with costs against the respondent.

Granted.

THE PETITION OF THOMAS E. BUTLER.

Mr. Searle, Q.C., applied for an order cancelling certain cession made by petitioner while suffering from a dangerous illness, and under the apprehension of approaching death, of a policy of insurance on his life in favour of trustees for the benefit of his minor daughter; petitioner being desirous to raise money on security of the said policy to satisfy his debts.

The Court expressed no opinion on the present application, but granted leave to apply again upon further evidence as to the intention of the petitioner at the time of making the cession.

BRODIE V. CAPE COLONISATION COMPANY. { 1897. July 12th.

Mr. Schreiner applied for an order requiring the respondents to restore to applicant possession of his farm known as Zevenfontein, in the district of Tulbagh, with all lands and tenements thereto belonging; the said property having been sold to the respondents who have failed to pay the purchase price, and are neglecting the land and allowing cattle to damage the vineyards.

Mr. Searle, Q.C., appeared for the provisional liquidator, Mr. Syfret.

Mr. Molteno appeared for the respondent company.

After argument,

The Court refused the application, with costs.

The Acting Chief Justice said: This is an application for an order compelling the provisional liquidator to give up physical possession of property sold to the company by the applicant in June, 1896. A portion of the purchase price has been paid, and it is clear from the affidavits that the seller put the purchasers in possession of this property. The balance of the purchase price was to be paid and transfer taken at a date now long past. This was not done, but from time to time extensions of time were given, and promises made to pay various amounts, amounting in all to £550. While the applicant was still in possession an agreement was come to to give a further extension of one month on payment of £10. In consideration of this the seller sold off, and left the property. The month expired in January. After that the applicant made declaration of sale, transfer duty was paid, and the purchaser allowed to obtain possession. No action to compel completion of the contract has yet been commenced Meanwhile on the 13th April the company was placed under provisional liquidation. This must affect the legal position of all the parties. Now the applicant comes and asks us to order the provisional liquidator to give up possession of the property. I think this is not an application that can be made in this way. We have not all the information necessary before the Court, and it may well be that the Insolvent Law, if it applies to this case, may put the liquidator in the position of a trustee, and that he may be able to say to the applicant: "The balance of your purchase money is so much; we will pay you and we will take the transfer." It is too late for the applicant to come before the Court and now ask that this matter should be taken as if no order for liquidation had been issued. Under all the circumstances of the case, in my opinion the Court cannot now make any order. The application must be refused, with costs.

HERBERT V. TOWN COUNCIL OF CAPE TOWN { 1897. Ju'y 12th.

Act 26 of 1893 – Act 25 of 1897—Statutory alterations—Date of taking effect.

A municipal corporation called a meeting of ratepayers for the purpose of giving consent to certain loans proposed to be raised for municipal purposes. A large majority present at the meeting voted in favour of the loans; but a poll was duly demanded by members of the minority.

At that date the provisions of the Municipal Act governing elections required that to give validity to any approval of loans, there should be an absolute majority of the enrolled voters of the municipality.

After the meeting of ratepayers an amending Statute was promoted by the municipality and passed, in terms of which a majority of ratepayers voting at the poll could authorise the raising of loans. The municipality notified that the poll demanded at the meeting would be held under the provisions of the new Act.

On a motion to compel the municipal corporation to act under the provisions of the Statute in force at the time the poll was demanded,

The Court *refused the application.*

This was an application on notice by Joseph William Herbert to the Town Council of Cape Town, calling upon the latter to show cause why a certain notice issued by the Council, under the heading of "the Cape Town Municipal Act, 1893, and the Cape Town Municipal Act Amendment Act, 1897," appearing in a local newspaper should not be so amended as to be a notice under the Act of 1893 only, and why in a certain poll referred to in the notice, the Council should not act in terms of the said Act of 1893 only.

The applicant made oath as follows: I am a partner in the firm of Attwell & Co., and am a large ratepayer in Cape Town, that a notice headed "The Cape Town Municipal Act, 1893, and the Cape Town Municipal Act Amendment Act, 1897," appears in the "Cape Times" of this day's date, signed by the Town Clerk and Deputy Returning Officer, giving notice that a poll of enrolled voters of the city of Cape Town, upon the proposals of the Council with reference to further contemplated loans (upon which a poll was demanded at a meeting of the enrolled voters held at the Drill-hall on Thursday, 6th May, 1897), will be held on Tuesday the 20th July, 1897, with a view of obtaining the consent of the enrolled voters to such loans. (Copy notice was annexed.) That it is the intention of the Town Council to decide the poll under the Act of 1897 instead of under the Act of 1893.

The Mayor of Cape Town deposed as follows:

I am the Mayor of Cape Town, and as such by law, the returning officer at polls of enrolled voters.

A large representative and influential meeting of enrolled voters to sanction certain loans (set out in an annexure to applicant's affidavit) was held on 6th May last, and such meeting by a majority of about three to one, and in one case about four to one, declared in favour of such loans, but a poll was duly demanded in accordance with law on each of the proposed loans by members of the minority. As it was quite impossible to obtain a poll of a majority of enrolled voters of the Municipality in favour of the loan, past experience having shown that a comparatively small percentage of voters record their votes at elections and polls of ratepayers, the Council resolved to approach Parliament for relief.

This they did with the result that the Cape Town Municipal Act Amendment Act, 1897, was passed giving the necessary relief.

This amendment met with no opposition in the House, and correspondence was published in the newspapers stating that opponents of the loans had no objection to the amending Act.

In my discretion as returning officer I delayed fixing a day for the poll until the Act of 1893 had been amended so that the counting of votes might proceed in terms of the desired amendment of the law now embodied in the Act of 1897.

Mr. Searle, Q.C., for the applicant.

Mr. Schreiner, Q.C., appeared for the respondents.

The Court refused the application with costs.

The Acting Chief Justice said: Certain loans were required by the Town Council of Cape Town, and they called a meeting of the ratepayers under Act 26 of 1893 to ratify the raising of the money. At that meeting, although a majority present were in favour of the loans, the minority present called for a poll. Section 104 of the Municipal Act regulated the proceedings to be taken in such an event. Between the day of the meeting and the day when a date was fixed for the poll, Parliament amended this 104th section. There is nothing in the new Act which says that section 104 as it stood at the time should apply to proceedings initiated before the Act but not yet completed. I think there can be no doubt that the intention of the Act was that from the date of its passing section 104 should be construed as amended, and that everything which might thereafter be done must be regulated by the section as amended. From the date of the passing of the Act the majority of votes given at any poll will govern the decision of the ratepayers. I think this is clear. The application will therefore be refused, with costs.

[Applicant's Attorney, Gus. Trollip; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

WOLSTONE V. WOLSTONE.

Mr. McLachlan applied to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights.

The Court made the rule absolute.

IN THE MATTER OF THE MINORS DU TOIT.

Mr. Graham applied for authority to the Master of the Supreme Court to pay out of moneys to the credit of the minors in the Guardians' Fund certain school expenses incurred by their stepmother, and also to pay out a monthly allowance towards the cost of their maintenance and support.

The Court granted an order in terms of the Master's report, costs out of the minors' estate.

IN THE ESTATE OF THE LATE WILLIAM A. RENNIE.

Mr. Molteno applied for authority to raise a sum of £50 on mortgage of certain landed property in the estate, situated at Salt River, for the purpose of effecting necessary repairs thereto.

The Court granted the application.

IN THE MATTER OF THE CAPE COLONISATION COMPANY.

Mr. Searle, Q.C., applied for the appointment of Robert Edward Ball (in the place of Edward Ridge Syfret, the present provisional liquidator) as official liquidator of the company, the said E. R. Syfret being about to leave the Colony on a visit to England; and asked that Messrs. Van Zyl & Buissinné be appointed to assist the official liquidator.

The Court granted the application, security for £1,000 to be given.

IN THE MATTER OF THE UNION BANK.

Mr. Schreiner, Q.C., presented to the Court an amount showing the terms of compromise proposed in respect of the liability of Mr. Henry Hall to the bank. The liquidators were of opinion that the compromise proposed should be accepted. Mr. Henry Hall offered £1,650 in settlement.

The Court granted an order in the usual terms.

IN THE ESTATE OF RASMEN.

Mr. Graham applied for an order authorising Ederis Kamish, executor testamentary in the above estate, to raise sufficient money on first mortgage of certain landed property (belonging to the minor children) to pay for drainage works required by the Town Council of Cape Town, and for waterleadings and repairs.

Ordered in terms of the Master's report: costs of the bond, and of this application to come out of the estate.

HANSMANN V. HANSMANN.

Mr. McLachlan applied that this matter might be allowed to stand over till the 1st day of next term.

Granted.

SUPREME COURT

(IN CHAMBERS).

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

IN THE ESTATE OF THE LATE LOUISE JUTA. { 1897. July 27th.

This was an application by Sir Henry Juta as executor testamentary in the estate of the late Mrs. Louise Juta for leave to pass a certain bond.

The petitioner set forth that in terms of the will of the deceased the executor is entitled to deal with the publishing business carried on under the style of J. C. Juta & Co., as he may deem fit for the benefit and advantage of the heirs under the will, and authority is granted to sell or dispose of the business as he may deem fit; that other partners had been taken into the firm; that it had become absolutely necessary to purchase premises for the due conduct of the business; that certain premises in Adderley-street had been purchased accordingly for £33,000, but that the seller had made it an essential condition that £24,000 should remain on mortgage at five per cent. interest, though the petitioner was prepared to pay entirely in

cash; that the major co-heirs raised no objection; and that the remaining partners had agreed to indemnify the estate against loss.

The seller demanding that the bond should be passed, a bond was duly tendered to the Registrar of Deeds for registration, but he refused to allow the bond to be registered for the following reason:

"There being no provision in the will of the late Mrs. Juta authorising the executor of her estate to pass a mortgage bond, I consider an order of the Court necessary for the registration of the bond proposed to be passed by the firm of J. C. Juta & Co., of which the estate is a partner."

Mr. Schreiner, Q.C., applied.

The order was granted as prayed, the Acting Chief Justice remarking that the Registrar of Deeds was quite right in refusing to pass the bond until the consent of the Court had been obtained.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN, (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSIONS. { 1897. Aug. 2nd.

On the application of Mr. Sheil, Mr. Isaac Petrus van Heerden was admitted as an advocate.

On the application of Mr. Buchanan, Mr. Manfred Nathan was admitted as an advocate.

On the application of Mr. Buchanan, Mr. Hugh Ross Solomon was admitted as an attorney, notary, and conveyancer.

REHABILITATIONS.

Mr. Gardiner applied for the rehabilitation of Cornelius Ford Lee.

Granted.

Mr. Gardiner applied for the rehabilitation of David Pieter de Villiers.

Granted.

Mr. Jones applied for the rehabilitation of Johan August Fredrik Dornbrack.

Granted.

Mr. Close applied for the rehabilitation of Pieter Christian le Roux.

LEVIN V. RABINOWITZ.

Mr. Maskew applied for discharge of the provisional order of sequestration of the defendant's estate.

The application was granted.

BOARD OF EXECUTORS V. OOSTHUIZEN.

Mr. Benjamin applied for provisional sentence for £126, being interest upon a mortgage bond.

The order was granted.

ROSS V. COHEN.

Mr. Benjamin asked for provisional sentence on twenty-three promissory notes, amounting to £1,300 15s. 6d.

Provisional sentence was granted.

COTTERELL V. SNYMAN.

Mr. Close asked for provisional sentence for £64 11s. 1d., with costs, interest on mortgage bond.

Provisional sentence was given.

HARTE V. FRAME.

Mr. Close applied for a final order of sequestration, provisional order having been given on 7th July last.

The order was granted.

THE MASTER V. KING'S EXECUTORS.

Mr. Sheil asked for the usual order on the defendant to file the administration account in the estate of which he is executor.

The order was granted.

ILLIQUID ROLL.

NASH V. JONES AND ANOTHER.

Mr. Close asked for judgment in terms of consent paper filed.

The application was granted.

FORBES AND ANOTHER V. PINKER.

Mr. Gardiner applied for judgment under Rule 319, for £62 13s., for work and labour and materials supplied.

The application was granted.

LIQUIDATOR OF HANDS AND CO. V. FRIEDMAN.

Mr. Jones applied for judgment by default of appearance for the sum of £225 10s. 9d., goods sold and delivered.

Application granted.

GENERAL MOTIONS.

GOLDSWORTHY V. GOLDSWORTHY.

Mr. Close asked for an order requiring the respondent to pay to applicant, his wife, from whom he is separated by judicial decree, such sum as the Court may decide upon, in monthly instalments, towards the support of herself and the minor son of their marriage.

The defendant appeared in person, stating that he had received permission from their lordships to do so, as he was unable to pay for counsel. He was separated from his wife in May, 1893, and from that time until October of that year he had no employment. He was then engaged by the Cape Town Harbour Board, first at the rate of 4s. 3d. a day, and later at 7s. 6d. a day. His wife had gone to live with her brother in the Transkei, and returned to Cape Town without informing him. From the Transkei she wrote that she was living "on the fat of the land." She had yearly £76 of her own.

The Acting Chief Justice said that the defendant, being in receipt of £108 a year, must contribute to the support of his wife and son.

Mr. Close, in reply to the Acting Chief Justice, thought that defendant should pay at least £2 a month.

Judgment was given that defendant pay £2 a month with costs, leave being given to either party to apply at any time for a variance of the order.

Re ESTATE OF SIR CHARLES MILLS.

Mr. Searle, Q.C., applied for an extension of the return day of a rule *nisi* issued under the Titles Registration and Derelict Lands Act for transfer to the said estate of certain piece of land in the district of Peddie, granted to Adolph E. Bauer in 1864, and known as Rietfontein, which land was in the possession of the said Mills from 1864 till the time of his death in 1895, and is alleged to have been duly purchased from the authorised agents of the said Bauer.

The rule had been ordered to be served on Bauer's representatives, butit had been difficult to find them.

The rule was extended to 1st November, and a copy of the documents ordered to be served on Messrs. Corbin & Corbin, Indiana, U.S.A., as representatives of certain of the heirs. One publication to be made in the "New York Herald."

Re ESTATE OF SYBRAND J. MOSTERT.

Mr. Joubert applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for registration in the name of the said estate of certain piece of land marked G, at Rondebosch, sold to John Holloway and John Goulder in 1849, and soon afterwards abandoned by them, and also for cancellation of the mortgage bond passed by them to secure the purchase price, which was never paid off.

Application was granted.

Ex parte WALTER LANE.

Mr. Close applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for registration in the name of petitioner of a piece of ground known as lot No. 176, at Walmer, in the district of Port Elizabeth, purchased by him from the representatives of the late Soudien Baydien, but never transferred.

The application was granted.

Ex parte WILLIAM HARE.

Mr. Gardiner applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for registration in the name of petitioner of certain two lots of ground, marked No. 252 and 235 at Roodebloem, in the Cape district, purchased by him from John Thomas, who acquired a right to the property, as did a previous purchaser from Jan T. Deneys, but never obtained transfer.

The application was granted.

Ex parte J. C. HAUPT.

Mr. Searle, Q.C., applied for leave to sue *in forma pauperis* in an action against Willem A. Scholtz for a declaration that certain document purporting to be the will of his late wife is null and void for want of due execution.

The Court referred the petition to Mr. Advocate Searle, Q.C., for his certificate as to *probabilis causa* or otherwise.

HAND V. FRIEDMAN.

Mr. Jones applied to make absolute the rule *nisi* interdicting Louis and Mary Weinthrob from paying over any sum exceeding £225 10s. 9d. to the respondent pending an action to be instituted by applicant.

The application was granted.

Ex parte ALBERT O. STRUIVER.

Mr. Buchanan applied to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for registration in the name of petitioner of certain piece of ground, known as lot No. 17, Block L, situate in King William's Town, purchased by petitioner's father many years ago from George Haist, whose whereabouts is unknown, but never transferred.

The application was granted.

OPPEL V. OPPEL.

This was an application in a suit for restitution of conjugal rights,

Mr. Close, for the plaintiff, explained that publication had been made in the Bulawayo papers, but there had been no publication in the "Government Gazette." Mrs. Oppel was present from Beaufort West, and he suggested that her evidence might be taken that day.

The Acting Chief Justice said they could not hear the case now as it must be considered as being one without return. Under the special circumstances a commissioner could be appointed later to take Mrs. Oppel's evidence at Victoria West.

The date for the return day was extended until 12th September.

WEYMARK V. WEYMARK.

This was an action for restitution of conjugal rights.

Mr. Buchanan appeared for the plaintiff.

Reginald Barry proved the marriage, that of Thomas Weymark and Edith Kate Howe.

Mrs. Weymark said she was married at Molteno, on 26th January, 1885. Her husband was a stonemason. About two years after the marriage she and her husband removed to Cape Town. At the end of three months her husband left for Kimberley. Witness at this time was living in a boarding-house in Cape Town. Her husband went to various places in the Colony, and finally, in 1891, went to Newcastle, Natal. Since he left her he had sent her either £24 or £26. Witness had not heard from her husband for the past six years. He promised to get a home for her in Newcastle, but he never did this. Her last letter to him was returned by the Post-office from Newcastle. There was no property and no children of the marriage. She could give no reason for her husband forsaking her. There was no quarrel and no ill-feeling. Since her husband left her witness had supported herself.

An order was given that the husband return to his wife on or before 30th September, failing which the usual order for divorce would be granted.

FORTH V. GRUNEWALD. { 1897. Aug. 2nd.

Sale — Delivery — Attachment — Interpleader.

Where G. *had sold a wagon to* S., *receiving part of the purchase price in cash, and for the balance a promissory note payable in three months, and* S. *thereupon entered into an agreement in writing with* F. *to sell the wagon and all his cattle to* F. *but retained the use of them until after* G. *had issued summons against him on the promissory note, delivering them for the first time on the day before judgment was given against him,*

The Court held *that the goods, being in the possession of* F. *at the date of attachment, were not attachable in execution of the judgment on the promissory note.*

This was an appeal from a decision of the Resident Magistrate of Stutterheim in an interpleader action heard on the 17th and 28th May last, in which the present appellant was the claimant of a wagon and certain cattle attached in execution of a judgment obtained by the respondent against one Schlodder. The respondent had made a wagon for Schlodder, and delivered it to him on the 18th January last, the purchase price being £35 10s. This was paid partly in cash and partly by a promissory note or £16 10s., due and payable on the 18th April. The day after this sale a document was drawn up, signed by Schlodder and the appellant Forth, who was a brother-in-law of the latter, by which Schlodder purported to sell the wagon for £30 and all his cattle for £34 to the appellant the latter however undertaking to lend them to Schlodder for the term of two months. The money was duly paid to Schlodder. At the expiration of the two months he was again allowed to retain their possession for a further period of two months. No rent was paid for their use. The respondent having failed to obtain payment on his promissory note on the due date, took out a summons against Schlodder. The appellant hearing of this, took delivery of the property on the 5th May. On the 6th May the respondent obtained judgment on the promissory note, and other judgments were also obtained against Schlodder, amounting in all to £50. The writ of execution was taken out on the 8th, but it was found that Schlodder had no property in his possession at that date. On the 10th the messenger attached the wagon and cattle, which were then in the appellant's possession. The latter claimed them, and an interpleader action was instituted, in which judgment was given against Forth, who thereupon appealed.

The Magistrate gave the following reasons:

1. That Forth was the brother-in-law of Schlodder.

2. That Schlodder lives on land belonging to Forth, and they are near neighbours, and might therefore be reasonably expected to be thoroughly conversant with one another's affairs and pecuniary circumstances, and consequently Forth must have known that Schlodder owed money, especially to Grunewald and others, and had not paid the full price for the wagon supplied to his order by Grunewald.

3. Notwithstanding his knowledge of these facts, Forth purchased all Schlodder's property, among which is the wagon in question, and a memorandum of the sale is drawn up which manifestly shows that, while desirous of assisting his brother-in-law Schlodder, Forth is equally solicitous to protect his own interests, irrespective of any claims which others may have against Schlodder's property. The sale must therefore be regarded as one of suspicious character, more especially as there was no legal or complete delivery of the property to Forth. Reference was made to *Lean's Trustee* v. *Cerruti* (1869. p. 313); *Long* v. *Randall* (S.D.C. 1, p. 62), and *Rens* v. *Bam's Trustee* (M. 2. p. 97).

Mr. Buchanan for appellant: The only grounds upon which the Magistrate found *mala fides* were the relationship between Forth and Schlodder, and that they lived together and must have known one another's business; these are not sufficient. The dominating point should be whether the purchase price was paid or not, and there was no doubt about it having been paid. Forth was a vigilant creditor and nothing more. When the sale took place Schlodder was not pressed by creditors. The time for delivery was definitely fixed in the contract. Delivery took place before seizure.

Mr. Jones for respondent: The neat point is whether the property could be saved from execution by delivery after summons had issued and the day before judgment was given. The decision depends on the *bona fides* of the appellant, and in addition to the facts set out by the Magistrate, want of *bona fides* is shown by the appellant's statement, that he required the wagon, while as a fact he left it for four months in Schlodder's possession, by the fact that he knew it had not been paid for, by Schlodder being allowed to retain possession without payment of rent, and all the other circumstances of the case. Even if transaction was *bona fide*, it must be shown that the delivery also was *bona fide*. In *Lean's Trustee* v. *Cerruti* (1869, p. 13), although delivery was made before surrender, it was held to be not a *bona fide* delivery.

The Acting Chief Justice: But that was a case of insolvency.

Mr. Jones: The principle is the same as to the delivery, whether it is a case of insolvency or judicial attachment. The delivery should also be immediate. Presumption of ownership is in the person who has had long possession, and that presumption can be rebutted only by the clearest evidence. The door to fraud is opened by permitting transactions of this nature. *Long* v. *Randall* (E.D.C., p. 62): *Fivaz* v. *Boswell* (S. 1): Judgments of Wylde. C. J. and Bell, J., pp. 237, 241.

The appeal was allowed, with costs in both Courts.

The Acting Chief Justice said: The question at issue is whether certain properties were executable in an action between Grunewald and Schlodder. Schlodder was the brother-in-law of the defendant, and on January 19 he sold certain property to Forth for value received. The sale was executed under a written agreement, which had been entered into in an attorney's office, openly and above board; the purchase price was paid also in an attorney's office, and receipts given, which were witnessed by the attorney. Five months after that, in May, judgment was obtained against Schlodder by Grunewald, and he then sought to attach the property which had been sold the previous January. This property, after the sale, was, by an agreement, allowed to remain in the seller's possession for two months, and I have no doubt that had the property remained up to the day of attachment a very good case might have been made out if no legal delivery had taken place, but before judgment was given and after the purchase price had been paid, physical possession was delivered over to the purchaser. The Magistrate held that the sale was suspicious, not so much on the ground of the purchaser's conduct, but on account of the seller's conduct, he having delivered the property knowing that he had other and larger creditors. But this is not a question of insolvency. Had it been a question of insolvency that point would have been raised. But here is property sold *bona fide* for a fair price which has been duly paid, delivery made, and the property found in the possession of the purchaser. We must hold that the property was not executable. The Magistrate erred in declaring the property executable. The appeal will therefore be allowed, with costs in this Court and in the Court below.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Findlay & Tait.]

MARITZ V. VISSER. { Aug. 2nd. " 6th.

Scab Act 20 of 1894, sections 7, 17—Temporary Inspector.

Where a Scab Inspector is temporarily appointed under section 7 of Act 20 of 1894, the failure of the Government to appoint a permanent inspector within five months of the date of the temporary appointment cannot invalidate the otherwise lawful acts of the inspector or terminate his tenure of office.

Appellant was appointed temporary Scab Inspector on the 21st December, 1896. Between the 12th and 29th of January, 1897, he caused the respondent's sheep to be dipped under section 17 of Act 20 of 1894 and on the 7th May sued for the expenses of the dipping. The Magistrate's decision that he had no locus standi *to sue was reversed on appeal.*

This was an appeal from a decision of the Resident Magistrate of Sutherland in an action heard on the 7th May last, in which the present appellant, the plaintiff in the Court below, who was appointed a temporary inspector on the 31st December, 1896, sued the respondent for the sum of £11 1s. 2d., being expenses incurred by the plaintiff, in his capacity as a temporary scab inspector, in dipping the defendant's sheep.

The summons set forth that the plaintiff claimed the sum of £11 1s. 2d., being the amount of sheep dip purchased and the hire of labourers and assistants and other miscellaneous expenses incurred by the plaintiff, in his said capacity, between January 12 and 29, 1897 (as per account attached), in dipping or causing to be dipped, under the provisions of section 17 of the Scab Act No. 20 of 1894, certain 950 goats and sheep, the property or in the lawful possession of the defendant, which said sheep and goats the said defendant, although duly instructed by the plaintiff so to do, had refused or neglected to cleanse as he was required to do under the provisions of the said section of the Act.

To this claim the defendant took the following exception: That the plaintiff, not having been properly appointed, is incapable of sustaining this action.

The plaintiff's agent admitted that he was merely a temporary inspector appointed upon the resignation of the previous inspector under Act 20 of 1894, section 7, and that no election for an inspector in place of the previous one had yet taken place.

The defendant was then heard in support of his exception, and his evidence went to show that he had been the previous inspector; that he resigned on the 28th November, 1896, and that there was considerable dissatisfaction in the district at the plaintiff's appointment; but he admitted that he had always recognised the plaintiff as temporary inspector.

The Magistrate, sustaining the exception, gave judgment for the defendant with costs, the following being his reasons: The Court found that plaintiff was appointed by the Department of Agriculture as temporary inspector of sheep upon the resignation of the previous inspector, the defendant, for Ward No. 1 in the Sutherland division.

The Department of Agriculture has the power under section 7 of Act 20 of 1894 to make, under the circumstances therein specified to meet cases of emergency, such temporary appointments, but this section distinctly provides that the substitute can only be so appointed until the election of a successor, which shall take place immediately. The word immediately must be construed to mean so soon as possible under the existing circumstances of the case, and in pursuance of the regulations regarding elections framed under authority of the Scab Act.

It was not apparently the intention of the Legislature that such temporary appointments should continue for any indefinite length of time. In this instance it appeared that no election of a successor to Visser has yet been held, nor have any steps been taken to have an election effected, although over five months have elapsed since the date of Visser's resignation.

It was the opinion of the Court, therefore, that though the appointment in the first place was legal, yet as it was not followed in due course by the election referred to in section 7, the appointment eventually became illegal *ab initio*, and therefore the plaintiff was now virtually in the same position as if he had never been appointed at all, and consequently, not being an inspector within the meaning of the Act, he is held unable to maintain the present action, and the exception taken is accordingly sustained.

Note: No exception to the Magistrate's jurisdiction to try this case was taken by the defendant's agent on the ground that the title to an office was involved therein, but the question might be considered as virtually raised in the evidence heard in support of the exception. The point, however, was not touched upon in delivering judgment. The judgment as re-

corded—exception sustained; judgment for defendant with costs—was inadvertently so pronounced instead of exception sustained and case dismissed with costs; but the mistake having been noticed only after the case had been closed and judgment recorded it is impossible of course for me now to correct it.

From this judgment the plaintiff now appealed.

Mr. Sheil for the appellant: That the Magistrate erred in upholding the exception in this case is, it is submitted, clear from his reasons He found that the plaintiff's appointment was originally perfectly valid, but, because five months had elapsed between the resignation of Visser and the date of bringing the action, during which time no permanent inspector was appointed, he arrived at the extraordinary conclusion that the plaintiff's appointment was void *ab initio*. Assuming for the sake of argument that there had been *laches* on the part of the Government, that fact could not deprive the plaintiff of the remedy given him under the 17th section of the Act of recovering the expenses to which he had been put in dipping the defendant's sheep. The Magistrate, in finding that there had been negligence on the part of the Government in not procuring the appointment of an inspector under section 6, lost sight of the fact that the expenses, for which the plaintiff sued, were incurred shortly after his appointment, namely between the 12th and 29th January. Again, having regard to the provisions of section 6 and to the delay which must be necessarily occasioned in revising the voters' roll and framing new rolls, it could never be contended that there was any undue delay on the part of the Government. As to the argument that the Government was the real plaintiff in the action, the language of the 17th section is so clear, that it would only be taking up the time of the Court in labouring the point that the Secretary for Agriculture has no *locus standi* under the section. It is submitted that the Magistrate clearly erred and that the appeal should be allowed.

Mr. Schreiner, Q.C., for the respondent: Mr. Alan Davison, the Principal Scab Inspector, had no power to make an appointment of a temporary scab inspector. Three weeks after the "appointment" of Maritz by Davison, a letter was sent Maritz signed by Mr. Charles Currey, the Under Secretary for Agriculture, saying that he approved of his (Maritz's) appointment temporarily as a sheep inspector under section 6 of the Act 20 of 1894. Section 6 did not deal with temporary appointments, and the mere fact that the Under Secretary for Agriculture wrote that he approved of the appointment did not constitute an appointment. Visser resigned on 28th November, and Maritz was "appointed" on 1st December. The entire proceedings have been irregular. A substitute has no power to recover anything in an action, a substitute has no power to sue. He is not an official himself, he is only the substitute of an official. The Act provides that the scab inspectors are to be appointed by election, and it looks as if the Government wished to evade the provisions of the Act. The law was that temporary inspectors could be appointed for "the intervening period." In this case no appointment had been made for five months. The Act seeks to protect the elective principle as against the appointment principle. The Magistrate's decision was correct.

Mr. Sheil, in reply to the Bench, said that the mention of section 6 was clearly a clerical error; section 7 was undoubtedly intended.

Cur ad vult.

Postea (6th August.)

The Acting Chief Justice delivered the following judgment: The plaintiff in this case was, on the resignation by defendant of the office of sheep inspector of Ward No. 1, district of Sutherland, appointed to the post temporarily by Government. The letter of the Under Secretary for Agriculture, notifying the appointment, recites that it was made under section 6 of Act No. 20, 1856. This is clearly an error, as it is section 7 of the Act which deals with such cases. It has been urged that this mistake was merely a clerical one, and ought not to be allowed to vitiate the appointment otherwise properly made. The error was not relied upon in the Magistrate's Court, where the question raised depended on the construction of section 7. The defendant has not been prejudiced by the mistake. On the contrary, he recognised the plaintiff's appointment, and under the circumstances we are of opinion that it need not now be further considered. On reference to the Scab Act it will be seen that the 16th section fixed four months from the 1st November last as a period for the simultaneous dipping of sheep in the Colony. The defendant not having complied with the law, the plaintiff treated defendant's flock under the powers conferred by section 17 of the Act. That section provides that the costs incurred by such treatment might be recovered by the inspector in any court of competent jurisdiction. The defendant refusing to pay the expenses incurred, was sued in the Magistrate's Court by the plaintiff in his capacity as inspector. Several exceptions were taken at the hearing, but it is the Magistrate's ruling on only one of these that is now appealed against. Though nominally an exception, it amounted to a special plea, and was that the plaintiff not

having been properly appointed as inspector, was incapable of sustaining the action. From the evidence led in support of this special plea, this incapacity was based upon plaintiff's appointment as inspector being a temporary one, coupled with the fact that no election of a permanent inspector had since taken place, as required by the 7th section of the Act. That section reads as follows: "In case the inspector, through death, resignation, suspension, or otherwise, shall be unable to fulfil the duties assigned to him under this Act, it shall be lawful for the Minister, until the election of a successor, which shall take place immediately, to appoint a substitute, who shall act in the intervening period" On Visser's resignation at the end of November, the Chief Inspector selected the plaintiff to act, the letter of appointment was issued from the Minister's department on the 21st December, and the dipping of defendant's sheep took place in January. The Magistrate sustained the exception, holding "that though the plaintiff's appointment was in the first instance legal, yet as it was not followed in due course by the election referred to in section 7, the appointment eventually became illegal *ab initio*; and therefore the plaintiff was now virtually in the same position as if he had never been appointed at all, and consequently not being an inspector within the meaning of the Act, he is unable to sustain the present action." Respondent's counsel did not in argument go quite to this length, for though admitting that the time which had elapsed between the date of plaintiff's appointment and his dipping of the sheep might not under the circumstances be unreasonably long, he contended that as a period of five months had been allowed to elapse before the bringing of the action, within which time a permanent inspector ought to have been elected, plaintiff's temporary tenure of office must be taken to have expired. We cannot assent to either of these views. The section is express that the substitute appointed by Government shall act as inspector during the period intervening between the resignation of the former officer and the election of his successor. The words of the section—that this election shall take place immediately, are directory. If the officials responsible for the election neglect to carry out the law, means may probably be found to compel them to do so. The plaintiff is not responsible for this neglect; and the fact that this direction of the Act has not yet been obeyed cannot either invalidate the otherwise lawful acts of the inspector, or terminate his tenure of office. The Magistrate's decision on the exception will therefore be reversed. Other questions have been raised which have not been adjudicated upon, and the merits have not been inquired into. The case must therefore be remitted for further hearing. The appellant will have his costs in this Court; costs in the Court below will abide the result.

Maasdorp, J., and Solomon, J., concurred.

[Appellant's Attorneys, Messrs. J. & H. Reid & Nephew; Respondent's Attorneys, Messrs. Sauer & Standen.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

PROVISIONAL ROLL.

CRESSY V. VAN DER MERWE. { 1897. Aug. 5th.

Mr. Close applied for provisional sentence for £106 16s., value of promissory note and interest.

Provisional sentence was granted.

EATON, ROBINS AND CO. V. TAYLOR.

Mr. Jones moved for the final adjudication of the estate of C. J. Taylor, provisional order having been given on 31st July.

The application was granted.

JAGGER AND CO. V. BURMAN.

Mr. Buchanan applied for judgment by default of appearance for £174 14s. 8d., the value of goods sold.

The application was granted.

ADMISSION.

Mr. Benjamin applied for the admission of John Hendrik van Rooyan as sworn translator in the English and Dutch languages, the oath to be taken before the Resident Magistrate at Kimberley.

The application was granted.

DAVISON BROTHERS v. COLONIAL GOVERNMENT. 1897. Aug. 5th. „ 6th.

Expropriation of land for railway—Ordinance 8 of 1843—Act 20 of 1857—Act 15 of 1872.

Where a railway was constructed by a company under an Act of Parliament, which granted it certain powers of expropriation contained in Ordinance 8 of 1843, and the powers of the company were afterwards vested in the Colonial Government;

Held, *that the powers contained in Ordinance 8 of 1843 were not limited to the expropriation of land required for the original construction of the railway, but that the Government was entitled by virtue of them to expropriate additional land subsequently required for the same railway.*

This was an application on notice for an interdict by Messrs. Davison Brothers, of Woodstock, to restrain Charles Bletterman Elliott, in his capacity as General Manager of Railways, and as such representing the Colonial Government, from taking or proceeding to expropriate certain land, of which the applicants are the registered owners, situate at Woodstock, in the Cape Division, and which the respondent had given notice of his intention to take and expropriate.

The applicants, in their affidavit in support of the notice of motion, alleged that they were the registered owners of certain property which abutted on the line of railway.

That portions of the said property, on one of which there are buildings erected (as shown on the plan annexed marked A), the Government contemplate taking for railway purposes and expropriating the same accordingly.

That two notices of such intention to expropriate have been received.

That the applicants were unwilling to part with the property proposed to be taken and expropriated, and contemplated erecting buildings on the said land, and that they were advised that the Government had no right to expropriate the said land.

In a subsequent affidavit the applicants alleged that their land was freehold, and that it appeared from the plan that the land was not required for making or repairing the railway, but the same was required for purposes not included in the Acts and Ordinances under which the Government is empowered, in succession to the Cape Town and Wellington Railway Company, to take land for making or repairing the said railway.

The first notice, dated 20th July, 1897, was to the effect that the General Manager required the land for railway purposes, and intended to expropriate the same under the provisions of Act 15 of 1872, Act 20 of 1857, and Ordinance 8 of 1843, and offered £500 as compensation.

The notice further required Messrs. Davison Brothers in terms of section 10 of Ordinance 8 of 1843 to state in writing within seven days whether they were willing to accept the above sum or not.

To this notice a reply was received from the applicants' attorneys, that they were unwilling to part with the land, and giving notice that if the Government proceeded with the expropriation an interdict would be applied for.

On the 28th July the second notice was given, calling upon the applicants to forthwith refer to arbitration the amount of recompense or compensation to be paid to them for the expropriation, and for that purpose to transmit to the Government attorneys, within four days, the name of the person whom they might select to be an arbitrator.

The Engineer-in-Chief, Cape Government Railways, filed an affidavit, in which he alleged that, owing to the increased traffic on the Western system of Cape Government Railways, and more especially on that portion near Cape Town, it had become absolutely necessary for the efficient working of the traffic as well as for the safety of passengers, to lay down additional lines of rails between Cape Town and Salt River, and for that purpose the land belonging to the applicants was required.

That the line of railway between Cape Town and Salt River was originally constructed by the Cape Town and Wellington Railway Company, under Act 20 of 1857, and was subsequently acquired by the Colonial Government, under the provisions of Act 15 of 1872.

Mr. Schreiner, Q.C., for the applicants: Act 20 of 1857, section 11, gives to the company which shall contract for the making of the Wellington Railway all the powers bestowed by Ordinance 8 of 1843 upon the Central Board of Commissioners. Act 15 of 1872 vests in the Government the same rights, powers, and privileges which the company had, and places them expressly in the same position as the Board of Directors of a railway company: those powers are contained in sections 8, 9, and 10 of Ordinance 8, 1843. These clauses were discussed in *Slabber* v. *Bell*

(4 Searle, 3), where it was held that they must be interpreted strictly. No other powers except those contained in Act 20 of 1857 have ever been conferred upon the Government with regard to this section of the line. Act 19 of 1874, which gives wider powers, refers to the section from Belleville to Mulder's Vley, and from the Castle to the Docks; the portion in question does not come under that Act.

Mr. Justice Buchanan: Is there anything in Act 20 of 1857 which confines the line to a single pair of rails?

Mr. Schreiner: No. It says a line of railway; it does not say more than one. The company had exhausted the powers conferred by the Act when it had finished the line, and could not have doubled it even before the Government took it over.

Mr. Sheil (Assistant Law Adviser) for the Government: It is very noticeable in this case, that the applicants in their second affidavit abandon the position which they originally took up. In their first affidavit their contention was that the Government had no right to expropriate the land, but in their second affidavit they admit that the Government has the right to expropriate, but they say that it appears from the plan that the land is not required for railway purposes within the meaning of Act 20 of 1857 or Ordinance 8 of 1843. In other words, they imply that the expropriation is *mala fide* though they produce no evidence on that point; as, however, their counsel has not argued the question raised in the second affidavit, it is unnecessary to consider the matter further than to notice the inconsistency between the two affidavits.

As, however, the applicants in court have abandoned their second position and fallen back upon their first contention, it becomes necessary to consider what the powers of the Government are under Act 20 of 1857, Ordinance 8 of 1843, and Act 15 of 1872. The last-named Act vests all the rights and privileges of the Cape Town and Wellington Railway Company in the Government (see section 2). These rights include all the powers granted to the company under the Act 20 of 1857, which in the preamble used the word "railway" and not "line of rails" as stated by the applicants' counsel.

It is important also to observe that under Act 20 of 1857 no limits of deviation are fixed, and consequently the position of the Government, as successors in title to the company, under Act 20 of 1857 is very different to that of an ordinary company in whose Act limits of deviation are fixed. See *Sedgwick* v. *The Metropolitan and Suburban Railway Company* (7 Juta, 328). Under section 11 of Act 20 of 1857 all the powers bestowed upon the Commissioners of Public Roads with regard to taking land and materials for making or repairing main roads were conferred upon the Cape Town and Wellington Railway Company, and as the Commissioners could take additional land for, say, widening a road, so also could the company take additional land, if it required such land, for railway purposes, and if the company could do so, *a fortiori* so can the Government. It has however been contended for the applicants that the Government has no power under the Act 20 of 1857, that that Act has become exhausted, and that, if it wishes to expropriate further land, fresh statutory power is required. *McDonald's case* (7 Juta, 290) is a complete answer to that argument. It was held in that case that when the Government has once been empowered by statute to make or repair a main road or railway, and, for that purpose to expropriate land, additional land, if required, can be expropriated without fresh legislative authority. If in *McDonald's case* Ordinance 8 of 1843 be substituted for Act 9 of 1858, and Act 20 of 1857 for Act 13 of 1873, that case and the present will be exactly parallel. In *Slabber* v. *Bell* (4 Searle, 3), which has been greatly relied on by the applicants, it was held that inasmuch as the only powers conferred upon the Cape Town and Wellington Railway Company, under the Ordinance 8 of 1843, were the taking land and materials for making or repairing main roads, the company had not the power to take stone from a quitrent farm to erect a station, and that as the Act 20 of 1857 was passed for the benefit of a company in derogation of the rights of the subject, its interpretation should be *strictissimi juris*, but Bell, J., remarked that in questions between the Government and the subject, a liberal interpretation would be adopted because of the general public benefit. So much for the statutes and cases. If the common law be looked at it is clear that the *princeps* has the power of taking the land of his subjects for public purposes on paying reasonable compensation, see *Voet* (1, 4, 7) and the judgment of De Villiers, C. J., in *Town Council of Cape Town* v. *Commissioner of Crown Lands* (Foord, 21). For the reasons stated it is submitted that this application must fail.

Mr. Schreiner in reply: *McDonald's case* is not in point. There the Act to be construed was Act 13 of 1873, which includes the words "works in connection therewith," which do not occur in Act 20 of 1857. Although this is a question between the government and the subject, Act 20 of 1857 must be strictly interpreted nevertheless, because the Government is placed in exactly the same position as a Board of Directors of a company. As to the rights of

the *princeps* at common law, see *Holland's Consultaties* (1, 1, 84, and 3, 1, 1, 43). He has only such powers as are conferred upon him. See also *Bower* v. *Colonial Government* (6 Sheil, 163).

Cur ad vult.

Postea (August 9th).

Judgment was given, the application being refused with costs.

The Acting Chief Justice said: The applicants seek to restrain the General Manager of Railways from expropriating certain of their lands situated at Woodstock required by the Government for the purpose of laying additional rails, which, it is alleged, have become necessary for the efficient and safe working of the traffic of the railway between Cape Town and Salt River. The applicants contend that the Government has no right to expropriate this land, inasmuch as the powers to construct this line, originally conferred upon the Cape Town and Wellington Railway Company, to whose portion the Government is now the successor, have long since been exhausted. To ascertain what powers were conferred, it is clear that the old Ordinance No. 8, 1843, and not the Roads Act, No. 9, 1858, must be looked at; as the Act No. 20, 1857, under which the line was constructed, only conferred on the Railway Company the same powers of taking lands as were then possessed by the Central Board of Commissioners under the Ordinance. The case of *Slabber* v. *Bell* (4 Searle, 3) was cited as one instance of the interpretation put by this Court on those powers. It was there held that under the Ordinance the company were not entitled to enter upon the lands of a person holding under a quitrent title and take therefrom, without paying for them, materials with which to build a station-house, and the ground of the judgment is reported to be that a station is not part and parcel of a railroad. That decision, however, does not settle the question now raised. The more recent case of *McDonald* v. *the District Engineer of the Midland and North-Eastern Railway* (7 Juta, 290) is much more in point. It was there held that the vesting by Act No. 13, 1873, in the Government for railway purposes of the powers of acquiring private property possessed by the Road Board under Act No. 9, 1858, continued after the completion of the railway, and that no new authority was necessary to expropriate additional land afterwards required for the same railway. It was there distinctly laid down that the Government was entitled to take the additional land they required under the original Act authorising the construction of the railway. But it is contended that the present application should be distinguished from that case, as here the railway has been constructed under a private and not under a public Act. A comparison of sections 9 and 10 of the Ordinance applicable here, with sections 11 and 12 of the Act under which that case was decided, shows that the powers of expropriation for purposes such as here stated conferred under the two statutes were very similar, though the rights of entry on land required are more extended under the latter enactment. I am unable to find a satisfactory reason for limiting the powers of expropriation in one case to land required for the original construction of the railway, and for extending it in the other so as to include land which is subsequently required. Nor is it inconsistent with the peculiar ground of decision in *Slabber* v. *Bell* to apply to the Ordinance as well as to the Act the principle affirmed in the more recent case of *McDonald*. In our opinion, therefore, the application must be refused with costs.

[Applicant's Attorney, G. Trollip; Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

Ex parte COURTIS'S EXECUTORS.

Mr. Buchanan moved for authority to the executors testamentary of the estate of the late J. H. Courtis, the father of the minors, three daughters, to raise a loan on first mortgage for the sum of £600 in order to pay Mr. Edward Courtis the sum of £365 18s. 9d. advanced by him, and to appropriate the balance towards the education and maintenance of the minors. The Master had reported upon the petition and the Court granted an order in terms of the report.

CAIRNCROSS v. OUDTSHOORN MUNICIPALITY. { 1897. Aug. 5th.

Municipality—Loan—Specifications and proposed works and undertakings—Act 45 of 1882, sections 145, 146.

The Council of a Municipality constituted under Act 45 of 1882, having given notice that they intended to borrow a sum of money for the purpose of purchasing certain land and certain water-rights required in connection with securing a water-supply for the Municipality, were restrained upon the application of a ratepayer from borrowing any money for the purpose until plans, specifications, and estimates of the proposed water works had been prepared and submitted to the ratepayers.

This was an application for an order requiring the respondents to cause plans and other documents to be prepared, showing the full estimated cost of certain operations for providing a water supply and the manner in which it is proposed to spend the amount of an intended loan of £13,000; also for an order declaring the steps already taken to be void, and compelling the respondents to comply with the law in regard to such municipal loan and operations.

The applicant in his affidavit stated that the following notice had appeared in the "Government Gazette" of the 13th July: "Notice is hereby given that in terms of section 146 of the Municipal Act of 1882, the Municipality of Oudtshoorn intend borrowing a sum of £13,000 for the purposes of purchasing certain portion of the farm Rust en Vrede, Cango West, and certain water-rights of portion of the farm De Cango, Cango West, required in connection with securing a water supply for the town of Oudtshoorn"; that the Municipality had not carried out the terms of sections 145, 146 of the Act, in that they had not placed before the ratepayers for their inspection any plans or specifications, or a full estimated cost of the undertaking; that the whole scheme would cost from £60,0 0 to £70,000; and that if £13,000 were raised on loan the liability of the Council would exceed ten times the revenue of the Municipality and the loan would therefore be prohibited by section 152. The respondents averred that the Act 45 of 1882 did not require more than a specification of the land where the proposal was to purchase land, and that the provisions relating to plans and specifications referred only to works and undertakings.

Mr. McGregor (with him Mr. Buchanan), for the applicant: The matter being one in connection with the borrowing of money, the Court will closely scrutinise the terms under which the Municipality is entitled to borrow. *Thornton* v. *Hugo* (5 E.D.C., p. 280). Those terms are laid down in Act 45 of 1882, sections 145, 146. The question is, what does this notice mean, and is it sufficient? The respondents cannot purchase land except for a corporate purpose; the notice itself states that the purpose is for constructing water works. Plans and specifications and estimate of those works must be published now; the scheme must not be split up. The Act requires publicity, and the sanction of the ratepayers; they cannot exercise an intelligent vote at the poll unless they have all this information before them. It is very questionable whether the respondents are empowered under section 136 to purchase land outside the limits of the Municipality. The Court will intervene if the land proposed to be bought is *extra commercia*. *Abbott on Municipal Corporations* (p. 453) as to the powers of Municipalities. The Public Health Amendment Act, 1897, section 19, specially gives this power. As to the right of inspection of members of a Corporation, *The Mayor of Bristol* v. *Cox* (26 Ch. Div., 683), and cases cited in *Chitty's Archbold on Practice* (p. 512, Library Edition).

Mr. Schreiner, Q.C. (with him Mr. Searle, Q.C.), for the respondents: We are borrowing for the purchase of land, not for permanent works and undertakings, and therefore we have fulfilled the provisions of the Act.

Mr. Justice Solomon: Can you borrow money for the purchase of land unless it is for permanent works and undertakings?

Mr. Schreiner: This land is certainly to be bought for that purpose, and the work and undertaking appear in the notice. We have specified the land and mentioned the farms. In order to entitle the applicant to an interdict, something more must be shown than a mere non-compliance with the section, some grievance or injury. This is an initial stage; we are bound to come to the rate payers for leave because we have no money in hand, but we are not bound to put the details of the whole scheme before them at this stage. As to powers of inspection, see *Motler* v. *Spence* (4 Juta, 46).

Mr. Searle, Q.C., on the same side: Section 146 requires a specification of the land only where the proposed loan is for the purchase of land, a specification of the work or undertaking only where it is for the purchase or construction of a work or undertaking. There are two loans to be proposed, but the one now under consideration is only for the land. If the argument put forward by applicant is to be upheld, the Municipality would have to go into the whole scheme before purchasing the land, with the result that they might lose a favourable opportunity. The ratepayers must first have an opportunity of objecting to the purchase of the land, otherwise they might be put to great expense.

Judgment was given granting an interdict restraining the Municipal Council from borrowing the proposed sum, with costs. The affidavits of the applicant not to be included in the costs.

The Acting Chief Justice said: The Councillors of Oudtshoorn have the very laudable desire to bring to the town a proper supply of water. But to supply the town with water they require to construct certain works, and to construct these works they require to raise a loan. The Municipality is incorporated under the General Municipal Act, No. 45 of 1882, and that Act places certain restrictions on Municipalities, it

requires them to go through certain formalities before they can raise a loan of money. Before proceeding to borrow money, it is provided that the Council shall cause plans and specifications to be prepared as well as an estimate of the cost. The object is that any municipality, before undertaking any large expenditure and heavy liability, must sit down and count the cost. The account of the cost must be submitted to the ratepayers. A Council before borrowing money must publish a notice stating the purposes of the loan, and the amount of money proposed to be borrowed. In the case now before the Court the Municipality propose to purchase certain lands and certain water-rights in connection with the scheme they have of supplying the town with water. But the Municipality has not yet prepared their plans and specifications; they have not yet made any estimate; they have not prepared anything they can submit to the public to justify the public saying whether the scheme should be adopted or not. A poll has been called, but before the poll can take place the ratepayers are entitled to know what the scheme is they are called upon to ratify. Mr. Searle, in argument, admitted that the ratepayers would by voting commit themselves to the principle, or reject the principle, of the water supply. But the scheme is not before the electors, and until the scheme is before the electors I cannot see how any ratepayers can give an intelligent vote on the proposed motion to be submitted to them at the poll. The notice published simply states that the loan is for the purpose of purchasing certain grounds, but the portions of the farms are not definitely specified. I do not think it is necessary to go into fractional details, but I think there should be sufficient details before the ratepayers to let them know what and how much is to be purchased. When Mr. Cairncross, a ratepayer, applied to see what the arrangements were, he was told that the Municipality was unable to submit to his inspection the documents which he wished to see. Now, the Act clearly sets forth that the information which was wanted should be supplied to the public. I think, therefore, that the Oudtshoorn Council is premature in proposing to buy these water-rights and lands until they have prepared a scheme and prepared their plans and specifications in such a way that the ratepayers must know what they are before committing themselves to the scheme which the Council propose to carry out. The Court will therefore interdict the Council from proceeding to raise any loan. Up to the present they have not sufficiently complied with the Act, and they are not entitled to raise any money whatever before they have prepared their plans and estimates. In granting the interdict, however, I think the Court ought to mark its displeasure at the nature of the affidavits which have been filed by the applicant. These affidavits ought never to have been filed, especially by a gentleman who professes to be a professional man, being totally irrelevant and argumentative. The judgment will therefore be that the respondents will be restrained from raising the proposed loan, with costs, but not the costs of the affidavits filed by the applicant.

[Applicant's Attorneys, Messrs. Fairbridge & Arderne; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

MEYER V. MEYER'S EXECUTORS. { 1897. Aug. 5th.

Mr. Schreiner, Q.C., applied, on behalf of C. P. Meyer, to have the award between him and the late J. Meyer and the late M. J. Meyer relating to the partition of the farm Plaatje's Drift, in the district of Humansdorp, made a rule of Court. He applied on a copy of the award, both the original deed of settlement and the original award having been lost.

There was nothing to show that the deed of submission contemplated that the award should be made a rule of Court.

The Court ordered the matter to stand over for affidavits, showing whether any other parties than those now before the Court are interested in the property, and by whom it has been occupied since the award.

Postea (August 26th).

Affidavits were read showing that there were no mortgages on the property.

Mr. Schreiner stated that notice had been given to all the parties concerned, and that they were all occupying in accordance with the award. Two were deceased and their executors did not wish to do anything in the way of consenting. An action for partition would be very expensive, and the same result could be arrived at by an application on motion.

The award was made a rule of Court, the costs of the application to be paid by the applicants in proportion to their shares in the farm.

THE MINOR BUCHANAN.

Mr. Benjamin applied for the appointment of Advocate W. P. Buchanan as a curator, to assist his minor brother Henry R. H. Buchanan in the execution of indentures as an articled clerk to Mr. Van Zyl.

The application was granted.

SUPREME COURT.

[Before the Hon Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

MAGISTRATES' CASES REVIEWED. { 1897. Aug. 6th.

The Acting Chief Justice said: A case has come before me, as judge of the week, in which one Brown was convicted of an offence against the Masters and Servants Act. On the conviction of the prisoner, a previous conviction was proved, obtained on May 13 of this year. The Magistrate therefore sentenced the prisoner to the full term allowed by the law in the case of a second conviction. The Magistrate, however, overlooked the fact that the offence upon which he now sentenced the prisoner was committed in January, before the previous conviction was had. The Magistrate detected the oversight himself and suggested that the present sentence should be reduced to thirty days' imprisonment. The sentence of three months' imprisonment will therefore be reduced to one month. There is another case, which came from the Assistant Magistrate of Ladismith, who committed three men for trial on a charge of cellar-breaking with intent to steal and with theft. The Attorney-General remitted the case against one of the prisoners, and ordered the Magistrate, when his case was disposed of, to take his evidence against the two other prisoners. The Magistrate, however, proceeded to try the two other prisoners without their case having been remitted to him, whereas he ought to have simply taken the further evidence and sent the papers to the Attorney-General. The sentences on the two prisoners in question must therefore be quashed.

WILSON AND CINAMON v. HIRSCHLER. { 1897. Aug. 6th.

Company—Flotation—Sale of claims in gold-fields.

The plaintiffs transferred to the defendant fifty claims in a gold-field, the latter undertaking, as portion of the consideration to deliver upon the flotation of a company to acquire the said claims fifteen per cent. in shares fully paid up of such portion of the nominal capital floated on the said claims remaining available to the vendors after making certain deductions,

The defendant ceded and made over his right to the R. Co.

The R. Co. *formed another company to purchase and work the claims, this company being registered as the* E. Q. Co., *and the claims were duly transferred to it. The defendant thereupon tendered to the plaintiffs fifteen per cent. of the purchase price in shares of the* E. Q. Co., *which the plaintiffs refused to accept.*

Held *that the plaintiffs were not entitled to shares in the* R. Co. *or to have the claims re-transferred to them.*

This was an appeal from a judgment of the High Court of Matabeleland at Bulawayo, delivered on the 21st April, 1897, in an action in which the present appellants, plaintiffs in the Court below, claimed from the respondent, defendant below, delivery of certain shares under a certain agreement or damages.,

The declaration stated that under a written agreement, executed on the 12th October, 1894, the plaintiffs and one McKenzie, who had since sold his interest to the plaintiff Cinamon, sold to the defendant fifty claims in the Sembesi district in Rhodesia, the defendant undertaking as portion of the consideration to deliver to the claimholders, upon the flotation of a company to acquire the said claims, 15 per cent. in shares fully paid up, of such portion of the nominal capital of the company floated on the said claims remaining available to the vendors after provision for the working capital in cash, reserve shares and deduction of the B.S.A. Company's share of the vendor's scrip; that in July, 1895, the said claims were acquired by a company named the Rhodesia (Limited), duly floated within the meaning of the agreement; that the defendant had nevertheless failed to transfer the claims to Rhodesia (Limited). Wherefore the plaintiffs claimed an order compelling the defendant to transfer the claims, deliver the shares, and pay £1,000 damages for delay, or £5,000 for breach of contract. Alternatively that if Rhodesia (Limited) was held not to be such a company as was contemplated by the terms of the agreement, then no such company as contemplated had been formed, and they claimed a re-transfer of the claims. The defendant pleaded that the acquisition of the claims by Rhodesia (Limited) was made subject to the limitation imposed by the agree-

ment upon the defendant's rights; that transfer to that company was not required by the terms of the agreement, nor would transfer have entitled the plaintiffs to shares in the company; that the agreement gave him the right of disposing of the claims within a certain term to any company which he might be able to form for their purchase and working; that in July, 1895, he ceded and made over this right to the aforesaid company, who on the 27th August, 1896, formed another company to purchase and work the claims, this latter company being registered as the Eastern Queen's Gold-mining Company (Limited), and that the claims were in due course transferred to it; that the shares due to plaintiffs were tendered to them, but that they declined to accept them. He said that the Eastern Queen's Company was such a company as was contemplated by the agreement, and denied the plaintiffs' right to shares in Rhodesia (Limited), or that they had sustained any damages. Upon these pleadings issue was joined. Judgment was given by Mr. Justice Watermeyer for the defendant with costs, and against this judgment the plaintiffs now appealed.

Mr. Searle, Q.C. (with him Mr. Joubert) for the appellants: The agreement between the claimholders and defendant was entered into on 12th October, 1894. Shortly afterwards defendant ceded to Marshall. On 19th February, 1895, a memorandum of association of Rhodesia (Limited), was registered in England. This memorandum embraced a very large scope of objects, but its main object was to acquire an estate in South Africa. On 30th March, 1895, defendant's option expired; he had then to decide whether he would take the shares. On 4th July, 1895, an agreement was entered into between Glasse, Marshall and Morrison and Marshall on the one hand and Rhodesia (Limited) on the other. The former were the vendors and agreed to sell certain properties, and options which they possessed. The prospectus of Rhodesia (Limited) was apparently issued in July, 1895, and the company was floated by these vendors. The learned Judge of the Court below appears to consider that the date of flotation and the date of registration must be the same, but this is not necessary; flotation is the getting the capital and may take place long after registration. The company simply stated their objects in the memorandum, and registered in order to be a company. *Palmer's Director's and Shareholder's Legal Companion* (pp. 92-95) as to the difference between flotation and registration. *Imperial Dictionary*, *Emma Silver Mining Company* v. *Lewis* (4 C.P.D., p. 396). There was clearly a sale to Rhodesia (Limited) and it was a company floated to acquire these claims. Sections 77 and 78 of the Mining Ordinance require declarations of purchaser and seller to be filed alleging that no other sale of the property has taken place, and it is difficult to see therefore how transfer could be made direct from Hirschler to the Eastern Queen's. If Rhodesia (Limited) is not a company floated on these claims because there are other objects then the Eastern Queen's is in the same position. The latter company was practically a piece of Rhodesia (Limited). The capital is small and companies with small capital are very often not worked, and so we may suffer damage, We are entitled at any rate to fifteen per cent. upon so much of the capital of Rhodesia (Limited) as is attributable to these particular claims. We looked to Hirschler personally for these claims.

Mr. Schreiner, Q.C. (with him Mr. Close), for the respondent, called upon to explain the admission in the plea that Rhodesia (Limited) had acquired the claims: It is an acquisition subject to a "limitation." The "limitation" is equivalent to what is stated in the prospectus. It is the limitation under which the company acquired the right to the claim. A better phrase would have been "subject to the obligations contained."

There was no personal obligation on the respondent to float the company. He could have floated it through an individual financier; why not through another corporation? Except in the case of a person who has expert knowledge, any person can perform an obligation on behalf of another. This is clear from the *Digest*, *Voet*, and *Van der Linden*.

Mr. Searle in reply.

The Acting Chief Justice said: In October 1894, an agreement was entered into between the plaintiffs and the defendant in settlement of certain disputes which were then pending between them. The plaintiffs transferred fifty claims in a certain gold-field to the defendant, and the defendant undertook to pay for certain work which had been done, and to spend a further sum of money in developing these claims, and he also agreed on or before the 30th March, to declare whether or not he would acquire the claims; that should he do so he would pay to the claim holders £300. That portion of the agreement apparently has been carried out by the defendant. Then came the condition under which the defendant undertook "to deliver to the claimholders upon the flotation of a company to acquire the said claims, fifteen per cent. in shares fully paid up of such portion of the nominal capital of the company floated on the said claims remaining available to the vendors after provision in working capital," &c. There

is nothing in the agreement to show that Hirschler was to do the whole of the flotation of the company without assistance by his friends. What the defendant did do, was to get the assistance of the Rhodesia Company, of which he was a director, to form a company to acquire the fifty claims. The plaintiffs contend that they were entitled to shares in the Rhodesia Company. The defendant, however, said that the Rhodesia Company simply acquired the rights which he had bought for the purpose of floating a company. The Eastern Queen's Company was formed, and 15 per cent. of the purchase price in shares of that company had been secured to the plaintiffs, and had been tendered, but then the plaintiffs refused. The question the Court below was asked to decide was to declare that the plaintiffs were entitled to shares in the Rhodesia Company. The Court below found that they were not so entitled, and I think that that view must be confirmed. The plaintiffs went on to say if they were not entitled to shares in the Rhodesia Company they were entitled to have the claims re-transferred to them. The Court below has decided that they were entitled only to the shares in the Eastern Queen's Company. I concur in that view, as I think the defendant has complied with the agreement. The Eastern Queen's Company was floated to acquire those claims; it was a company floated for the working of those claims, and the shares in that company have been tendered by defendant. One of the sellers has actually objected to receive shares in the Rhodesia Company, and another stated in his evidence that the Eastern Queen's Company was such a company as was contemplated under the agreement. One of the plaintiffs thought that the real dispute was because the Eastern Queen's Company was floated with too small a capital. If the Eastern Queen's Company had been floated with a larger capital, he would have been satisfied to take the shares. There is, nothing to show that there had been fraud or any mismanagement, or any improper acts on the part of Hirschler, in floating the Eastern Queen's Company. Much was left to Hirschler's discretion, and he seemed to have exercised that discretion fairly and in a *bona-fide* manner. The judgment of the Court below must therefore be confirmed.

Mr. Justice Maasdorp concurred.

Mr. Justice Solomon concurred.

[Appellants' Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SCHOEVERS V. DU PLESSIS. { 1897. Aug. 6th.

Scab Act, sections 17, 52—Costs of dipping—Loss of sheep—Counter-claim—Jurisdiction.

A Scab Inspector is entitled to sue in his individual capacity for the costs properly incurred by him in dipping sheep under Act 20 of 1894, section 17.

The costs referred to in section 17 include the value of the dip, the labour employed, and the expense reasonably incurred in getting the dip to the farm where it is used, but do not include the inspector's travelling expenses.

The plaintiff, a Scab Inspector, sued the defendant for £7 19s. for expenses incurred in dipping the sheep of the latter. The defendant set up a counter-claim for £21, damages sustained by the loss of sheep which died in the dipping, and a second claim for £20 damages, caused by the wrongful act of the inspector in removing the sheep from his farm.

Held, *that the first counter-claim was beyond the Magistrate's jurisdiction, but as the second claim was within his jurisdiction and was perfectly distinct from the first, the Magistrate should try the claim in convention and the second claim in reconvention. Whether the first counter-claim was one which could be brought against the inspector at all, or whether it was not a special remedy given against the Government and to be dealt with as provided by section 52 of the Act, not decided.*

This was an appeal from a decision of the Resident Magistrate of Philip's Town in an action in which the present respondent, the plaintiff in the Court below, sued the appellant, the defendant, for the sum of £7 19s., being expenses incurred by the plaintiff in his capacity as Scab Inspector for Ward No. 5, McNaughton, division of Philip's Town, in dipping certain sheep and goats, the property of the defendant, which the latter, after due notice and reasonable time, had refused and neglected to dip.

The defendant excepted to the qualification of the plaintiff and to the form of the action, owing to the absence of a proper warrant to sue, signed by the Secretary for Agriculture.

The defendant further pleaded that there were matters in dispute between himself and the Government exceeding the jurisdiction of the Court, and he put in a counter-claim for £21, for the loss by death of certain fifty-three sheep, the property of the defendant, caused through dipping the said sheep in November, 1896, by the Government servant, J. L. du Plessis, the Assistant Scab Inspector for Ward No. 5.

He further claimed £20 as and for damage caused to him by reason of the wrongful and unlawful removal of certain 900 sheep, his property, in November, 1896, from the farm Kareepoort to the farm Koppie by the said inspector.

The defendant further excepted to the account on which the plaintiff's claim was based, as it was not sufficiently detailed and was not supported by proper vouchers, and he pleaded that the item for sheep dip (£2 12s. 6d.) was excessive and that plaintiff, as a paid Government servant, was not entitled to extra cart and horse hire (£3 18s. 6d.) in performing his ordinary duties as a scab inspector.

The Magistrate overruled the exceptions.

The defendant then tendered £3 13s., which the plaintiff refused to accept. He admitted the correctness of three items in the account amounting to £1 18s., wages paid to labourers, and pleaded the general issue.

After hearing the plaintiff's evidence, none being tendered by the defendant, the Magistrate gave judgment in favour of the plaintiff for £7 19s., less 3s. 9d., the price of four packets of sheep dip powder which had not been used.

The Magistrate gave the following reasons for his judgment: Although the defendant's attorney pleads that the item for dip is excessive, and that as a paid Government official plaintiff is not entitled to the extra cart and horse hire, yet no evidence whatever is tendered to support that plea. In my opinion the charges are not excessive (nothing to the contrary having been shown), they have been properly incurred, and are due to the plaintiff.

In regard to the counter-claim defendant's attorney pleads that there are matters in dispute between the defendant and the Government exceeding the jurisdiction of the Court, and puts in a claim for £21 for damages for loss of sheep, and a claim of £20 for damages caused by unlawful removal. No doubt the object of this plea was to oust the jurisdiction of the Court.

Even supposing the action to be one by the Government against the defendant which it is not, then according to *Smith* v. *Ramsbottom* the Court would still have jurisdiction in regard to the claim in convention, leaving the defendant to his ordinary remedy for damages in a competent Court. But the action is not one brought by the Government against the defendant. It is an action by the plaintiff in his official capacity as Scab Inspector, not as representing the Colonial Government, for costs incurred in dipping the defendant's sheep, and recoverable by him in his said capacity as Scab Inspector in terms of section 17 of Act 20 of 1894. The action for damages should therefore be directed against the Government.

From this judgment the defendant now appealed.

Mr. Schreiner, Q.C., for the appellant: The primary point in this appeal is whether the Act allows the inspector to claim for scab dip used, labour, and other expenses incurred by him in terms of section 17, and does not allow the claim of the defendant to be pleaded in reconvention; the damages claimed were caused in the execution of his duty. The defendant's counter-claim is composed of two: (*a*) £21 for sheep destroyed in the dipping; (*b*) £20 for a wrongful and unlawful act on the part of the plaintiff outside the Act; he had no right to remove the sheep to Koppie. The Magistrate was right in excluding the counter-claim for £21 as being beyond his jurisdiction, but he should have entertained the counter-claim for £20. *Smith* v. *Ramsbottom* (8 Buchanan, 98); *Scott* v. *Barnard* (9 Juta, 323); *Dale* v. *Winship* (9 Juta, 509). Section 17 of the Act does not authorise an inspector to remove a flock from one farm to another. The Act must be rigidly construed. The costs allowed are the costs incurred by "taking and cleansing" the sheep. This does not include the cost of travelling, which should be paid by him out of his salary. I admit the tender of £2 8s. 9d. is insufficient.

Mr. Sheil for the respondent: Having regard to the decision in *Dale* v. *Winship* (9 Juta, 509) I cannot contend that the Magistrate was justified in not considering the counter-claim for £20 unless he was satisfied, upon the construction of Act 20 of 1894, section 17, that the counter-claim was merely fictitious, in which case, it is submitted, he was right in refusing to entertain it. It was pleaded in the Court below, and it has been argued here, that the amount charged for cart hire was excessive, but the plaintiff had to travel twenty-seven miles, and the Magistrate, who is best acquainted with the circumstances of the district, has found that

the charge was not excessive, and it is unusual for an appellate Court to interfere with a jury question of this nature.

Mr. Schreiner in reply: If a counter-claim is within the Magistrate's jurisdiction he must go into it, and cannot entertain the question of *bona fides* or not until he has actually tried it.

The Acting Chief Justice said: The first question raised is whether the inspector can sue in his own name, or must the Government sue for the cost of dipping the defendant's sheep? The 17th section of the Scab Act settles this. It enacts that "it shall be lawful for such inspector to take such sheep and to cleanse them, and the costs thereby incurred may be recovered by such inspector in any court of competent jurisdiction." This action is therefore properly brought by the inspector. The next point is, what can be included in the costs which the inspector is entitled to recover against a farmer whose sheep he dips? He is entitled to recover all costs properly incurred, such as the value of the dip, the labour, and the like; but the inspector's travelling expenses do not come within such costs. He is required by the nature of his appointment to visit different places within his district, and it is not for the farmer who is visited to pay the inspector's travelling expenses. There is on this account a charge of £2 12s. 6d. for the inspector travelling in a cart and pair to and from the town to fetch the dip. This is excessive and unreasonable on the face of it. The amount of £4 1s. 9d. which is left after deducting the travelling expenses and this charge of £2 17s. 6d, the inspector has proved to have been incurred, and for that amount he is entitled to judgment. As the case will have have to go back to the Magistrate, the plaintiff will have an opportunity of proving what it would reasonably cost to get the dip required from the store to the farm, and this amount if proved can be added to the £4 1s. 9d., with costs in convention in the Court below. Now comes the claim in reconvention, which raises important questions. The defendant claimed two amounts as damages. The first is for £21 sustained by the loss of sheep which it is alleged died in consequence of the dipping, and the second is for £20 damages for the wrongful act of the inspector in removing the sheep from defendant's farm. These amounts taken together are beyond the Magistrate's jurisdiction, and on that ground the Magistrate has dismissed them both. But as was shown in the case of *Dale* v. *Winship* (9 Juta, 511), where the two counter-claims are perfectly distinct from each other, and one of them is within the Magistrate's jurisdiction, the fact that the first counter-claim exceeded his jurisdiction ought not to have deterred him from trying the second counter-claim. The second counter-claim is for damages alleged to be suffered by the wrongful act of the inspector, and could therefore be tried in an action brought by the inspector. The other counter-claim is for an amount beyond the jurisdiction, and on that ground alone could not be inquired into. It is an open question whether it is a claim which could be brought against the inspector at all, or whether it is not a special remedy given against the Government, and must be dealt with as provided by the 52nd section of the Act. The case will be sent back to the Magistrate to hear the second claim in reconvention. It may or may not be substantiated, but the defendant is entitled to have it adjudicated upon. It may be that the inspector can show that he did no more than was necessary under the circumstances to cleanse defendant's sheep. The appeal must be allowed with costs of appeal, and the judgment in the Magistrate's Court altered to £4 1s. 9d., with costs; with leave to plaintiff to give such additional sum as would be necessary to take the dip used from the store to the farm, and the Magistrate to hear and determine on the claim in reconvention for £20 damages.

Mr. Justice Solomon, in concurring with the judgment, said that although it was not necessary to decide the point now it was quite possible, having regard to the 52nd section of Act 20 of 1894, that if the claim for £21 had been within the Magistrate's jurisdiction he might have decided upon it. He wished to guard himself, in case the question should hereafter arise, from the impression of having expressed a contrary opinion.

[Appellant's Attorney, G. Trollip; Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice) Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

PIRIE v. PIRIE. { 1897. Aug. 9th.

This was an action for the restitution of conjugal rights.

Mr. Close appeared for Mrs. Pirie, the plaintiff. He stated that the parties were

married in S. John's Church, Cape Town, in January, 1883, and of the marriage three children were living—a girl twelve years of age, a boy of ten, and a boy of eight. In February, 1890, her husband deserted her, and had refused to return or support her. Plaintiff asked for the restitution of conjugal rights, and failing that, divorce and custody of the children.

Reginald Barry, clerk in the Colonial Office in charge of marriage registers, produced the marriage certificate of Louisa and John Pirie.

Louisa Pirie said when she married her husband was a colour-sergeant in one of the regiments. They did not live happily, as her husband drank and ill-treated her. She married him in Cape Town, and was with him in Hong Kong and other places. They returned to Cape Town after he left the service and settled there, but after they had had "words" about another woman in February, 1890, he left her. In 1891, after he had left the regiment and was up-country, he sent her £11. Since that time he had not written nor sent her money. She had supported herself and children as a bookbinder.

Decree was granted for the restitution of conjugal rights, the defendant to return to or receive the plaintiff on or before 15th October next, failing which rule *nisi*, calling upon him to show cause why divorce should not be granted before 1st November next.

[Plaintiff's Attorney, D. Tennant.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

CASTAGNINO V. CASTAGNINO. } 1897. Aug. 10th.

This was an action for divorce on the ground of the defendant's adultery.

Mr. Close appeared for the plaintiff.

Reginald Barry, clerk in the Colonial Office in charge of marriage registers, proved the marriage.

The plaintiff said she was married at Rondebosch in 1890. She and her husband went to Johannesburg, and there he ill-treated her very much. She went to Kimberley, leaving her husband at Johannesburg. At Kimberley she supported herself by keeping a laundry and taking boarders. Her husband being ill, she brought him to Kimberley, but he had not been long down when he assaulted her with a stick and frightened her boarders. For assaulting her he got six months' imprisonment. After that her husband came to Cape Town, and on 20th June last, in consequence of what she heard, she and a Mrs. Vos went to his house at Salt River. There was a woman in the house, and witness at once ordered her to leave, but she replied that she had lived with Castagnino for three years, and Castagnino told his wife that he was "baas." Later that night she and Mrs. Vos looked into the house and saw her husband and the woman in bed together. She smashed in the window and went home.

Mrs. Vos corroborated regarding visiting Castagnino's house, and said she saw the man and woman in bed together. When Mrs. Castagnino smashed in the window the woman fell out of bed.

Decree of divorce with costs was granted,

[Plaintiff's Attorneys, Messrs. Fredgold, McIntyre & Bisset.]

DE KLERK V. NIEHAUS. } 1897. Aug. 10th. " 11th. " 12th. " 13th. " 16th.

Water—Prescription.

Where a stream of water flowing through the property of N., *had for a period longer than the period of prescription been diverted by* D., *a lower proprietor, and his predecessors in title during the dry season of the year, by means of a dam and furrow also on* N.'s *property, which dam and furrow the lower proprietor had regularly maintained and periodically repaired,*

Held, *that* D.'s *right to the sole user of all the water received by the dam was established, but that he was not entitled merely by reason of such diversion to an order restraining* N. *from using a reasonable share of the water above the dam.*

Held, further, *that as to the water flowing above the dam,* D. *was not entitled to its sole use, without proof of some adverse act committed by his*

predecessors previous to the commencement of the prescriptive period and acquiesced in by the upper proprietor during such period.

Where N.'s *predecessor in title had asked and received permission from* D.'s *predecessor to take a portion of the water for the purposes of irrigation above the dam and had for a short time used water under such permission but had then ceased to use it?*

Held, per Solomon J., *that this might be regarded as an assertion by the lower proprietor of the right to the whole of the water and an acquiescence by the upper proprietor, and that if the subsequent upper proprietor had thereafter not used any of the water for thirty years from the time of such permission the upper proprietor would have lost his right to any of the water above the dam, but that the subsequent damming up of the water and use of a small portion as of right by one of the subsequent upper proprietors, though without the knowledge of the lower proprietor, was sufficient to interrupt prescription, and to preserve* N.'s *natural right to a reasonable share of the stream.*

This was an action for a declaration of rights as to the use of the water of a certain stream known as the Dorp River, flowing over the defendant's land in the division of Tulbagh.

The plaintiff's declaration alleged:

1. The plaintiff is the registered owner of the farm Straatskerk, and the defendant is the registered owner of the farm Holle Sloot, which farms adjoin one another, and are both situated in the division of Tulbagh.

2. A certain perennial stream of water rising in the Witzenberg mountains flows over a farm called Kruisvallei, and after a due proportion of the water has been used by the owner of the said farm the said stream flows across land which now falls within the Municipality of Tulbagh, thence on to and over the farm of the defendant, and finally on to and over the plaintiff's farm. The said stream, during part of its course over the farm Kruisvallei and over the municipal ground aforesaid, flows in a channel which was originally artificial, but which has been in existence as the channel of a perennial stream for a period far longer than the period of prescription. The water of the said stream is thereafter turned into the natural bed or channel of the Dorp River, which is not a perennial stream; and at a certain spot in the said natural bed the said water, including any water flowing in the channel of the said Dorp River, is again led out by an artificial furrow over part of the defendant's farm, and thence on to the farm of the plaintiff.

3. In or about the year 1805, the Board of Landdrost and Heemraaden for the district of Tulbagh, having jurisdiction so to do, duly framed and put in force certain regulations for the distribution of the water in the said stream after it had passed the farm Kruisvallei among the owners of the land now comprised within the Municipality of Tulbagh and the then owner of the plaintiff's farm Straatskerk. In terms of the said regulations it was enacted that when the said water was not being used thereunder by the said owners it should have a free flow to the farm Straatskerk.

4. At the date of the said regulations the said farm Straatskerk included the farm Holle Sloot now owned by the defendant. The said farm Holle Sloot was deducted from Straatskerk, and separate title was issued to it in favour of a predecessor of the defendant in or about the year 1818. In the said title no rights to the water of the said stream were reserved in favour of the owner of Holle Sloot.

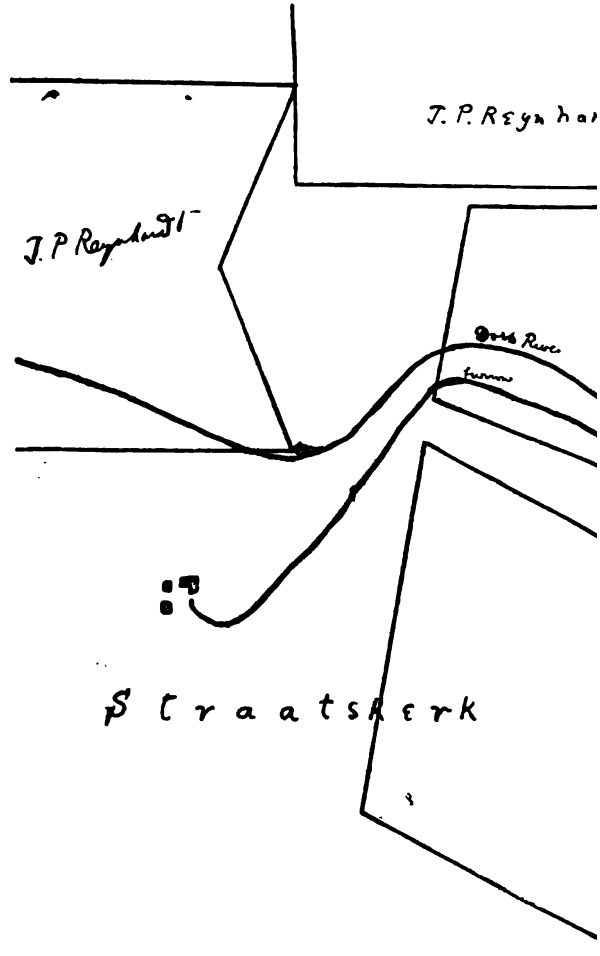
5. Ever since the year 1818 the plaintiff and his predecessors in title have, as a right, used during the dry season the whole of the water of the said stream flowing in manner described in paragraph 2 hereof over the farm Holle Sloot. They have turned out the said water by means of a dam in the bed of the Dorp River aforesaid upon the defendant's farm, and have conducted the said water in a furrow over the defendant's property, and thence on to the land now owned by the plaintiff, and have used it there. The said dam and furrow have been in existence for a period far longer than the period of prescription.

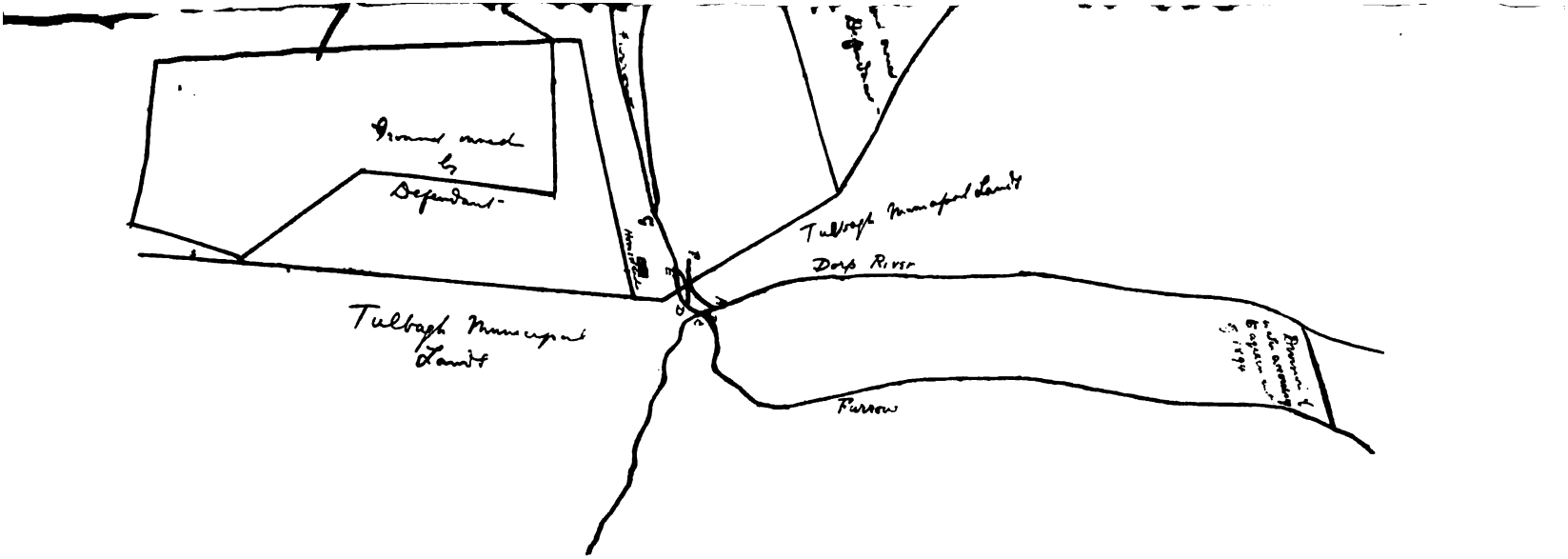
6. For a period far longer than the period of prescription the plaintiff and his predecessors in title have claimed and exercised the right to prevent the defendant and his predecessors from using any of the water of the said stream flowing as aforesaid in the dry season, to wit, the months of October and April, both inclusive, for the purposes of irrigation; but they have allowed them to make use of the said water for domestic purposes.

7. At divers times during the months of February and October, 1896, and January and February, 1897, the defendant has wrongfully

EXPLANAT(

D. Where defendan
G. Dam at which pl
AF. Old furrow.
OPR. Old course of pla
OR. New cut, where




Ground used by Defendant
Tulbagh Municipal Lands
Dorps River
Tulbagh Municipal Lands
Furrow

and unlawfully diverted the water aforesaid by turning it out of the furrow on the farm Holle Sloot, and also out of the channel of the Dorp River aforesaid; the water so diverted was water to which the plaintiff was solely entitled and the defendant has used it for purposes of irrigation and for distilling, and has deprived the plaintiff of the use of the said water to which he was entitled, and he claims the right to continue so to do.

8. By reason of the wrongful and unlawful use and diversion of the said water by the defendant as aforesaid the plaintiff has suffered damage in the sum of £50.

The plaintiff claims:

(*a*) Payment of the sum of £50 for damages as aforesaid.

(*b*) A declaration that the plaintiff during the dry season, to wit, the months of October to April, both inclusive, is entitled to the use of the water flowing in the Dorp River in manner in the second paragraph of the declaration mentioned over the defendant's land, and is entitled to divert the said water by means of the dam and furrow aforesaid.

(*c*) An order interdicting the defendant from using any of the said water during the said period for other than domestic purposes, and from diverting water running in the furrow aforesaid during any period of the year.

(*d*) Alternative relief.

(*e*) Costs of suit.

For a plea to the declaration the defendant said:

1 He admits the allegations in paragraphs 1 and 2 of the said declaration, save that he says that the Dorp River is a perennial stream.

2. He admits the allegations in paragraphs 3 and 4, but he says that at the time when the regulations mentioned in paragraph 3 were framed, both the farm now known as Straatskerk and owned by the plaintiff, and the farm known as Holle Sloot and owned by the defendant were included in the farm Straatskerk, and when the farm Holle Sloot was cut off and transferred, the title thereto issued contained, and does now contain, no provision restricting its right to a share in the water in paragraph 2 of the declaration referred to, and to which share the defendant is, as such owner of Holle Sloot as aforesaid, by law entitled.

3. He says specially that the farm Holle Sloot is traversed by and abuts on the perennial stream in paragraph 2 of the declaration referred to, and that he is therefore, as riparian owner, entitled to a reasonable share of the water of the said stream, and that he and his predecessors in title have always without let or hindrance, and as of right and throughout the whole year, enjoyed the use of a reasonable share thereof.

4. As to paragraph 5, he admits that a certain dam and furrow have been in existence on his farm for a period longer than the period of prescription, and that the said water used therein to flow, but he says that subsequently, and well within the period of prescription, the plaintiff's predecessor in title obtained permission from the defendant's predecessor in title to lead the said water in covered pipes from a certain point on the said furrow some distance below the said dam on to plaintiff's farm. Thereafter, and since the plaintiff became the owner of Straatskerk, he pulled up the said water-pipes and dug a new furrow, and therein led the water heretofore in the said pipes conveyed, but the defendant has never given his consent to the construction and use of such new furrow.

Save as above, he denies the allegations in paragraph 5.

5. He denies the allegations in paragraph 6, save that he admits that he and his predecessors have used water for domestic purposes, but he denies that they did so by permission of the plaintiff and his predecessors in title.

6. He denies the allegations in paragraph 7, and says that he has never used more than such reasonable share of the water as whereto he is rightfully entitled, and he denies the allegations in paragraph 8.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

And for a claim in reconvention the defendant (now plaintiff in reconvention) says:

1. He craves leave to refer to the matters set forth in his plea, and more particularly the matters set forth in paragraph 4.

Wherefore he claims:

(*a*) An order that the defendant should relay and cover over the pipes in paragraph 4 of the plea referred to and convey the water therein, or that he should lead the water in the old furrow in the said paragraph mentioned.

(*b*) Alternative relief.

(*c*) Costs of suit.

For a replication to the plea the plaintiff said:

1. As to paragraph 4 of the plea, he says that heretofore and when the prescriptive right to the water claimed in the declaration had already been acquired by his predecessors in title, one Glaeser, then predecessor in title of the defendant, agreed with one Malan, then predecessor in title of the plaintiff, that the said waterright be conveyed by the said Malan by a

shorter course than heretofore had been used across the farm Holle Sloot, below the plaintiff's dam. for the use of the farm Straatskerk.

2. The plaintiff's said predecessor in title therefore for his own convenience laid pipes along the said shorter course for the conveyance of the said water, but the said pipes thereafter became choked and unserviceable. and the plaintiff, as he lawfully might, removed the same, and with the knowledge and approval of the said Glaeser lawfully conducted the water, and it is lawfully conducted in the said furrow along the same shorter course aforesaid.

3. He denies the other allegations of the defendant, and joins issue.

For a plea to the claim in reconvention he says that the defendant has sustained and sustains no injury in respect of the matter relied upon in the claim in reconvention.

To this replication a general rejoinder was filed.

Mr. Schreiner, Q.C. (with him Mr. Close), for the plaintiff.

Mr. McGregor (with him Mr. Buchanan) for the defendant.

Sydney S. Jacobson (of Walker & Jacobson, plaintiff's attorneys), said he had been at the farms in question, and had gone over the ground. He had visited all the material points, and prepared plans for the plaintiff.

Cross-examined by Mr. McGregor: Witness visited the ground in July, and was there for three days.

Antonie Chiappini Redelinghuys, Malkop's River, seventy-one years of age, said he did not farm now himself. He knew the farm Straatskerk. It was his property, and it became his in 1857. Before he became owner he knew it. The former owner was Adrien Louw, and witness bought the farm from him. Holle Sloot was, when he bought Straatskerk, owned by Jacobus Theron. Theron died, he thought, in 1862. When witness bought the farm the dam and the furrow were on Holle Sloot. The furrow went from the Klipbank to Straatskerk. The dam is now in the same place, and the furrow went in the same direction, although there had been slight alterations. He remained owner for twenty-two years, until 1879. On one occasion Mr. Theron took water out of the Dorp River. Witness was asked by Theron if he could take out the water. It was during his ownership that Theron only on one occasion asked for the water. Theron asked if he could put up a dam and take out water to irrigate his fruit trees. Witness gave him no answer, but Theron promised if he got the water to "keep his eye" on the village people to see that they did not take too much water. When he finished the irrigation he was to turn the water back to the river. The reason he asked witness for permission was because the water was his. All the water that came there belonged to him. All the time witness was on the farm he treated the water as his property. Theron told witness that he was stopped taking the water by some people, one Scholtz being included. No other people used the water but Theron. The water was taken by Theron to irrigate a little line of peach trees. Near the place there was a little vineyard. Theron could not irrigate the vineyard. In that locality there were a great many vineyards that had no irrigation, and crops were also grown without any water except rain. They were known as "dry farms." The widow De Vos was the proprietor. Theron never had transfer, and when Theron died she again took possession. There was first a woman care-taker, and she was followed by Dr. Simpson, the doctor, of Tulbagh. After him came William Vos, son of the proprietor. He also occupied, without transfer, and after him came J. C. Glaeser, and Glaeser was occupying when witness sold his farm. None of the people he had mentioned ever took water out of witness's furrow. Witness knew the Dorp River. It did not run all the year round. It was generally dry from December to March. When the rains came in March all their rivers began to run. The Kruis Vallei furrow always had water. The village could not take water from the Dorp River. In the dry months the water that runs down the Dorp River is from the Kruis Vallei.

Cross-examined by Mr. McGregor: The water that his farm Straatskerk was entitled to was so obtained by judgment of the Landdrost and Heemraaden. Formerly water was taken from a dam behind the Dutch Reformed Church, but this was not now possible, owing to a washaway. Theron only used the water for one year. Theron died in 1862, but the furrow could still be seen. The furrow had never been used since Theron's time, so far as witness knew. Theron had a row of peach trees; then there was a garden and the vineyard. Theron had a garden for only one year, and that was the year they got the water from him. The garden might have been there a year longer, but if it was, it had no water. There might be more land cultivated since he left, but there was no more irrigation. Trees had been planted there since he left. Glaeser told him he rode water for distilling. Before Theron came and asked for the water witness did not think it entirely belonged to him. Theron asking for the water made him think it was understood that the water was his. In his time the dam behind the church was

never dry. In drought there was not sufficient water in the Dorp River to supply the farms. He used to make vleis in summer. In his time he had plenty of water. Last summer was very dry, but there was a small strip of water in the vlei.

Re-examined by Mr. Schreiner: Theron was the owner of the farm, although he never got transfer. Glaeser's vineyard could not be irrigated from the furrow. There was no doubt about Theron asking for the water. At first witness refused him the water, but Theron coaxed him into it.

David J. Malan, farmer, Wagon Drift, Fort Beaufort, said he was the owner of Straatskerk from 1879 to 1890. He knew the dam at the Klipbank. The foundation of the dam was the Klipbank, and when water was low it had to be collected by means of sods before it ran into the furrow. During this time Glaeser never made use of the water from witness's furrow. Water for drinking was taken in buckets, but no water was turned out for distilling. In his time he saw Glaeser pumping below the dam of Straatskerk. By means of long tubing he conveyed the water over the furrow. The scheme did not last long, but it was certainly tried for a time. No one ever asked for water from him. Witness claimed the water on the Heemraaden rights. Witness had permission from Glaeser to make a new furrow, a near cut (O R in plan). Glaeser heard that witness wished to buy the farm Glaeser was on, with the object of having a better furrow, and Glaeser gave him permission to make the furrow so that witness should not compete with him for the farm. When he first made the cut Glaeser gave him unconditional permission to make the furrow. Afterwards witness placed pipes in the furrow, because the sides of the furrow frequently fell in and blocked up the furrow. The whole length of the furrow was 136 yards, and the pipes were laid to the length of between 48 and 50 yards. Sometimes he could make vleis in the Dorp River in the summer months. If nobody led water the Dorp River would always run.

Cross-examined by Mr. McGregor: He claimed all the water flowing into the dam, any water that escaped from the dam he did not claim. He claimed all the water that he possibly could take out. He claimed the water from Dorp River because it ran into his dam, and because it had run there for years and years and nobody else had claimed it. The village had the right to take eight hours' water from the river per diem. Glaeser might have distilled, carting the water from the river. Witness had never seen him doing so. Witness could not remember offering Glaeser ground to sow for the permission to make the furrow.

Mathias P. Louw, Tulbagh, deposed that when he was a lad he lived on Straatskerk. He was brother-in-law of Mr. Redelinghuys. He knew the farm very well, and also knew Holle Sloot. The dam and the furrow now there were the same as they were when he lived there. Holle Sloot never took water from the furrow. At one time Holle Sloot had a furrow further up. It was made by Theron. Witness was there when the furrow was made. Theron, after he got permission, took water from the Dorp River. William Vos used to bring his husks down to Straatskerk to distil.

Cross-examined by Mr. McGregor: He did not know if Mr. Vos had a kettle and could distil himself. It was not customary there to lead water for rye and oats.

Re-examined by Mr. Schreiner: The furrow made by Theron was never used after Theron's death.

Paul Andries de Kle k deposed that he bought the farm of Straatskerk from Mr. Malan. He was chairman of the Municipality, and as such knew the different farms. He could remember the sale of Holle Sloot to Mr. Glaeser. The dam was there where it is now. After purchasing Straatskerk he went to live there. Between 1890 and 1893 witness and Glaeser were the owners of the two farms. When witness bought the farm he regarded the water in Dorp River as his. He took all the water that he could from the dam. Out of the dam there might be leakage. Glaeser distilled at his homestead, and for that purpose he carried water from the river, lifting it up in buckets. Witness did not object to Glaeser taking the "drink water" from the river. He objected to any distilling if the water ran back to the river. Witness removed the pipes placed in the river by Malan becau e the pipes got stopped. It was in Glaeser's time that he removed the pipes and took the water by the furrow. During the dry season the only water in the Dorp River came from the Kruis Vallei. Between October and December, if water came down the Dorp River, witness claimed it. That water was collected at the dam, and he contended that the farmer of Holle Sloot had no right to that water. The Dorp River had no source of its own; it depended upon three upper streams. In 1894 witness had an action against Mr. Marais, but that dispute was settled. Mr. Niehaus purchased the farm of Hollesloot, and in February, 1896, witness complained of him diverting the water (at point D in plan). Witness wrote him saying that unless the

water was turned on at once legal proceedings would at once be taken. The water was wasted by the furrow, and there was more water taken out than was necessary for distilling. Witness also wrote a letter objecting to the distilling taking place by Niehaus beside his (witness's) furrow, as it resulted in the pollution of the water. The letter had no effect, for he continued distilling, and after the distilling he turned the water into his land. Other letters were sent by witness to Niehaus objecting to him using the water. Witness at the time particularly wanted the water for his vineyard, and his vines suffered much owing to the want of water. He had twelve leaguers less of wine this year than formerly, and the cause was the want of water. At the time the water was being taken for the distilling the water was also taken below the dam for Niehaus's garden. Since that time the water had been diverted for distilling and for the gardens.

Cross-examined by Mr. McGregor: Witness had no cause to complain about Glaeser. He considered that Niehaus had treated him badly about the water. He complained of him taking water out of the Dorp River above the dam. He did not complain of him taking the water below the dam. He objected to the furrow because of the waste and the dirtying of the water. There was not enough water for both farms. It was not true that he had a vlei in December last.

Jacobus Theron (51), farmer, Middlepost, said he had lived at the farm since he was a child. His father had the farm, and he succeeded him. In the dry weather the stream from which he got his water was dry, and none got into the Dorp River. His stream was generally dry from January to March. The Dorp River usually dried up in January, February, and sometimes March as well. When they stopped pressing further up the water usually came down.

Cross-examined by Mr. McGregor: There was not much water came from the Drostdy lands further up the stream.

John Daniel Theron (60), farmer, brother of the previous witness, lived as a boy on Middlepost. He now farmed Uitvleigh. With regard to the Dorp River, he could confirm what his brother had said as to the months it became dry.

Cross-examined by Mr. McGregor: J. H. Lombard was a neighbour of witness. He could remember one night that Lombard forgot to turn his water off, and it ran all night, doing witness's vineyard some damage. That was in the month of December or January. This season had been a particularly dry one.

Stephanus Louw (63), farmer, Tulbagh district, deposed that he knew the Dorp River, and had known it for fifty years. It was usually dry towards the end of December, and remained dry until the rain came, in March and April.

Cross-examined by Mr. McGregor: He knew very little about the Dorp River at the present time. It was about forty years since he left the district.

Jacobus de Wet, butcher, Tulbagh (50), stated that he knew Straatskerk. He lived there three or four years when he was young. At that time there was never any water taken for irrigation for Holle Sloot. There was cultivated ground and a vineyard. He could remember Glaeser putting up a pump in the river and pumping the water over the furrow.

Cross-examined by Mr. McGregor: The dam and the furrow were in the same position as they were in in Mr. Theron's time.

Stephanus de Klerk, son of the plaintiff, said he went to school in the village last year; he took two letters to Mr. Niehaus. He delivered the first letter to Mr. Niehaus himself, and the second he gave to Mrs. Niehaus.

By Mr. McGregor: He took one letter in July and another in August.

Mr. Redelinghuys (recalled) said the furrow running from the dam was in existence long before his time.

THE DEFENCE.

P. J. P. Marais, auctioneer, Tulbagh, and chairman of the Municipality: He had spent his boyhood in Tulbagh. The plan produced was prepared by him, and was as accurate as it could be under the circumstances. He knew the neighbouring farms. In Vos's time the water was led from the dam in an open furrow, and irrigated garden ground and a vineyard. The Dorp River was a perennial stream in the true sense of the word. It ran in summer quite independent of the Kruis Vallei water.

Cross-examined by Mr. Schreiner: Witness was agent for the defendant. He was often at Holle Sloot in Vos's time and knew what was done. The plans of the defendant were prepared by him. He made the plan from the original diagram of Holle Sloot farm. He made the rough draft. The plan was prepared by someone in Cape Town.

Mr. Schreiner: So your statement that you prepared the plan is false?

Witness admitted that he had not made the plan. He remembered Glaeser's furrow being made. The furrow which started at the back of the Dutch Reformed Church was in existence when he was a boy. He was sure the vineyard

was watered and the garden as well. He always regarded that Hollesloot had the right to the water of Kruis Vallei. Witness was sued by De Klerk in 1894 for using water, and had to pay damages and costs. He negotiated on behalf of the village for the water. He was asked by Mr. Montgomery Walker to summon everyone who was interested, so that all might be represented. He did not summon Mr. Niehaus. In December, 1894, he wrote a letter to Mr. Walker, in which he stated that Mr. De Klerk had the sole right to the stream. They paid £200, some people being paid £1 for their rights. He was warned by Mr. Montgomery Walker to bring everyone forward who had an interest in the water, yet he did not summon Mr. Niehaus. He could not admit that he then understood Mr. Niehaus had no interest. While the settlement of the water was going on Mr. Niehaus was living in the village of Tulbagh. In an exceptionally dry year the Dorp River might be almost dry for an hour or so, but practically it was constant. No "af-loop" water returned to the river. When someone started brick-making on the Dorp River Mr. De Klerk objected.

Mr. Schreiner: And then you set up the case that the water was the "af-loop" water from the village.

Witness thought his case was that the "af-loop" water was from the Drosdty.

Re-examined by Mr. McGregor: The actual plan was prepared from data supplied by him, and from a rough draft prepared by him.

V. A. van der Byl, attorney-at-law, gave details concerning the preparation of the defendant's plan.

H. J. Niehaus, the defendant and owner of Holle Sloot, said he became owner in February, 1896. Previously he lived in Tulbagh. He knew the Dorp River. In the summer months it was a flowing river. His father had an erf, through which the river flowed, and afterwards he had an erf himself. He knew Holle Sloot before he bought it. He knew that Glaeser used to put water into his vleis from the stream. Witness used the water in the same style as his predecessor, Loubser, did. That was, he took the water as he required it. Witness irrigated his garden from the furrow, and irrigated cultivated patches as well. For distilling, he got water from the river. There was a furrow there, and he used it. After distilling he turned the water back into the river. When he bought the farm Mr. Glaeser told him the conditions. He used about a third of the stream at a time; sometimes twice a week, sometimes not at all.

Cross-examined by Mr. Schreiner: Witness claimed to have the right to take a reasonable share of the water from the furrow. The sons of Mr. De Klerk had once turned the water off again.

Charles J. Loubser, farmer, Ceres-road, said he formerly lived on the farm Holle Sloot. He irrigated part of the farm, portions both above and below the dam. He also used water for distilling. He took the water out of the river by throwing up an embankment and taking water by a furrow. He did that during the three years he was on the farm. Witness had been on the farm of the defendant recently. He thought the ground Mr. Niehaus cultivated had been increased, but witness thought he used more water than Mr. Niehaus did. The Dorp River ran during the summer months. While witness was on the farm Holle Sloot he had no dispute about water with the plaintiff, Mr. De Klerk.

Cross-examined by Mr. Schreiner: It was not correct that Mr. De Klerk would not permit him to take water. Mr. De Klerk only asked why witness changed his furrow, and witness told him that he wished to enlarge his garden. He took the water from the river by an old furrow. He took the water at the place where the kettle now is. The same furrow that watered his trees supplied him with water for distilling. His kettle was about four yards from the river. From the kettle he led the water to the trees by a furrow. The trees stood about fifteen yards from the river. The furrow was on Holle Sloot ground. Mr. Niehaus said the previous day that it was impossible to take water out on the Holle Sloot ground. Mr. Niehaus's furrow was on the Dorp's ground. Witness never took out water on the Dorp's ground. Witness was at the farmsteading about a month ago. He did not go over the ground. He did not see what water Niehaus led. Niehaus had more ground, so he presumed he used more water. On one occasion witness went to the ground, but he did not see how much water he used. He therefore withdrew the statement that he visited the homestead only, and not the ground. When he said that the Dorp River ran in the summer months he meant that it ran at a point below the church. Before he bought the farm he was a wagon-maker in Tulbagh. He heard there were disputes about the water, and he knew that De Klerk was getting money from the Municipality for the water. Witness never made a claim to the Municipality that he was entitled to the water. He made no claim, because De Klerk was a poor man, so that he (De Klerk) could take the money and he (witness) could get on well enough without it.

Re-examined by Mr. McGregor: So long as witness got his water he thought that De Klerk

could take the money. His furrow was about the same as Mr. Niehaus'. His was part of the old furrow, but the place where they took the water out of the river was different. Witness planted more things that required water than Niehaus did.

Johannes C. Glaeser deposed that he took possession of Holle Sloot in 1873, and sold it in 1893. He made use of the water constantly to irrigate his farm. Along the watercourse there were two fig trees below the dam. There was a small inlet there which showed that there must have been a garden there. He walled up the ground and planted it with fruit trees, altogether about eighteen trees of different sorts. He irrigated these trees regularly. It was necessary to irrigate the trees, and he did that all the time he was there. Lower down, opposite the Holle Sloot homestead and above the dam, he planted about fifty oak trees, some of them lower down. Before that there were two pear trees near, and running from them upwards was a vineyard, and on the opposite bank of the river were peach trees. Some years after the ground on which pear trees were was washed away; about twelve or fourteen feet were washed away. He laid a dam right across the river and made a furrow to water the oak trees. That furrow ran northwest, and it had been washed away. The river now and since that time had a different course, and the water had to be led out on the Dorp's ground. Witness had no garden. In addition, he had a pump in the river below the dam. That was the only place suitable for a pump. The water he used for a garden he was trying to make beyond the furrow. For distilling, he carted water from the river to near his house. Every morning his water-cart went down to the river for house water. When distilling, he used six hogsheads, and the cart went back and forwards until about mid-day. The distilling went on for nearly a month. While he used the water no one objected to him. Malan one day came to him, and asked to be allowed to make a near cut for his furrow through a piece of witness's ground. Witness objected as it would spoil the ground, and suggested that he should make a furrow by another route on the west side, and Malan replied that the ground there was too rocky. A few days later he observed Malan and several men making the short cut furrow, and when witness expostulated Malan offered him ground for cultivating. This witness declined to accept, and Malan then offered to lay pipes and cover them in so that the ground could be used for cultivation. Malan laid only a portion of the pipes. It was not correct that he gave Mr. Malan permission to make the furrow on condition that he (Malan) did not seek to buy Holle Sloot, and thus by competing to increase the price. At the time witness did not know that it would be necessary for him to repurchase the farm.

Cross-examined by Mr. Schreiner: He did not see what his age had to do with the question. He was seventy-seven years of age. His mother-in-law left the farm as a bequest to witness's wife. Transfer was to be passed on the death of his mother-in-law. His mother-in-law died in 1869 or 1870, and he took steps to have the transfer passed immediately on her death. He took possession in 1873. He was not certain when his mother-in-law died. It must have been about 1873. Malan he had always found to be a straight and honourable man. He thought Mr. Malan was mistaken when he said the furrow was not made until after the sale. He thought Mr. Malan was also wrong when he said that if witness did not "run him up" at the sale, he would be allowed to make the "near cut" furrow. It was true that he had a conversation with Mr. Malan before the sale. It may have been after the sale that the furrow was made. Mr. Malan first made the furrow, and tried the water. Witness could not say when the pipes were laid. He would not say that Mr. Malan was telling a lie when he said that he only laid the pipes, because the sides of the furrow were falling in. He would contradict Mr. Malan if he said there was no condition about filling in the furrow. Mr. De Klerk afterwards removed the pipes, and witness could not say whether he objected to him taking them away. Witness was a passionate man, and De Klerk was still more passionate, so he thought the less he had to do with him the better. Witness when he visited Holle Sloot in February last did not see Niehaus leading water. Niehaus took the water out in municipal ground. He put a dam across the river which took all the water, but he could not say when the dam was made. Witness took all the water in summer by that dam. There was no loss of water, as the water after passing the trees passed into the river again. When he went there he was told that Straatskerk had the right to certain hours of the water along with the municipality. Witness did not know if he ever told Redelinghuys or Malan that he had a right to the water. He simply led out water from the river and returned it again. Witness could not say that Mr. Malan had ever seen him using his furrow, nor did he ask for permission to take the water. He produced two leaguers of brandy and ten leaguers of wine. All the water he used for distilling was carted from the river. Only part of the old furrow could be used,

Arie Bool, a former servant of Mr. Theron's, stated that in Vos's time water was led out of the Dorp River, as much as was required. He was working on Mr. Niehaus's farm during February of this year, and could say that Mr. Theron would require more water. For ten years he was streetkeeper to the Municipality of Tulbagh. He knew that the Dorp River flowed during the summer months. In Theron's time they took out water at the place known as where the fig-tree stood.

Cross-examined by Mr. Schreiner: He was present when the furrow was made. It was made in Mr. Theron's time. He often when streetkeeper went to see the water, to see that there was not a waste of "aff-loop" water from the furrow. He had heard several witnesses say that for months at a time the river was dry except for the water that came from the Kruis Vallei, and he agreed with them. He could not say that water was taken from the furrow for the garden in Mr. Redelinghuys's time. It was taken in Mr. Louw's time.

Johannes Albertus Theron stated he was born forty-four years ago in Tulbagh district. Up to 1863 he could say that they led water from the river at the back of the old church.

Cross-examined by Mr. Schreiner: He left Tulbagh in 1863, when he was in his tenth year. Mr. Redelinghuys never objected to the leading of water that he heard of.

Johannes P. Reyhardt, farmer and speculator, occupied the farm next to plaintiff's farm. He had seen vleis on plaintiffs' farm during the summer months.

Cross-examined by Mr. Schreiner: He had lived for three years at his present place, but he had known the farm for twenty years.

Mr. Schreiner for the plaintiff: In 1818 when Holle Sloot was cut off, it was open to the proprietor to make some use of the water; he could probably have acquired some right to the water at the dam. *Myburgh* v. *Van der Byl* (1 J., p. 360.) From 1818 onwards Straatskerk made use of the dam and furrow as its own. In 1857, there had already been an acquisition by prescription by Straatskerk.

Mr. Justice Buchanan: How could you get a prescriptive right to the water above the dam, by reason of the mere own-user on the part of the upper proprietor?

Mr. Schreiner: The taking of all the water at the dam was an adverse act of ours; it has come down to us from time immemorial. Arie Bool's evidence must be discredited; if there was any use of water by defendant's predecessors, it was a furtive use. The event to which Redelinghuys refers, must have taken place some time between 1857 and 1862, therefore prescription must have taken place then. The permission given by Redelinghuys to Theron commences a new period of prescription, which included the water above the dam. Having a man to guard the water was an adverse act. The dam and furrow always took every drop of water which they could take, and the defendant cannot now be allowed to claim any share of it. He cannot say we take an unreasonable share in the face of the overwhelming evidence of the fact that Holle Sloot has always been considered to be a dry farm and that we are entitled to all the water. The agreement with the Municipality though registered against the other proprietors is not registered against Holle Sloot because the chairman of the Municipality said Holle Sloot had no rights. We have committed an adverse act in having a dam upon defendant's land and though we have established our right by prescription it might be useless to us if the defendant could take the water which flows into it. *Jordaan* v. *Winkelman* (B. 187[illegible], p. 79). There is nothing to show that if the dam mentioned in that case were beyond the boundary, all the water might not have been taken. The gardens and pear trees of the proprietors of Holle Sloot were placed where they could not get water led to them. Theron's use of the water was not founded on right and therefore not a *usurpatio*, it only lasted two years. The prescription commenced in 1857 by Theron's recognition of Redelinghuys' rights was completed in 1887. The user of Loubscher and Niehaus being after 1887 cannot affect the question. Glaeser's user was insignificant and must have been without knowledge of the owner of Straatskerk. *Usurpatio* must be *nec vi nec clam nec precario*. *Burger Van Schalkwyk* v. *Hugo* (F., p. 89). After the act of Theron the onus of showing a clear *usurpatio* of prescription is upon Theron's successors; if Glaeser had a right he would have used much more water than he did. Where an adverse act is required it can be done just as well by making a dam low down as by placing it at the top of the farm. All that is required is to take all the water and make the farm a dry farm. If the defendant were allowed to take the water at G, he would be enabled to take it down and irrigate lands below G.

Mr. McGregor: The dam and furrow were in existence in 1818, when Holle Sloot, was cut off and all natural advantages belonged to it as well as to Straatskerk; there was no deduction of water-rights and no reservation of the furrow in plaintiff's favour. *Ludolph* v. *Wegner* (6 Juta, 199). We are in the position of riparian proprietors of the water in the furrow

exactly as if it were a natural stream. There must be adverse user by the plaintiff and all he can point to is the dam, but the dam was there in 1818.

Mr. Justice Solomon: His cleaning the furrow and repairing the dam every year is a strong adverse act.

Mr. McGregor: He has a common law right to do that, and we could not stop him.

Mr. Justice Buchanan: But he must have a right first.

Mr. McGregor: The *jus aquaeductus* belongs to both pieces cut off. *Digest* (18, 1, 47). Therefore the furrow had to be recognised. *Kohler* v. *Baartman* (12 S.C.J., p. 216); *Voet* (8, 4, 14), as to water flowing in an artificial channel. If there has been no adverse act, there is no period from which prescription commences. Theron, on whose acts the plaintiff bases his claim, was not the registered owner; he may have been a tenant, he was never competent to affect our rights. The fact that many of the witnesses on both sides were former proprietors of Holle Sloot shows that the question of the water-rights was never considered clear. There is strong evidence of the user of water for distilling and for irrigation. Glaeser's use was not *clam* and it was of right. If we are entitled to the water above the dam a difficulty arises in preventing our taking it below the dam. All we want is a reasonable share.

As to the counter-claim, Glaeser and Malan are not at one; no consideration was given; what was given was a mere licence which could be revoked at any time. The continued use of the furrow is damaging to Holle Sloot. *Voet* (8, 4, 16 and 18) as to these licences. *Angell on Watercourses* (p. 90).

Mr. Schreiner, in reply, cited *Juta's Burge* (p. 145); *Digest* (41, 1, 13): *Voet* (41, 3, 19).

Post. a (August 16th).

Judgment was given for the plaintiff for a declaration that during the dry season, from October 15 to March 15 in each year, he is entitled to the use of the whole of the water flowing in the Dorp River at the dam on Holle Sloot, approximately marked G on plan A, and that the plaintiff is entitled to divert the said water by means of the furrow leading from the said dam on the farm Holle Sluit on to the farm Straatskerk. Further, for an order interdicting the defendant from, in future, diverting any water from the said furrow during any period of the year, and lastly, for £10 damages and costs.

In the claim in reconvention, absolution from the instance with costs.

The Acting Chief Justice said: The farm Straatskerk adjoins the property formerly known as Kerkstraat, now the village of Tulbagh. The Dorp River, after passing through the village property, crosses the farm Straatskerk. This river is fed by several tributaries, one of which, known as the Kruis Vallei Stream, was assigned to the residents of Kerkstraat. Disputes soon arose over the user of their water, and by a decision of the Court of Landdrost and Heemraaden as early as the year 1805, this stream was apportioned between the erfholders of the village and Hon. Jacs. de Wet, then owner of Straatskerk. The stream was diverted into a furrow running through the village and joining the Dorp River at a spot close above the boundary of Straatskerk. The water of the other tributaries of the Dorp River were appropriated by other upper proprietors, so that latterly, at all events during the summer season, the Kruis Valley stream formed the main source of supply for Straatskerk. In 1818 a portion of this farm, now known as Holle Sloot, was cut off and transferred to the predecessor in title of the defendant, and the plaintiff has become the proprietor of the remainder, upon which the old homestead was situated. Holle Sloot abuts directly on the village, and the Dorp River runs through its whole length. It thus stands in the position of an upper riparian property in relation to the remainder of the farm. For convenience' sake this remainder may now be referred to as Straatskerk. On Holle Sloot there is a dam on the Dorp River, and a furrow leading therefrom to plaintiff's homestead. The plaintiff claims the right, by means of this dam and furrow, to divert during the summer season the whole of the water flowing over defendant's land, and complains of a diversion of portion of this water by defendant. This action is brought for a declaration of rights, an interdict against future diversion, and the payment of £50 damages. There is no reservation in the transfer of Holle Sloot, or any servitude registered against the title, and plaintiff's claim is founded entirely on prescription. The evidence led for the plaintiff reaches back as far as 1857. Mr. Redelinghuys, the then owner of plaintiff's property, has proved that at that time the dam and furrow were old; and indeed defendant's counsel was willing to admit that they were in existence at the date of the subdivision of the property. What was disputed is the fact of the user of the water in the furrow solely by the lower proprietors. On this issue of fact we are of opinion that the plaintiff has succeeded. None of the former proprietors of Holle Sloot were inclined to deny that the dam and furrow were always considered as belonging to Straatskerk. We also find as a fact that, at all events from 1857, it was the practice for the owners of

Straatskerk during the summer season to divert into the furrow the whole of the water collected at the dam. None of the plans put in are accurate in detail, but for the purposes of this case the dam may be placed approximately at the spot marked G on plan A. It seems likely that the proprietors of Holle Sloot occasionally took water from this furrow, but this taking was of a very limited supply, and was not constant. It is only recently that any appreciable quantity of water was taken, and this was after prescription had been acquired. There has not been such an interruption of the user proved as would prevent prescription from running. It therefore follows that defendant, by taking water during the last summer from this furrow, infringed the plaintiff's rights. As to what are the months in which the supply of water is scarce, the evidence varies. The declaration originally fixed from October to March, but at the trial plaintiff asked leave to amend so as to include the month of April. The flow of water in the Dorp River above the junction with the Kruis Valley stream is stated to fail usually in December, and the winter rains to commence in some seasons early in March and in others as late as the beginning of May. When the rains set in the plaintiff no longer requires, nor can he take the whole of the water. As we are asked to fix a period, taking an average season, we think that the five months from 15th October to 15th March will be a fair time within which to give the plaintiff the sole right of user of water from the dam. The plaintiff is entitled to a declaration of rights to this extent at least. But the plaintiff goes further, and seeks to restrain the defendant from taking any water whatever, except for domestic purposes, out of the Dorp River, even above the dam at G. This claim is also based on prescription. The plaintiff alleges that the owners of Holle Sloot have not, for a period of upwards of thirty years counting from 1857, used any of the water of the Dorp River for irrigation purposes, but have allowed it all to flow down the river to the dam. This alone is not sufficient to establish an adverse right. It is a clearly-settled principle of law that an upper proprietor does not, by mere non user, lose his rights as a riparian proprietor. Plaintiff's right to have a dam and furrow on defendant's land is in the nature of a positive servitude; the further right which he claims of preventing the defendant from taking any water to which as a riparian proprietor he is entitled above the dam is in the nature of a negative servitude. In the absence of actual grant or of contract to establish such a negative servitude by prescription, there must be adverse user, shown by some act done asserting the right, acquiesced in by the upper proprietor. See *Jordaan* v. *Winkelman* (Buch. S.C. Rep. 1879. p. 86). The only act done by the lower proprietors which plaintiff has been able to put forward is the placing of the dam at G, and the leading therefrom of the whole of the water collected thereby at that spot. We are unable to accept this as conclusive against defendant. A servitude of a right to lead out all the water which collects at a lower point of a stream may be quite consistent with a right in the upper proprietor to exercise riparian ownership above such spot. The use of water lower down does not do away with the power to take water higher up the stream. The dam and furrow are necessary to the enjoyment of the positive servitude, but they are not necessarily an assertion of right to the negative servitude claimed. It is contended, however, that the plaintiff's claim is supported by the circumstance that Holle Sloot was always considered a dry farm, and that *existimatione circumcolentium* it was not entitled to any water rights. No doubt the Municipality of Tulbagh negotiated only with the plaintiff when a division of the water of Kruis Vallei stream by quantity was substituted for a division by turns, and that the defendant was not consulted or made a party to the contract entered into between them. But though the opinion of neighbours may aid in determining on a fact such as the perennial character of a stream, legal rights cannot be taken away by any such opinion. Then again, the evidence does not establish acquiescence by the upper proprietors in the claim now set up by the plaintiff. The plaintiff is willing to concede the use of water for domestic purposes. This is only because user for such purposes has in fact been made, otherwise if the plaintiff could restrict the use for one purpose he could for all. In addition to this user for domestic purposes, it has been proved that several successive proprietors of Holle Sloot have, within the period of prescription set up in this case, led out water above the dam for irrigation and for distilling purposes. Stress was naturally laid on the statement that Theron, who died in 1862, during his occupation of Holle Sloot, asked permission from the lower proprietor before leading out water; but the subsequent owner, Glaeser, who was in occupation for twenty years, irrigated from the stream above the dam as of right and without asking any permission, and no objection was raised to his so doing. It may be true that the configuration of the ground is such that very little land above the dam can be irrigated and owing to the washaway of

the banks of the river it seems probable there will be greater difficulty than formerly in leading out any water, but that is no ground for declaring the defendant divested of his rights. On these two grounds, therefore, first that there has not been any act done to assert the right claimed, and secondly, that the evidence shows user by the upper proprietors during the period for which prescription has to run, we must hold that the plaintiff has not made out a case for any further declaration of rights. As to damages, it appears that the last season was an exceptionally dry one, and that no very great quantity of water was taken by the defendant out of the furrow. No special damages are pleaded. The defendant, however, asserted a right, in which a sertion he has failed. We are of opinion that the sum of £10 will meet the requirements of the case. Judgment will therefore be for the plaintiff for a declaration that during the dry season, to wit, from the 15th October to the 15th March in each year, he is entitled to the use of the whole of the water flowing in the Dorp River at the dam on Holle Sloot, approximately marked G on plan A; and that the plaintiff is entitled to divert the said water by means of the furrow leading from the said dam over the farm Holle Sloot on to the farm Straatskerk. Further, for an order interdicting the defendant from in future diverting any water from the said furrow during any period of the year. And lastly, for £.0 damages and costs of suit. As to the claim in reconvention, the pipes which were placed in the furrow by the previous owner of Straatskerk were taken up again many years ago without objection by the then owner of Holle Sloot. The evidence is not satisfactory of any agreement requiring pipes to be placed in the furrow, and there was no claim made to have them replaced until plea was filed in this case. For whose benefit the pipes were originally placed in the furrow is not clear. A stronger case may possibly hereafter be made out, but in the present suit absolution from the instance must be given on the claim in reconvention with costs.

Mr. Justice Maasdorp concurred.

Mr. Justice Solomon said: The two main questions to be determined in the case are (1) whether the plaintiff is entitled, as he claims, to the use of all the water which is diverted at the dam G, and which is led thence by a furrow over the defendant's farm Holle Sloot on to the plaintiff's farm Straatskerk, and (2) whether he is further entitled to the use of the whole of the water flowing in the Dorp River over the farm Holle Sloot above the dam S. It is frankly admitted on behalf of the plaintiff that when the farm Holle Sloot was in 1818 cut off from Straatskerk, the former farm was entitled to use a reasonable share of the water of the perennial stream flowing in the channel of the Dorp River, and that being so the onus lies upon the plaintiff of establishing that since 1818 the de endant has lost his right to the use of this water. Now it is quite clear in the first place that for a period longer than the period of prescription the owners of Straatskerk have every year during the dry season diverted the whole of the water of the Dorp River, by means of a dam at the point S, and have led the water thence by a furrow on to their farm. I am also satisfied upon the evidence that during the said period the owners of Holle Sloot have made no use of the water running in this furrow, but that the whole of the water has been allowed to run down to the lower farm. The evidence further has established in my opinion that the said dam and furrow were always regarded by the owners of Holle Sloot as being the dam and furrow of Straatskerk, with which they had no concern whatever, and with which they had no right to interfere, and that they were not regarded as being a dam and furrow common to both farms. These being the facts I am of opinion that the plaintiff has acquired by prescription the right to divert the whole of the water of the Dorp River during the dry season in each year, and is entitled to the exclusive use of the water flowing from the dam in the furrow leading to Straatskerk. For the defendant it was contended upon the authority of the case of *Jordan* v. *Winkelmann* that there was no such evidence of adverse user on the part of the lower proprietor as against the upper proprietor as is necessary in order to deprive the upper proprietor of his right to a reasonable share of the water. Now if the dam at S had been a permanent structure by which the Dorp River had been diverted from its natural bed into an artificial channel, and if this artificial channel had been treated as being common to the upper and lower proprietors, there would doubtless have been great force in this contention. The facts, however, are that the dam was used only during the dry season of the year; that every year it had to be rebuilt by the lower proprietor, and that the natural bed of the river remained unchanged. That being so it seems to me that the act of the lower proprietor in going every year upon the land of the upper proprietor and appropriating the whole of the water of the stream to his own use is as strong evidence of adverse user as could possibly be produced. It is an assertion every year by the owners of Straatskerk of their right to the whole of the water diverted at S, and an acquiescence in such assertion by the owners of Holle Sloot, who, though they had land below

the furrow which might easily and profitably have been irrigated, never attempted to assert their right to use the water of the furrow. I am of opinion, therefore, that the plaintiff has fully established his right to divert the whole of the water in the dry season by a dam at S, and that the defendant is not entitled to use the water in the furrow. The plaintiff, however, goes further, and claims that the defendant should also be restrained from leading water out of the Dorp River above the dam G. Now, certainly the contention that an upper proprietor has lost his right to the use of the whole of the water of the only stream running across his farm is a somewhat startling one, and the evidence upon which such a claim is based should be of the most conclusive character. We start with the fact that in 1818 Holle Sloot was entitled to a reasonable share of the water, and there is no satisfactory evidence to prove that between 1818 and 1857 that right had been lost. There is, no doubt, some evidence to show that Holle Sloot was regarded as a dry farm at a very early period, and it seems clear that the amount of ground that could be placed under irrigation was comparatively small. But there is certainly nothing in the evidence sufficiently tangible to justify the finding that in 1860 Straatskerk had acquired the right to the whole of the water flowing down the channel of the Dorp River. About that year, however, an act occurred upon which great reliance is placed by plaintiff as being the starting point of a period of prescription ending in 1890, at which date it is contended that Holle Sloot had lost the right to the use of any water in the Dorp River. The act relied upon is, as deposed by the witness Redelinghuys, that Theron, the owner and occupier of Holle Sloot, asked permission from Redelinghuys, the proprietor of Straatskerk, to take water out of the Dorp River above the east boundary of Holle Sloot to irrigate a portion of that farm. Now, dismissing from consideration some initial difficulties about this evidence, and granting that this fact has been satisfactorily established, I am quite prepared to go thus far with the contention of plaintiff's counsel, that such an act may certainly be regarded as an assertion by the lower proprietor of the right to the whole of the water, and an acquiescence in such assertion by the upper proprietor. If then this state of things had continued for a period of thirty years, or if commencing with such an act, the evidence had established that from that date the plaintiff had used the whole of the water for that period, I should have been prepared to hold that the owners of Holle Sloot had lost their right to the use of any of the water. So far, however, from that being the case, I am satisfied mainly upon the evidence of Mr. Glaeser and one Boer, that from 1873 to 1893, at any rate, the proprietors of Holle Sloot systematically and constantly led water from the Dorp River for purposes of irrigation. It is argued that such user, if proved, was so trifling that the maxim "*De minimis non curat lex*" should apply, and moreover that it was "*clam*," and without the knowledge of the lower proprietors. As regards the second point, however, we have the evidence of Mr. Glaeser that he periodically dammed up the water of the stream, so that it is difficult to understand how the lower proprietors could have been ignorant of what he was doing. But even if it was done without their knowledge, the fact remains that it was done openly, and as a right, and that this is not a case in which the defendant is attempting to establish that he has acquired a servitude by prescription as against the plaintiff, but one in which the plaintiff claims that the defendant has lost his rights by adverse user. And so also with regard to the amount of water that was used, it is true that the extent of ground put under irrigation was very limited, and that consequently not very much water was taken; but I am satisfied that Glaeser used as much as he required, and quite sufficient to preserve his natural right to a reasonable share of the stream. The fact appears to be that Holle Sloot is a farm on which there is not much land that can be irrigated, but that is a matter with which we have no concern. The right to take water out of the stream above G, though it may not be of much value, is a right which, in my opinion, the owners of Holle Sloot have systematically exercised in the past; and consequently when the plaintiff claims that he is entitled to the whole of the water in the Dorp River he is claiming more than he has heretofore had the use of, and his claim cannot be allowed. Before concluding I would say just one word upon the subject of the agreement between the Municipality of Tulbagh, and the owners of Straatskerk with regard to the division of the water. No doubt the fact that the defendant, though he knew of the agreement, stood by and did not assert his right to a share of the water, might fairly be relied upon if it stood alone, as evidence to some extent of an admission by him that he did not claim any of the water. But when we find that at the same time he was actually using the water, and that his predecessors in title had also used the water, the effect of the evidence is completely neutralised. After all the best evidence as to the "*existimatio circumcolentium*" must necessarily be the actual use of the water, and

upon that point there can be no doubt. For these reasons I agree with the judgment which has been pronounced.

Mr. Schreiner applied for expenses of plaintiff's attorney in preparing plans and in making the necessary inspection of the locality.

Mr. Justice Buchanan: That would practically be allowing an attorney fees for qualifying as a witness.

Mr. Schreiner cited Rule of Court 300, allowing two guineas a day for inspection in any land or water case.

The Court ordered a reasonable amount, in the discretion of the taxing officer, to be allowed for plans.

[Plaintiff's Attorneys, Messrs. Walker & Jacobson; Defendant's Attorney, V. A. van der Byl.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSION. { 1897. Aug. 12th.

Mr. Buchanan applied for the admission of Mr. D'Urban Godlonton as attorney, notary, and conveyancer.

The application was granted.

Mr. Joubert applied for the admission of Mr. John Granville Nicholson as a conveyancer.

The application was granted.

REHABILITATION.

Mr. Close applied for the rehabilitation of George Green.

The application was granted.

PROVISIONAL ROLL.

MAY V. AVENT.

Mr. Gardiner moved for provisional sentence for £30 rent due on a lease.

BOSMAN AND CO. V. ARMSTRONG.

Mr. Jones moved for the final adjudication of the defendant's estate.

The application was granted.

WATSON AND CO. V. FRANK LEA BROADBENT.

Mr. Gardiner applied for an order for the final sequestration of the defendant's estate.

The application was granted.

WATSON AND CO. V. MARIE THERESE BROADBENT.

Mr. Gardiner applied for an order for final sequestration.

The application was granted.

THE MASTER V. EXECUTORS OF WILLIAM JONES.

Mr. Sheil moved for an order calling upon the defendants to file an account.

The order was granted.

SWANSON V. WALKER.

Mr. Gardiner applied for judgment by default of appearance for £23 5s., balance of account for rent of a house at Woodstock.

The application was granted.

GENERAL MOTIONS.

In re THE MINORS FOXCROFT.

Mr. Buchanan applied for authority to realise certain landed property and to pay the minors' share into the Guardians' Fund.

The application was granted in terms of the Master's report.

In re THE MINORS WILSON.

Mr. Benjamin asked for leave to raise a loan of £300 to pay off existing bond and incur certain expenses in connection with Cape Town drainage scheme.

In re THE MINORS HATTING.

Mr. Close applied for authority to the Master to make good out of the funds standing to the credit of the minors in the Guardians' Fund, so much as may be required to complete the purchase amount of certain landed property.

The application was granted.

Ex parte JACOBUS PETRUS MALHERBE.

Mr. Benjamin applied for authority to the Registrar of Deeds to cancel a certain mortgage bond for £300 in favour of the Wellington Bank, which has been lost but fully settled.

A rule *nisi* was granted, publication to be published in the "Gazette" and in a newspaper circulating at the Paarl, calling on all persons interested to show cause within a month from

date of publication why the application should not be granted; failing the objection the bond to be cancelled.

Ex parte CHARLES J. HAYWARD, SEN.

Mr. Benjamin applied for authority to the Registrar of Deeds to issue a copy of a mortgage bond for £400, dated 4th August, 1896, and passed by William Henry Ring in favour of petitioner, who has lost the original.

A rule *nisi* was granted, calling upon all persons interested to show cause within a month why the application should not be granted, notice to be published in the "Government Gazette" and the "Beaufort Courier."

In re THE MINORS LABUSCHAGNE.

Mr. Benjamin applied for leave to pass a mortgage bond for £357 in favour of Johannes Carl, and specially pledging the farm Kafir's Kraal, in the district of Albert, to pay off an existing bond and other liabilities.

The application was granted.

Ex parte FILAI SAMAI. AMENDMENT OF TRANSFER DEED. { 1897. Aug. 12th.

Mr. Benjamin applied for leave to amend certain transfers and mortgage bond. The applicant was the registered owner of a piece of ground at Kalk Bay known as lot 5A, of lots 5 and 6 on the deed of transfer annexed to the petition; lots 5 and 6 belonged to one Muller, who in July, 1868, transferred 5A to one Jacobs, who again transferred it to applicant in September, 1868. The property had since been re-surveyed and it was found that the property which applicant occupied and stood possessed of was lot 6A. Lot 6A was still registered in Muller's name but Muller was dead and no representative or relative of his could be found. There were mortgagees of both lots 5A and 6A who could not however be traced; the prayer was for the amendment of transfers and mortgage bond by substituting 6A for 5A.

A rule *nisi* was granted calling upon all persons interested to show cause within a month why the application should not be granted, notice to be inserted in the "Government Gazette" and the "Cape Times," and served on the mortgagees of both lots. Returnable on the last day of term.

Postea (September 13th).

Mr. McGregor applied that the rule might be made absolute.

The application was granted.

Ex parte ADAM LANGA.

Mr. Close moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

The order was granted.

Ex parte THE EXECUTRIX OF J. D. GOOSEN.

Mr. Buchanan moved that the rule *nisi* granted under the Derelict Lands Act be made absolute.

The order was granted.

SUPREME COURT

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

BAARTMAN V. COLONIAL GOVERNMENT. { 1897. Aug. 16th.

This was an application on notice calling upon the defendants to show cause why the case between the parties, which had been set down for trial by the Government for the 17th inst., should not be postponed until Tuesday, the 24th inst., or such other date as the Court might decide, and why the costs of the present motion and the costs incidental to the postponement should not be costs in the cause, or why the applicant should not be granted such further or other relief as to the Court might seem meet.

The action was for £73 12s. 6d., damages alleged to have been sustained by the plaintiff by delay on the part of the Railway Department in delivering certain fifty-nine head of cattle consigned from the Orange River Station to the Paarl on the 10th August, 1896. The pleadings were closed in December last, and the case was set down by the Government under Rule 30 on the 22nd July for trial on the 17th inst. The case for the applicant was that when he received notice of the set-down he was in the district of Middelburg; that he had great trouble in disposing of his cattle owing to the rinderpest regulations in force in that district; and that it was impossible for him to be in Cape Town with his witnesses by the 17th.

On behalf of the Government it was alleged that subpœnas had been served on several stationmasters; that these officials would arrive in Cape Town to-day; that substitutes had to be found to take their places; and that very

great inconvenience would be occasioned to the Railway Department by the case standing over until the 24th inst.

Mr. Schreiner, Q.C., was heard in support of the application.

Mr. Sheil, for the Government, consented on condition that the costs of keeping witnesses in Cape Town until the 24th be paid by plaintiff.

Application for postponement granted, plaintiff to pay costs.

The Acting Chief Justice said: The alleged injuries complained of were inflicted in August of last year, more than a year ago, and the pleadings were closed in December, but the plaintiff took no steps to have the action brought to trial. On 22nd July, however, he received notice that the case would be set down for trial on August 17. Negotiations afterwards took place, and the plaintiff informed the defendants' attorneys that he wished to apply for a postponement. The case would be postponed for a week, plaintiff to pay costs; if any witnesses have come for to-morrow, and have to wait a whole week on account of the postponement, their costs must be paid by the plaintiff. It will still be open to the plaintiff to withdraw the case if he finds that less expensive.

Postea (17th August).

Mr. Schreiner, Q.C., stated that he did not intend to call any evidence, and would consent to absolution from the instance being granted.

Judgment was accordingly given of absolution from the instance with costs.

[Plaintiff's Attorney. C. C. Silberbauer; Defendants' Attorneys, Messrs. J. & H. Reid & Nephew.]

DE MARILLAC v. BRUYNS. { 1897. Aug 16th.

Judgment—Misrepresentation.

Application to vary judgment of the Court on the ground of misrepresentation, which was not proved, refused.

Mr. Close applied for authority to the Registrar of the Court to issue a writ against the respondent for £500, or for the sum of £250, the price paid to respondent for certain shares, or otherwise for leave to re-open the case between the parties heard in May last. The applicant stated in his petition that he had on the 19th May last obtained a judgment against the respondent, by the terms of which the latter was ordered to sell immediately certain two shares in the South African Prospecting and Developing Syndicate and pay over the proceeds to the applicant, or to deliver the shares within seven days, failing which to pay him £500 as damages. That after the order was granted, on the 21st May, respondent's attorneys wrote to his attorneys stating that the South African Prospecting and Development Syndicate had been dissolved and that each share had been apportioned an equivalent in a syndicate called the Loeriesfontein Syndicate, and offered ten shares of £50 each in the last-mentioned syndicate in lieu of the two shares awarded him by the Court. These he refused to accept, stating that the Loeriesfontein Syndicate was insolvent, and the shares worthless and claimed £500 damages. The respondent then tendered the two shares in the South African Prospecting and Developing Company, which the applicant also stated were worthless, as the said syndicate was not then in existence. He alleged, further, that the Court had been induced to grant the order in the terms in which it was granted by the misrepresentations of the respondent and one of his witnesses in stating that no shares had been sold since 27th March, 1895. That the respondent had since that date sold a half-share to one Morrison and another half-share to one Dix for the sum of £250. That he had applied to the Registrar of the Court for a writ against respondent for the sum of £500, or alternatively for the sum of £250, being the price of the shares sold to Morrison and Dix.

The respondent alleged in his affidavit that at the time judgment was given it was known that the South African Prospecting and Developing Syndicate had sold its interests to the Loeriesfontein Syndicate and that the shareholders in the former were entitled to a proportionate number of shares in the latter syndicate; that the shares in the latter were not worthless or the syndicate insolvent: and that he had always been ready and willing to carry out the terms of the judgment.

Mr. Close for the applicant, the plaintiff in the action: The defendant's tender is only a nominal tender; it is not a real one. The shares were worthless at the date of the judgment; the Court ordered delivery of shares in a syndicate which does not exist any longer; this leaves the defendant the option of delivering worthless shares or paying £500 damages; he naturally jumps at the former. But the Court could not have intended a nullity. The Loeriesfontein Syndicate shares are valueless and it was not our duty at the time of the action to find out their value. From the terms of the order the Court must have found as a fact that the value of the shares was £500. What we really ask for now is a variance of the order: *Flower* v. *Lloyd* (10 Ch. Div., p. 327). In this case there has been misrepresentation. *In the*

Matter of Taylor's Estate (22 Ch. Div., p. 497). *Mellor* v. *Surrie* (30 Ch. Div., 239). These cases are in point as to the general powers of the Court: not as to the procedure.

Mr. Justice Solomon: Why did you accept the shares at the trial?

Mr. Close: We accepted them under a misapprehension, which was justified. We relied on the evidence of the defendant.

Mr. Benjamin, for the respondent, was not called upon.

The Acting Chief Justice said: During last term the plaintiff brought an action against one Bruyns, and judgment was given that two shares in the South African Prospecting and Developing Syndicate should be delivered to him, and failing delivery payment of £500, defendant to pay the costs of the suit. It is admitted by applicant's counsel that the judgment has been complied with, that a tender has been made in terms of the judgment, strictly within the letter of the judgment, and that the costs of the suit have been paid, and therefore the judgment has been satisfied. But the plaintiff comes into court now and says there was a mistake in the order. I have referred to my notes, and find that what the Court ordered has been done. But the plaintiff alleges that the Court would have made a different order if the evidence placed before them had been different. It was hinted that in the evidence of the defendant there was perjury, but that is not an unusual charge, for it is common for parties to consider that the other side have committed perjury in their evidence. I think it would be wise in the case of *Flower* v. *Lloyds* (10 Ch. Div., p. 333) to read the utterances of Lord Justice James on the subject, whose remarks are forcible and plain common sense. This opinion is in favour of litigation not being reopened in the manner now asked for. It was alleged that witnesses had committed perjury, but the Court is not prepared to make any such declaration. It was said that if there had not been fraud there had been misrepresentation, but even that, I think, has not been established. There is no ground for reopening the case; such a thing has never been done in the practice of this Court so far as I am aware. The order of the Court is plain, and it does not require any interpretation. Under these circumstances I fail to see how we can grant the application. The application will be refused with costs.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

THE TABLE BAY HARBOUR BOARD V. THE DEPUTY SHERIFF OF CAPE TOWN. 1897. Aug. 16th.

Ship—Attachment *ad fundandam jurisdictionem*—Execution—Preference for dock dues—Act 36 of 1896, section 84.

The Table Bay Harbour Board having attached a ship ad fundandam jurisdictionem *in an action for dock dues, and the ship having been at a later date attached in execution of judgment, and duly sold by the Deputy Sheriff, an application to amend the distribution account of the proceeds by awarding the Harbour Board a preference for the dock dues accruing between the dates of the two attachments was refused.*

This was an application upon notice to the respondent for an interdict restraining him from distributing the proceeds of the sale of the ship Gordon Castle in the manner proposed by him in his account, and calling on him to show cause why the applicant's full claim for dock dues should not be amended.

The applicant's affidavits showed that the ship had been attached *ad fundandam jurisdictionem* on the 26th March in an action to recover £894 7s. for dock dues up to the 22nd March; that judgment for that amount was given on the 12th April; that the ship was attached in execution on the 13th April, and in due course sold by the respondent on the 28th May, realising £3,250; that he had awarded to the applicant the said sum of £894 7s., interest and costs, and also the sum of £132 18s. 5d. for dock dues from the 13th April to 28th May, the balance being awarded *pro rata* to other creditors; that the vessel remained in the Docks from the date of the attachment *ad fundandam jurisdictionem* until after the day of sale, and that the applicant was therefore entitled to payment of the full dock dues up to the day of sale, firstly by virtue of the lien given by Act 36 of 1896, section 84, or otherwise upon the ground that such claim formed a charge upon the respondent as part of the expense in keeping possession of and preserving the vessel. The respondent alleged that considerable difficulty attended the distribution of the funds owing to the various claims made upon them, which claims were set forth in the proposed plan of distribution; that his plan had

been carefully framed and in accordance with legal advice: that notices had been served upon all the claimants mentioned in the plan and also upon the judgment creditors; that the period mentioned in notices for objection to his plan had expired but no notice of application in restraint of the proposed distribution had been received by him with the exception of that filed by the applicant.

He said further that no judgment had been obtained for the dock dues in respect of which it was sought to obtain an amendment of the account.

The proposed plan annexed showed available proceeds amounting to £1,200 18s. 8d., proposed to be distributed as follows:—

12th April.	Table Bay Harbour Board —writ and costs	£916	19	4
5th May.	Cunningham & Gearing—writ and costs	253	14	6
3rd "	Combrinck & Co.—writ and costs	19	1	4
5th "	Wm. Quine—writ and costs	11	3	6

Several other claimants on bonds were mentioned in the plan, but to these no shares were awarded.

Mr. Buchanan for the applicant: The Sheriff should follow the procedure laid down by rule of Court 117. The ship is subject to a lien for dock dues. Act 36 of 1806, section. 84 This lien attaches for any charges due by the master or by the ship: the Sheriff took the ship with full knowledge of the attaching lien. We could not stop the sale in execution and therefore the lien attaches to the proceeds. Any person having a lien upon a thing can enforce it against the proceeds of the sale of the thing. *Voet* (20 1. 13). We are entitled to be paid for dock dues from the 24th March, when the ship was originally attached: we were bound to attach: the respondent admits that he has to allow maintenance from the date of judgment, but that is not sufficient. He ought to have moved the ship out into the Bay in order to escape these charges.

Mr. Schreiner, Q.C., for the respondent: It was unnecessary to attach *ad fundandam jurisdictionem*, but even if necessary, the lien after attachment was not good for more than £894. The Sheriff was not *dominus*. He became *dominus* only after execution and was then liable for expenses. The only obligations upon the Sheriff were those imposed by Ordinance 3 of 1843: he had four writs which he had to allow to share in the proceeds: he had also certain claims of bondholders: if it was his duty to entertain the applicant's lien it was also his duty to go into the bondholders' claims.

Mr. Justice Solomon: The Sheriff does not by attaching a ship *ad fundandam jurisdictionem* take it into his possession; it is merely an arrest.

Mr. Schreiner: It is a pure arrest; to found jurisdiction is to await the further order of the Court; the possession was still in the Harbour Board and they should have taken judgment. *Coote on Admiralty Practice* (p. 17). It is attempted to apply Rule of Court 117 to this case, but that only applies to immovable property whereas a ship is a movable. *Reed and Others* v. *Crozier and Cloete* (2 S., 183).

Mr. Buchanan in reply: *Coote on Admiralty Practice* (p. 144). It is not necessary to bring an action. *Voet II.* (4. 64). We were bound to attach the ship; that is laid down in *Einwald's case* (5 J., 86).

The application was refused with costs.

The Acting Chief Justice said: In this case the ship Gordon Castle was attached at the instance of the Harbour Board of Cape Town. That attachment was a matter of form, and was necessary in that particular case to give the Court an opportunity of trying what claims the Harbour Board had against the ship. After that attachment the Harbour Board brought forward its claims and obtained judgment on April 12. On the following day the writ was placed in the hands of the Sheriff, and under the writ the Sheriff took possession of the ship, sold it, and has now distributed the proceeds. There were other claims, but they were not lodged within the ten days, and consequently had no right to share on the first writ. The Sheriff, in distributing the proceeds, paid the Harbour Board in full, including £132 for dock dues between the date of the attachment in execution and the date of the sale. This was a debt attached to the ship, and properly payable by the Sheriff, because the ship being laid in the dock is in the same position as though left in a warehouse. But the Harbour Board now say they had another claim against the ship, incurred before the debt, and which, they stated, was a preferent claim under the Harbour Board Act As it is now purely a question of the distribution of proceeds, the Harbour Board cannot now come forward and ask the Sheriff to award them a certain amount on their claim. The distribution by the Sheriff seems to be perfectly correct. The application will therefore be refused with costs.

[Applicant's Attorneys, J. Messrs. H. Reid & Nephew; Respondent's Attorney, C. C. Silberbauer.]

SUPREME COURT

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

KOTZE V. KOTZE. } 1897. Aug. 17th.

Action for nullity of marriage on the ground of previous *steeprum* — Deed of seperation—Divorce.

This was an action for a decree of nullity of marriage or alternatively for divorce on the ground of adultery. The declaration stated that the parties went through the ceremony of marriage on the 6th October, 1896, before the Resident Magistrate of Cape Town, the plaintiff believing the defendant then to be a maiden of good fame and repute, but that immediately afterwards he ascertained that she was not a virgin, and had therefore never since cohabited with her or treated her as his wife, and that on the 9th November, 1896, the parties had executed a notarial deed of separation; that the defendant had prior to the 6th October, unknown to the plaintiff, practised the calling of a common prostitute, and that in concealing her loss of virginity from him she had practised a fraud upon him and that the alleged marriage was therefore null and void *ab initio*. There was an alternative declaration claiming a divorce on the ground of adultery since the 6th October.

Mr. Close for the plaintiff.

The Acting Chief Justice suggested that as the deed of separation had been entered into the action had better proceed for divorce instead of for nullity.

Reginald D. H. Barry, from the Registry Office, proved the marriage of the parties.

Dirk Johannes Kotze, contractor, Newlands, the plaintiff, stated that he formerly lived at Saldanha Bay, where he was manager for Messrs. Stephan Bros. In July, 1896, he came on a visit to Cape Town, and happening to be in a large warehouse in Adderley-street, he there met with a young lady. The meeting took place in the afternoon. They talked together in the shop for a little, and he then walked with her along the street. He did not go to her house. Altogether they were not together more than a couple of hours. Before leaving she gave him her name and address, and he then took the train for the country. He said good-bye to her on the street. After he got back to Saldanha Bay he wrote to her and she replied. She informed him that she came from Oudtshoorn, and that her family was a very respectable one. He made inquiries himself and was told that she was of a very respectable family. After a little delay he wrote and asked her to marry him, and she consented. Up to proposing marriage he had only seen her the once.

The Acting Chief Justice: Have you the letters that you received from her?

Witness: No, I haven't got any of her letters. I was so disgusted when I found myself in such a scrape that I destroyed them. Continuing, witness said that he arranged for the woman to visit his brother's farm near Malmesbury. His brother was married. Du Preez (the defendant) proceeded to the farm, and he joined her there on Oct. 3 last year. The marriage took place in Cape Town three days later. His brother brought the woman down to Cape Town, and they were married before the Resident Magistrate. In the morning after the marriage she made certain statements to him, the result of which was that he told her he could not live with her. He brought her back to town, and he at once consulted law agents. A deed of separation was then prepared. He had not seen her since. He took her to be a respectable girl, and she made no confession to him of any kind until after the marriage. In the deed of separation he had made her certain monetary allowances, but at the time he did so he was unaware of the woman's real character and calling.

Richard Collins Keast, lay inspector under the Contagious Diseases Act of 1895, deposed that he had known the woman Maria du Preez since March, 1895. He recognised her as one of the women on the photograph produced. He knew of her marriage, and he was aware that after her marriage she returned to her former life. She was admitted to hospital on 12th November, a month after her marriage, and was discharged from hospital on 12th April. The last time he saw her professionally was on 10th May, but since that time she had gone to Port Elizabeth. Since October, 1896, the month of her marriage, he had frequently seen the woman in brothels in Cape Town.

Mr. Close intimated that he had more evidence to lead, if their lordships thought it necessary.

The Acting Chief Justice replied that further evidence was not necessary.

Decree of divorce was granted, and all benefits provided for in the deed of separation were declared forfeited.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

BEILES V. BEILES. { 1897. Aug. 18th.

This was an action for restitution of conjugal rights, failing which for divorce on the ground of the defendant's malicious desertion. The parties were married in 1893 and the desertion was alleged to have taken place in 1894.

Mr. Buchanan for the plaintiff.

Defendant in default.

Hester Isabella Katherine Johanna Beiles, the plaintiff, said she lived in Bokfontein, Calvinia. She knew her husband Mark Beiles twelve years before they were married. They were married in December, 1893. Her husband, who was a Jew, was a trader. It was arranged before marriage that the sons would become Jews and the daughters would be of her faith. There was only one daughter of the marriage. In September, 1894, her husband told her he was going to town to bank money, and saying he would be back in twenty days. She received a letter from him in Cape Town, wherein he renewed his promise to return. Her husband never returned. Witness received a letter from London saying he was obliged to leave South Africa and go to his own country. He had often wished to tell her that he could not stay longer in her country, but as he knew she would not accompany him, he had been obliged to make his departure in secret. The letter stated that he loved his wife, her mother, and his child, and he stated that he had left £100 for his child, and that the animals, carts, &c., would be his wife's property. Witness wrote to the address given, saying that if he sent her a ticket she would go to him, but to that letter there had been no reply, and the letter had not been returned. She wrote to her husband's sister in Chicago, but that letter was returned. When her husband left he had £2,000 with him. He had a good business, and was making money. She had realised about £150 between the money and the stock left. Her husband came from some part of Russia, the address she did not know.

Their lordships granted a rule for the restitution of conjugal rights, the defendant to return to or receive his wife on or before 18th November, failing which a rule *nisi* to show cause on 30th November why decree of divorce should not be granted, the plaintiff to have the custody of the child, with costs.

The intendit in this case had been served at the London Post-office, but had been returned. The rule *nisi* was now ordered to be served by posting it as a registered letter to the defendant's last known place of residence and to be published as before in the "Daily Telegraph."

[Plaintiff's Attorney, S. J. Mostert.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSION. { 1897. Aug. 19th.

Mr. Jones applied for the admission of Mr. Henry Latham Currey as an advocate of the Supreme Court.

The application was granted.

PROVISIONAL ROLL.

GROBBELAAR V. GOUS.

Mr. Buchanan applied for provisional sentence for £43 10s., being the balance due on a promissory note.

The application was granted.

KALM V. SHABODIEN AND COMPANY. { 1897. Aug. 19th.

Compulsory sequestration on the ground of insolvency refused where the applicant was the only creditor and his claim was disputed.

Dissolution of partnership is not an act of insolvency.

This was an application for the final adjudication of the defendants' estate, the provisional order having been granted by the Acting Chief Justice on August 5. The grounds of the application were that the estate was insolvent, and also that there had been an alienation with intent to defeat creditors.

Mr. Buchanan appeared for the plaintiff, and Mr. Close for the respondent.

After the applicant had filed his answering affidavit the respondents filed others, to which

applicant consented on condition that he should be allowed to file replies. Mr. Close now proposed to read these further affidavits, but the Court refused to hear them even with applicant's consent.

Mr. Close: No specific act of insolvency is alleged; the firm has been dissolved for more than six months.

Mr. Justice Buchanan: A firm is not extinct until it has been liquidated and its debts paid.

Mr. Close: The bond on which the application is based is on an illegal consideration; therefore the applicant is not a creditor. The proper course for him to follow is to sue on the bond and then its validity could be tested. But even if the bond is a good one the respondents are not insolvent. *Prince* v. *Klosser* (9 Juta, p. 170).

Mr. Buchanan: It is not necessary to take judgment on the bond.

The Acting Chief Justice gave judgment. He said: This is an application for the compulsory sequestration of the defendant's estate. The application is made under two Acts, first under Ordinance 6 of 1843, on the ground that there has been an alienation of goods with intent to prevent the creditors from obtaining payment of their debts. The plaintiff appears as the only creditor. The alienation complained of is a dissolution of partnership between the defendant and his partner. A mere dissolution of partnership is not an act of insolvency, especially when it was known to the creditor. Then, under Act 38 of 1884, it is competent for a creditor to sequestrate his debtor's estate if he satisfies the Court that the debtor is insolvent and that it is for the benefit of the creditors that the sequestration shall take place. In this case there is a disputed debt; the plaintiff is the only creditor, and his claim is disputed. It is not shown clearly that the estate of the defendant is insolvent, and, under these circumstances, the order must be discharged with costs. There are suspicious circumstances in the case, but still we had better not express an opinion on them, as the matter will probably come before the Court again in another form.

[Plaintiff's Attorney, J. Ayliff; Defendants' Attorney, D. Tennant.]

WARREN AND OSBORNE v. MUNRO BROS. { 1897. Aug. 19th.

Insolvency—Assignment.

Compulsory sequestration decreed where the defendants' estate was clearly insolvent and it was found impossible to carry through a proposed assignment.

This was an application for the final adjudication of the defendants' estate under Act 38 of 1884.

Mr. Searle, Q.C., appeared for the plaintiffs; Mr. Schreiner, Q.C., for the defendants.

Mr. Schreiner: It is necessary not only to show insolvency, but benefit to creditors to result from a sequestration. There is no presumption that because an estate is insolvent it is for the benefit of creditors that it should be sequestrated. Assignment would certainly work out more beneficially for the creditors. All the creditors are in favour of an assignment except the applicants and they object because of the assignee proposed. *De Vos* v. *Bourkill* (B. 1868, p. 1) shows that the Court has a discretion even where an act of insolvency has been committed. *Deare and Deitz* v. *Koester* (1868, p. 17); *Liquidators of C.G.H. Bank* v. *Deneys* (J. 8, p. 63).

Mr. Searle was not called upon.

The Acting Chief Justice gave judgment. He said: The defendants' case has been so fully and fairly argued by Mr. Schreiner that I think it is unnecessary to hear Mr. Searle. This is an application for the compulsory sequestration of the defendants' estate, under Act 38 of 1884. By the third section of this Act, a creditor for over £100 can apply for the compulsory sequestration of an estate if he can prove first that the estate is insolvent, and secondly, that it is for the benefit of the creditors that the sequestration should take place. The section requires him to set forth the grounds upon which these two statements are made. In this case the plaintiff is a creditor for considerably over £100; he is a creditor for £335 out of a total of £2,677, and he is the largest unsecured creditor. The creditor next to him in value is Mr. Hilliard, who is a creditor for £243. It is not denied that the estate is insolvent, and the utmost that can be hoped for is 7s. 6d. in the £, and the question remains—is it for the benefit of the creditors that sequestration should take place? It has been contended that it would be for the benefit of the creditors if the estate was assigned, but it is clear that an assignment cannot be carried through without the consent of all the creditors. In this case the creditors decided that an assignment should be carried through by August 5. This assignment was not carried through, and on August 9 this application was made for compulsory sequestration.

The plaintiff was at the meeting of creditors, but he stated at that meeting that he did not bind himself to concur in the assignment, and it is not contended that he was bound by his presence at that meeting. It is not contended to-day that the plaintiff is barred in this application on the ground of his concurrence in the resolution, but it is simply opposed on the ground that it is not for the benefit of creditors that this sequestration should take place. It is said that an assignment would be better than a sequestration for the creditors, but an assignment is impossible; it has failed, and it cannot be carried through. Is it for the benefit of creditors that this sequestration should go through? The plaintiff is the largest unsecured creditor, and he considers it would be better in his interests. Then in his affidavit he has remarked that it was resolved by the creditors that if the assignment failed, the insolvent should surrender voluntarily. This does not appear from the minutes, but the plaintiff was clear that that was part of the agreement, though it is contradicted, I think. Cases have been cited to show that it is within the discretion of the Court. I am assuming that the Court has discretion in this case and would not necessarily grant a sequestration simply on the assertion that it was for the benefit of creditors, but assuming that discretion in this case, I think, considering the fact of the undisputed insolvency of the estate, and that the plaintiff himself considers it would be for his benefit, and that the plaintiff is the largest creditor, and that the creditors now seem to have come to disputes, that the estate would be frittered away in further proceedings or in an execution. I think it is certainly in the interests of all creditors that this estate should be sequestrated. There is insolvency, and these two grounds being proved to my satisfaction, I feel bound to grant an order for the final adjudication of the estate as insolvent, the costs to follow the order.

Plaintiff's Attorney, Messrs. Findlay & Tait; Defendants' Attorneys, Messrs. Van Zyl & Buissinné]

ILLIQUID ROLL.

HEYDENRYCH V. BOYCE. { 1897. Aug. 19th.

Mr. Jones applied, under Rule 329, for judgment for the sum of £82, less £15 paid on account, the balance due under a certain agreement, less £13 paid since the issue of summons.

The application was granted.

THORNE, STUTTAFORD AND CO. V. EFFENDI.

Mr. Maskew applied for judgment under Rule 329 for £47 1s. 2d., less £13 19s. 6d. paid on account, for goods sold and delivered.

The application was granted.

REHABILITATIONS.

Mr. Gardiner applied for the rehabilitation of Jozua Jacob François le Roux, Jacob's son.

The Court refused the application, the trustee reporting that the insolvent had kept no books, but granted leave to apply again in six months.

Mr. McGregor applied for the rehabilitation of Abraham Johannes Marais, Jan's son.

The application was granted.

Mr. Buchanan applied for the rehabilitation of Jacob François Minnaar, Jacobus' son.

The application was granted.

Mr. Close applied for the rehabilitation of Gideon Jozua Malherbe.

The Court refused the application, the trustee reporting that no books had been handed over, but granted leave to apply again in six months.

IN THE MATTER OF THE MINOR SCHONNBERG.

Mr. Buchanan applied for the appointment of a curator to assist the said minor in the execution of indentures as an articled clerk to Attorney David Tennant, jun., with a view to being admitted as an attorney and notary.

The application was granted, and Mr. Benjamin appointed to assist the petitioner.

WHITEHEAD V. SHEARER'S EXECUTRIX.

This was an application for extension of the period granted by the Court on the 20th May last within which plaintiff may proceed with his action.

The applicant had obtained an order upon the 20th May, calling upon the respondent within three months, either to remove his fence and restore the building removed by him, or else establish his rights to the strip of land in dispute. The affidavit of the applicant's attorney now set out that it had been found necessary to have a re-survey of the property in dispute; that a declaration had been drawn by counsel, but the draft had been lost; that owing to the absence of his counsel from Cape Town it had not been possible to file the declaration until the 12th August, and that it was impossible now for applicant to establish his rights within the term.

Mr. Graham appeared for the applicant; Mr. Searle, Q.C., for the respondent.

After argument,

The Acting Chief Justice gave judgment. He said: This application originally was in the nature of an application of spoliation, and when that was heard on May 20, the Court ordered the respondent to restore the fence which had been removed, unless within three months from that date he established his right to the strip of land in dispute. The three months expire to-morrow, and he has not established that right, and h. now applies for an extension of time. The nature of the act done by the applicant was such that he ought not to have delayed in establishing his right. The respondent objects to any further extension, and in my opinion I think the respondent is entitled to stand upon his strict legal rights, especially as without his consent the case cannot be tried this term. Under these cumstances the application should be refused with costs.

Mr. Justice Maasdorp said he should be inclined to grant an extension, especially as no material injury would be done to the parties. It seemed to him that the plaintiff set to work to proceed with his action, and the delays had been accounted for. If the defendant would not assist the plaintiff in going to trial he would have granted an extension till next term.

Mr. Justice Solomon said he did not think that there was sufficient reason to account for the delay which had taken place, and he agreed with the Acting Chief Justice that the applicat on should be refused.

The application was refused with costs.

[Applicant's Attorney, C. C. Silberbauer; Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

MACKIE, DUNN AND CO. V. PORT ELIZABETH HARBOUR BOARD

This was an application on behalf of the defendants in the action for a commission to take the evidence in London of James Golder Macfarlane.

Mr. Benjamin appeared for the applicants; Mr. Schreiner, Q.C., for the respondents.

Mr. Schreiner objected to the commission on the ground that an exception had been taken to the plea and if the exception were upheld the evidence of Macfarlane would not be admissible. The plaintiffs had pleaded over, and the exception was not at present ripe for argument as a lease which should have been attached to the declaration had been omitted *per incuriam*: it was not proposed to argue the exception before the day of trial.

Mr. Benjamin was not called upon.

The Acting Chief Justice gave judgment. He said: In this case the defendants have pleaded a certain agreement which was entered into by James Golder Macfarlane, and they propose that Macfarlane is a witness absolutely indispensable on behalf of the defendants at the hearing of the case. Macfarlane lives in England, and they wish to take his evidence. It is true that an exception is taken to the plea. If the plaintiffs wished to have that exception argued they should do so, but the Court cannot now determine whether the exception is good or not. According to the plea the witness is a material witness, and there is good ground for having him examined by commission. The application will be granted, the evidence to be taken before Mr. Mackarness and returned before the first day of next term; the question of costs to stand over.

IN THE MATTER OF THE MINOR ISADORA ADRIANA DE VILLIERS.

Mr. Graham applied for leave to the Board of Executors to pay out of the funds administered by them the sum of £100, to be spent in the education and maintenance of the said minor.

The application was granted.

IN THE MATTER OF THE MINORS VAN ZYL.

Mr. Benjamin applied for leave to the tutor to raise a loan of £100 on mortgage for the payment of certain claims due to the executors of their late father's estate, and for other purposes.

The Court granted an order in terms of the Master's report.

IN THE MATTER OF THE MINORS GORDON. { 1897. Aug. 19th. ,, 31st.

Mr. Searle, Q.C., applied for an order authorising the Master to receive certain moneys deposited with the Malmesbury Board of Executors by the Rev. Van de Wall, now deceased, in trust for the said minors, or otherwise for an order authorising the said Board to pay the capital, with interest to date, to the mother of the minors, their father being dead.

The petition of the Secretary of the Malmesbury Board of Executors, the applicant, set out:

1. That on the 24th December, 1894, the Reverend Gilles van de Wall deposited with the said Board a sum of £300 in trust for the minor Gilles Gordon as a deposit for twelve months certain.

2. That on the 9th December, 1895, the said Gilles van de Wall, as trustee for Mary Gordon, deposited a further sum of £700 with the said Board on similar terms as the above.

3. That Gilles van de Wall died on the 2nd January, 1896.

4. That at the time that the aforesaid moneys were deposited the said Gilles and Mary Gordon were minors and never have since attained their majority.

5. That the aforesaid sums of money are still in the hands of the said Board.

6. That the petitioner had been informed that the mother and natural guardian of the minors, Johanna Hendrika Gordon had applied to the Master of the Supreme Court requesting him to receive from the said Board the said monies and to pay the same into the Guardians' Fund for the benefit of the minors, but the Master had declined to receive them.

7. That the said Johanna Hendrika Gordon thereupon applied to the said Board requiring them to pay her the aforesaid sums of money, but that petitioner had been advised that he could not pay the same to her without an order of Court. The petition had been referred to the Master and he had made the following report: No curator has been appointed over the moneys deposited for the minors nor has the father nominated a guardian over his minor children. The question for the consideration of the Court appears to be whether the mother as the natural guardian is authorised to give a valid receipt and to receive the amount due to her minor children, and on this point I may refer to *Van Rooyen* v. *Werner* (9 Juta, p. 425). With regard to the reference made to me in the petition I beg to point out that as the minors are under the natural guardianship of their mother I am not called upon to interfere in the matter (Section 6 of Ordinance 105) nor am I empowered to receive into the Guardian's Fund or to allow interest on moneys other than those authorised and required by law to be paid into the fund (Sections 26 27 of Ordinance 105).

Mr. Searle: Van de Wall was in the position of a curator, nominate and could have applied for letters of administration as such. *Van Rooyen* v. *Werner* (9 Juta, p. 425); *Ekstein* v. *Ekstein* (4 Juta, p. 13). If a trustee is appointed he can under section 6 pay over the money into the Master's hands.

The Court ordered the case to stand over in order that some proper person might be nominated as trustee.

Postea (August 31st).

The secretary of the Malmesbury Board of Executors was appointed trustee.

[Applicant's Attorney, P. M. Brink.]

THE RECEIVER OF SHAW AND MOORHEAD AND ANOTHER V. MOORHEAD'S TRUSTEES AND ANOTHER. } 1897. Aug. 19th.

Mr. Graham applied for the admission of a proof of a debt for £581 by the applicant Joseph Jacobsohn, in his capacity as the receiver of the partnership firm of Shaw & Moorhead, now in liquidation. His affidavit alleged that he tendered the proof at the second meeting of creditors in the estate of Moorhead; that Moorhead objected to the proof on the ground that it was premature, inasmuch as the liquidation of the estate had not been completed, and that Shaw himself should have tendered the proof; the proof was thereupon rejected. He further alleged that the insolvent had himself admitted the debt at his examination; that it was lawfully owing to the partnership of Shaw & Moorhead; and that at the third meeting of creditors, the following resolution was carried: "That should the liquidator of Shaw & Moorhead move the Supreme Court or any other superior court for the admission of his claim, that in that event no costs be incurred by the trustees in opposing such motion and that any opposition be left in the hands of individual creditors at their own risk."

The Acting Chief Justice said that the Magistrate appeared to have rejected the proof of debt without cause and without any objection being taken. The application must be granted with costs, to be recovered against the estate.

IN THE ESTATE OF THE LATE HERBERT HENRY COLES BAKER. } 1897. Aug. 19th.

Mr. Searle, Q C., moved for the confirmation of a proposed arrangement by one of the co-executors, to take over the share of the estate in the business of Baker, Baker & Co.

The petitioners were the joint executors testamentary of the late Herbert Henry Coles Baker, who died on the 14th February, 1893, and one of them, Thomas Burnham King, was his late partner in the firm of Baker, Baker & Co. The articles of partnership provided *inter alia* that in case of the death of either of the partners the survivor, might if so desirous take over the whole co-partnership business; if he declined to do so then the course to be pursued was laid down in clause 37; clause 37 had been followed and liquidation proceeded with until the 31st July, 1896, when a balance-sheet was framed, showing the interest of Baker therein at £80,237 14s. 1d. The petitioner King now offered to purchased the interest and share of Baker in the business and all his assets for the said sum of £80,237 14s. 1d., £10,237 14s. 1d. in cash and the balance in eight equal instalments within

four years with interest at 5 per cent. All the heirs of Baker had consented to this arrangement. The Court was now asked to consent on behalf of the minor heirs.

The Master recommended the arrangement.

The Court consented to the arrangement on behalf of the minor, on condition that the purchaser does not pass any hypothecation over his property as long as any of the purchase money remained unpaid.

IN THE MATTER OF THE PETITION OF MATTHYS HENDRIK GREEFF.

Mr. McGregor moved for leave to appeal *in forma pauperis* from a decision of the Resident Magistrate of Van Rhyn's Dorp, and for other purposes.

The matter was referred to counsel for his certificate.

IN THE MATTER OF THE CAPE COLONISATION COMPANY.

Mr. Searle, Q.C,. applied on behalf of the official liquidator, Robert Edward Ball, for the sanction of the Court to a certain compromise and proposal for immediate payment of salaries for the term of six months to the employés.

The Court ordered notice to be given in the "Gazette" and the "Cape Times." and the proposals to lie for inspection in the offices of the liquidator and of the Master, with leave to move the Court on September 12.

REGINA V. MAYONGO. { 1897. Aug. 19th.

Criminal appeal—Theft.

This was an appeal from a conviction of the appellant by the Resident Magistrate of Glen Grey.

The appellant was charged with theft in that upon or about the 7th July, 1897, and at Bengu, in the district of Glen Grey he did wrongfully and unlawfully steal two fowls, one the property of Lemuel Adonis, the other the property of Jack Kalifa, both of Bengu.

The evidence against the accused was very strong, the fowls being found in his possession or near the place where he was arrested shortly after the theft.

The Magistrate found the accused guilty and sentenced him to a month's imprisonment with hard labour.

From this conviction the appeal was now brought.

Mr. Molteno appeared for the appellant. He said that the prisoner had already undergone his sentence, but he was unable to argue with any chance of success that there were not some grounds on which to convict.

Mr. Sheil, for the Crown, was not called upon

The Acting Chief Justice said it was very difficult to put forward grounds in support of the appeal He did not see what the Magistrate could do under the circumstanc s but convict, and there were no grounds for interfering with the sentence.

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN, (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

VADASZ V. KOENIG AND CO. { 1897. Aug. 20th.

Contract of employment—Breach of condition by employé—Payment of salary—Damages.

The plaintiff entered into the service of the defendants, importers of goods, on condition that he should bring into their business the agencies of certain manufacturing firms of whom he said he was to be the South African representative; he had no appointment from any of these firms as agent and he failed to bring any of these agencies into the business.

Held *that he was not entitled to recover the salary stipulated for as consideration for his services or damages for wrongful dismissal.*

This was an action in which the plaintiff, a commercial traveller, residing in Cape Town, claimed from the defendant, Julius Koenig, an importer, carrying on business in Cape Town under the style of Koenig & Co., the sum of £20 for salary due from 1st April to 11th May, 1897, in terms of an agreement entered into between them, £15 damages for wrongful dismissal, and £20 3s. 4d. for goods sold and delivered to the defendant in April, 1897. The agreement referred to was contained in two letters, dated

respectively the 19th and 20th March, 1897, which provided that the plaintiff should enter the service of the defendant from the 22nd March to the 31st December, 1897 on the following terms:

(*a*) That he should bring into the latter's business the agencies of all the manufacturers of whom he was appointed the South African representative.

(*b*) That he should receive one-third of the commission derived from them, a fixed salary of £15 per month, and 5 per cent. of the net profit of all business transacted in defendant's name.

(*c*) That he should consign to defendant's firm all goods which he might buy, defendant to settle for them monthly.

(*d*) That 20 per cent. of the expenses on all business transactions shou'd be deducted from plaintiff's emoluments.

The defendant pleaded that the plaintiff represented at the date of the agreement that he was agent in South Africa for certain foreign firms, of which he gave him a list, and that upon the faith of such representations, and that he would bring into defendant's business the said agencies, the latter entered into the agreement; that the representations were untrue; that plaintiff rendered no services to defendant, and did no business up to May 13; that there has been a total failure of consideration, and that he was therefore entitled to refuse payment of salary. As to the £20 3s. 4d. he pleaded a tender.

In reconvention he claimed £20, damages for trespass committed by plaintiff on June 18, 1896, in entering upon his premises and removing two cases valued at £1 12s. 6d., and £40 damages for the false representations mentioned in the plea.

The replication denied that the representations made were false, said that he refused the tender of £20 3s. 4d., but accepted a subsequent tender of £34 12s. 10d., orally made by defendant, but not completed. As to the removal of the cases, plaintiff pleaded that he did not remove them from the defendant's premises.

Mr. Close for the plaintiff.

Mr. Searle, Q.C., for the defendant.

Louis Vadasz, the plaintiff, said he was formerly in the employment of Koenig & Co. Before coming to Cape Town he was in the employment of Weiss & Co., London. When he proposed to come out to South Africa he wrote to two Chambers of Commerce, one in Bohemia, the other in Austria, and had replies before leaving London. The replies stated that the Chambers would recommend witness to exporters in their respective districts. He sent the Chambers references, as they required such before recommending him. The result was that he received letters from a number of firms who were willing that he should represent them in South Africa. From most of the firms he had received letters of appointment, with other firms he made verbal agreements. The letters he gave to the defendants. Samples were to be sent him, and upon these samples he was to get orders here. From some firms he received samples, in other cases it was impossible to get samples. He was to be paid £15 a month and commission. On 1st April the defendant paid him £5, and when witness asked for money at the beginning of May defendant said he was unable to pay him through want of money. On 12th May witness said he must have payment, if not that he would raise an action against the defendant. Mr. Koenig next morning told him that he (plaintiff) had spoken in such a manner the previous afternoon that he (Koenig) had decided to place the matter into the hands of his attorney. Witness had done nothing but ask for the wages due to him. He had not got employment, and in July he decided to start business on his own account. Witness had acted straightforwardly all through, and in fact Koenig had never questioned his *bona fides*.

Cross-examined by Mr. Searle: He did not mention three of the firms and say that they were his backbone. The three dealt in millinery. He did not say that with one, Weiss, he expected to do about £15,000 worth of trade. Up to 12th May samples came from two firms, pamphlets came from another firm. On 17th April Mr. Koenig advised him to cable for samples. He cabled to one firm, Weiss, but no reply came. Later witness wrote to Weiss, but up to 12th May no answer was received. On 24th March Mr. Koenig suggested that witness should write to a number of the firms whose names he had given, stating the arrangements come to with Koenig & Co., saying that he would transact business as agreed on, but under the name of Koenig & Co. Up to 12th May none of the firms had replied. Witness brought out goods with him and consigned them with Koenig & Co. Koenig & Co sold £20 worth, but a portion unsold he took away with him. He had only done business with one of the firms mentioned to the extent of £3 4s. Mr. Koenig did not tell him when he dismissed him that he was dismissed because the arrangements had turned out to be a failure, and that witness's representations as to being agent for the firms were untrue. Mr. Koenig appeared to be very hard up, and that was the reason he did not pay him his salary.

Mr. Searle said a letter had been received from one firm, Richter & Co., in reply to the letter sent by Vadass in March. This letter stated that they were not bound by any agreement with Vadass.

Witness said after leaving he returned to Koenig's place and removed two cases. They were not Koenig's property. They were bought by witness in London. It was not true that Koenig had paid him for the cases. Koenig bought the goods but not the cases. Witness removed the cases about eight o'clock in the morning.

Louis Ludolph, agent for the plaintiff, spoke to plaintiff consulting him. He sent a letter of demand for £61 odd, and defendants tendered £20 3s. 4d. At a subsequent interview Koenig offered another £5, which was refused, and he then offered £15 as the salary. On 29th May witness wrote to defendant agreeing to accept the offer, but no reply had been received.

Cross-examined by Mr. Searle: Witness did not go to Koenig's office. At the meeting in his office Koenig did not say he could make no arrangements without consulting his attorney. Pressed, witness remembered that he got a reply to his letter four or five days later.

Julius Koenig said he carried on business under the title of Koenig & Co. In March he was introduced to Vadass. In an interview plaintiff suggested that he should be allowed to use the name of Koenig & Co., and the use of the sample-room. Later he spoke to representing various European firms, giving the names, and stating that samples were about ready for shipment when he left London. Plaintiff said he had no letters of appointment, saying that in England it was not customary to give such letters. Later on plaintiff showed him four letters of appointment. In April plaintiff was paid his salary due. Time went past and no orders came in, and no samples arrived. Witness complained to him, but said he would allow matters to go on until April 17. The class of goods for which samples were expected were for the summer trade, and the orders had to be got in April. In April some crockery samples arrived, but no business was done. Later, a small box of wood type, about a dozen of type, arrived On May 1 plaintiff asked for money, but witness put him off to see if the samples arrived. His suspicions were aroused by the letters received from Chambers of Commerce. The business done had only amounted to £3 4s. Witness had not got any of the agencies mentioned, and the plaintiff had not fulfilled his contract in that respect. On May 12 witness, when plaintiff asked for money, told him that he was not entitled to any money, and plaintiff stated if he was not paid he would raise an action for it Plaintiff was very insulting, and witness told him that he would have nothing further to do with him, and that he would have to go to his solicitors. Witness consulted Mr. Brittain, and tendered payment for the goods he had purchased from the plaintiff. Mr. Ludolph came to his office. Witness did not actually offer to pay the £15. Mr. Ludolph told him he had no case, and he gave such a very black description of the Court that witness was a little afraid. Mr. Ludolph said the matter would be so expensive that, even although he won the case, he would be a loser. Subsequently he met Ludolph on the street, and went with him to his office, and in talking witness said he might give the £15, but it was not an offer—it was more of a talk. Plaintiff did some correspondence, but he had nothing else to do. There being no samples he could do no business, and the witness got him to do something.

Cross-examined by Mr. Close: Witness was to pay him £15 a month, and one-third of the commission received from orders. Witness had the two-thirds of commission, and plaintiff had the use of the office and sample-room. There was no definite offer made of £15. He told Ludolph that he would have to consult his attorney first.

After argument,

Judgment was given for the amount tendered, £20 3s. 4d., with costs; on the claim in reconvention, absolution with costs.

The Acting Chief Justice said: The plaintiff sues on a contract which he alleges he has performed. The contract is not very clearly set forth in the declaration, but it can be arrived at through the letters attached to the declaration. The plaintiff promised to bring into the business of the defendants, the agencies of the manufacturing firms of whom he said he was to be the South African representative, in consideration of which he was to receive a certain salary. The list of firms was given, which showed that there were eight foreign firms, and the agencies of these firms he undertook to bring into their business. The plaintiff had no appointment from any of these firms as agent. Three of the firms were English, and about them all he could say was that he had had verbal communications with them, and that they promised to send him samples to enable him to carry on the agency. These three firms never sent samples, they never had any communication with the plaintiff, and there was no possibility of any agency being brought into the business by the plaintiff, so far as they were concerned.

Of the remaining five firms, three took no further notice. Only two firms wrote out afterwards, one of whom, Peach, sent a small sample of crockery goods, and another sent a sample of type, through which a small order was obtained. Two firms wrote giving him their terms for goods, one of which was cash, to be paid at Home before the goods were sent out, and the other cash against bills of lading. The plaintiff does not appear to have performed his part of the contract. He has not acted fraudulently, indeed his conduct seems to have been *bona fide*, but he must perform his contract. It is not enough to enter into the contract, he must perform his part of the contract. In this case the plaintiff has failed to perform his part of the contract He has not brought into the business of the defendant the agencies which he stated he had received. I have had some difficulty in the case from the fact that the defendant did not at once dispense with the plaintiff's services but put him off on the question of salary, but as Mr. Searle has pointed out, in any claim on that head a further action can be raised. The question that has to be determined is whether the plaintiff has performed his contract. Before he sued the other side he should have seen that his part of the contract had been performed, and this he has failed to do. Under the circumstances judgment will be given for the amount tendered, £20 3s. 4d., with costs to date of tender; the subsequent costs must be paid by plaintiff.

[Plaintiff's Attorney, P. M. Brink; Respondent's Attorney, D. Tennant.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice). the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSION. } 1897. Aug. 26th.

Mr. Benjamin applied for the admission of Mr. David Stroyan as an attorney, and that the oath might be taken before the Resident Magistrate at Aliwal North.

The application was granted.

PROVISIONAL ROLL.

HEDLEY BROTHERS V. LANGE.

Mr. Gardiner applied for provisional sentence for £595 16s. 8d., balance of a promissory note for £952.

The Acting Chief Justice pointed out that the note was unstamped, although it had been made in 1895, and was for £952: the Court had pointed out before the necessity of stamping promissory notes at the time of making. It might be stamped now and a fine of £1 inflicted. Provisional sentence would be granted as prayed.

BAM V. ROBERTSE.

Mr. Gardiner applied for provisional sentence for £180, less £72 0s. 1d. interest on a mortgage bond.—Granted.

FORBES AND MCFARLANE V. PINKER.

Mr. Gardiner applied for the compulsory sequestration of the defendant's estate; provisional order had been granted on the 18th August.—Final order was granted.

REHABILITATION.

Mr. Close applied for the rehabilitation of Samuel Moritz Plant, the surviving partner of the firm of S. M. Plant & Co. The estate of Plant & Co. was placed under compulsory sequestration on October 6, 1884. The assets realised £775 18s. 3d., and the liabilities proved were £5,138 12s. 9d., leaving a deficiency of £4,362 14s. 6d. It was stated that Mr. Plant had left for Germany and had not returned.

The application was ordered to stand over for explanations by the applicant of certain statements in the trustee's report.

GENERAL MOTIONS.

Re THE MINOR ROBERTSON.

Mr. Close applied in the matter of the minor Robertson for an order authorising the tutor dative to sell certain property.

An order was granted in terms of the Master's report.

BOSMAN'S TRUSTEES V. BOSMAN. } 1897. Aug. 26th. Sept. 6th.

Foreign ante-nuptial contract unregistered—Removal to Colony—Insolvency—Placaat of Ch. V., 1540, Act 21 of 1875.

Where a wife has rights of property secured to her by a foreign ante-nuptial contract, validly made at the domicile of the parties, the subsequent removal of the spouses to this colony does not take away her right to prove concurrently with other creditors on her husband's insolvency in this colony on a claim to which she is entitled under the marriage contract.

B., *who was domiciled in the S.A. Republic, and his wife, who had never previously resided in this colony, were married in the S.A. Republic after having executed an ante-nuptial contract under which he promised to give her £500 value in furniture or in cash. This contract was never registered in the Deeds Registry of this colony. The spouses afterwards settled here and while here* B. *became insolvent.*

His wife tendered a proof of debt for £500 under the ante-nuptial contract. Application to have the proof expunged was refused.

"Bernstein *v.* Bernstein's Trustee" *(Sheil 7, p. 169) commented on.*

This was an application on behalf of the trustees of the insolvent estate of J. J. Bosman to have expunged a proof of debt for £500 tendered by Florence Bosman, his wife, as owing to her under an ante-nuptial contract entered into on the 1st May, 1895. The ground of the application was that the contract was entered into in the S.A. Republic, in which country the insolvent was not permanently domiciled, and that it was not registered in the Deeds Registry Office of the Colony. These facts were admitted by the insolvent except that he denied that he was not domiciled in the S.A. Republic at the date of the contract. He alleged that he went to the S A. Republic in February, 1895, with the full intention of making it his permanent domicile, and was engaged there as a cutter. He married there in May, and in October came to the Colony to see his wife off to England, but intended then to return to the S.A. Republic: that he was induced while in the Colony to give up his intention of returning, and to set up in business here, and that his wife had at no time previous to her marriage resided in the Colony.

Mr. Schreiner, Q C., for the applicants, referred to *Bernstein* v. *Bernstein's Trustee* (7 Sheil. p. 169). The insolvent was either domiciled in the Colony or not: if domiciled here registration was necessary; if not, then Act 21 of 1875 has no application on the authority of that case, which laid down that it applied only to persons domiciled or married in this colony. Mrs. Bosman was never domiciled here. If Act 21 of 1875 does not apply then the decisions in *Thurburn* v. *Steward* (7 P.C. (N.S.), 353) and *In re Chiappini* (B. 1869, p. 143) are still binding. The wife cannot claim in competition with creditors. *Paterson's case* (1869, p. 96; L.R. 3, P.C. 478); *Placaat* (C.V., 1540).

The Acting Chief Justice: But the *Placaat* has been repealed long ago.

Mr. Schreiner: Not as regards this case. In *Hurley* v. *Palier* (1 Juta, 154) the *Placaat* was relied upon, and the Chief Justice said that the authorities all went to show that a cession by a husband to his wife, such as was alleged to have been made in that case, could not be sustained as against creditors.

The Acting Chief Justice: The ground of the decision in that case was that there was no valid cession.

Mr. Schreiner: The *Placaat* is repealed only as regards marriages affected by Act 21 of 1875. This case is analogous to *Hurley* v. *Palier* because there was no handing over of the property. The Act was passed for the benefit of creditors. The *Placaat* is in force in the Transvaal as being part of the common law, and must govern the parties because they were married there.

Mr. Justice Solomon: Would not the wife, under international law, be entitled here to the same benefits that she would have in the Transvaal?

Mr. Schreiner: Registration there cannot make registration here. *St yn* v. *Steyn* (1873, p. 105; 1874, p. 16); *Van der Keessel* (262).

Mr. Searle, Q.C., for the respondent: The question whether the *Placaat* is in force in the Transvaal is of no importance with regard to creditors, one must refer only to the *lex fori Dicey on the Conflict of Laws* (Ed. 1896, pp. 671, 672, 673). To acquire domicile residence need not be of any particular length of time. *Dicey* (p. 105 *et seq.*); in *Bernstein* v. *Bernstein* no argument was addressed to the Court on section 1 of Act 21 of 1875; the judgment was not intended to refer to the whole Act, because some sections expressly refer to contracts executed out of the Colony. The cases quoted are almost all cases in which preference was claimed, but we only claim con-

currently, registration is only necessary in order to found a legal hypothec. The contract can only be set aside if fraudulent.

Mr. Schreiner in reply: As to a person having two domiciles: *Voet* (23, 2, 28); *Hollandse Observaties* (3, 38).

C.A.V.

Postea (6th September).

The Acting Chief Justice, in giving judgment said: This application to expunge a proof of debt made by Mrs. Bosman on her husband's insolvent estate, was in the first instance based on a question of domicile. The notice of motion states the ground of the application to be that the alleged debt represents a claim under an ante-nuptial contract entered into at Johannesburg, and which was not registered in the Deeds Registry of this colony; and the trustees' affidavit avers that when the contract was entered into on May 1, 1895, the insolvent was not permanently domiciled in the South African Republic from which country he returned about the month of October in the same year. To this it is answered by the insolvent that when he went from this colony to the Transvaal he did so with the intention of permanently residing there; that he was engaged in business there when he married; that his wife at no time previous to her marriage had resided in this colony, and that it was only afterwards when his wife was passing through the Colony on her way to England on account of her health that he resolved to remain here. The allegations of an insolvent are not necessarily to be accepted as conclusive in matters connected with his estate, but when they stand uncontradicted, and no reason is given for discrediting them, they are entitled to consideration. It is possible they may be capable of disproof, but in the absence of cause shown to the contrary, we must, for the purposes of this application, take them to be correct. The insolvent's statements are supported by the contract itself, which describes both husband and wife as of Johannesburg, and the contract was duly registered in the Transvaal. It has been admitted, inferentially at least if not directly, that had this ante-nuptial contract been registered here this application would not have been made. It has been recently decided in this Court, in the case of *Bernstein* v. *Bernstein's Trustees*, that the rights of property secured to the wife by a foreign ante-nuptial contract validly made at the domicile of the parties at the date of the marriage, are not lost merely through want of registration of the contract in this colony. In this case the further question has been raised, whether on the subsequent removal of the spouses to this colony, the wife has any right to prove concurrently with other creditors on her husband's insolvency in this colony, on a claim to which she is entitled under the marriage contract. There is no question here as to the ownership of property. The wife's claim is founded on a promise in the contract that in consideration of the marriage the intended husband would transfer to the intended wife furniture to the value of £500, or otherwise hand to her the sum of £500 for the purpose of buying such furniture for herself. It is contended for the trustees that the wife's claim is barred by the provisions of the sixth section of the *Placaat* of Charles V., of 4th October, 1540. Though this section of the *Placaat* has been absolutely and without qualification repealed in this Colony by the first section of Act No. 21, 1875, counsel has urged, apparently in all seriousness, that this repeal applies only to cases of ante-nuptial contracts which have been registered under that Act, and has maintained that it was so decided in *Bernstein's* case. I have no hesitation in saying that the decision in *Bernstein's* case neither intended to decide, nor did it decide, any such question. Act No. 21, 1875, dealt with two distinct matters, the one being the repeal of the *Placaat* and the other the registration of ante-nuptial contracts. It is abundantly clear from the context that the solitary sentence in the Chief Justice's judgment relied upon by counsel, viz., "That Act applies only to contracts executed in this colony or (if executed elsewhere) by persons domiciled in this colony," referred not to the repeal of the *Placaat*, but to the question of registration. The question now to be decided is whether, in the case of spouses who were not domiciled in this colony, and who were married in another country without community of goods, the wife is entitled upon the insolvency of her husband in this colony to claim goods proved to be her separate property, although no instrument in the nature of an ante-nuptial contract had been registered in this colony. If the *Placaat* could have been relied upon at all in that case, it would have helped the trustees and not the wife, yet the decision was in favour of the wife. But as a fact the *Placaat* was never referred to or considered in that case. I cannot suppose that a question of such importance, which did not come up for decision, and which was never raised in argument, was intended to have been disposed of so curtly, in what at most would have been merely an *obiter dictum*. The leading principle of law affirmed in *Bernstein's* case, and one which has been frequently recognised, was, that the rights of spouses fixed by the law

of the domicile of the marriage, cannot be altered or lost merely by a subsequent change of domicile. Any claim founded on rights so acquired must, of course, not conflict with the rights of third persons according to the law of the country in which the claim is asserted. The *concursus creditorum* in this case being in this colony, the *lex fori* must decide questions of priority or competition among creditors. Now apart from the *Placaat* no authorities have been cited to show that the wife's legal claims must be postponed to those of other creditors. The decision of the Privy Council in *Thurburn* v. *Steward* (L.R., 3 P.C. Ap., 478), is instructive on the law of this colony on this point. In that case it was held that a promise in a settlement made in England, the then domicile of the spouses, not registered here, to pay money for the benefit of the children which might be born of the marriage gave rise to a claim against the husband's insolvent estate which was provable concurrently with creditor's claims; while the promise in the same contract to pay money to the wife was held to be postponed, and this solely in consequence of the *Placaat* which was then law in this colony. Now that the *Placaat* has been abrogated, the ground of the distinction drawn in *Thurburn* v. *Steward* falls away. It follows that on this application, as it stands, the trustees have not shown themselves entitled to the order prayed. As already stated, it may be possible for the trustees to show good grounds for expunging the wife's proof of debt, and if so, they ought not to be precluded from doing so, Leave will therefore be reserved to them, if so advised, to establish by action any facts which they may consider would justify their application, If such an action is brought before the end of next term, the costs of this application will abide the result. If no action is instituted before then, this application will be taken to be refused with costs.

[Applicant's Attorney, G. Trollip; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

Ex parte STORK. { 1897. Aug. 26th. Oct. 13th.

Transfer by wife, without husband's assistance, of property registered in her own name—German law as to husband and wife.

Where a woman married in Germany without community of property, had come to this colony with her husband, and had purchased property here with her own money, and without his assistance, and was afterwards deserted by him, the Court granted a rule calling upon her husband to show cause why she should not be allowed to pass transfer to a third person to whom she had sold the property.

Mr. Schreiner, Q.C., in the matter of the petition of Jeannette Stork (born Leopold), applied for an order authorising the Registrar of Deeds to pass transfer of certain land registered in the petitioner's name and sold by her without the assistance of her husband, who has left the Colony.

The petition set forth that petitioner was married in Germany, in 1884, to Carl Wilhelm August Stork, without community; that in the beginning of 1895, she came out to the colony with her husband, and had since resided in Cape Town; that in April, 1895, she purchased certain immovable property in Cape Town with her own money, obtained without the assistance of her husband, and that transfer was passed on the 6th June, 1895, to the petitioner "Jeannette Stork, married in Germany to Carl Stork.' That in July, 1897, her husband deserted her and left the colony with another woman after informing her that it was his intention not to return to her; that she had sold the said property to one Pfuhl for £250, but that the Registrar of Deeds refused to pass transfer owing to her having signed the power to pass transfer without being assisted by her husband. She further alleged that her husband had no right to the property, and that she was wholly unaware of his whereabouts.

An affidavit was also put in, to which was annexed a letter from the Imperial Consul General for Germany, containing a statement of the German law relating to the position of husband and wife.

Mr. Schreiner said that it appeared that the German law as to the position of husband and wife was similar to the Colonial law, and cited *Ex parte Joubert* (2 Sheil, p. 131) and *Ex parte Trouwer* (5 Sheil, p. 36).

A rule *nisi* was granted calling on the husband to show cause why the application should not be granted before 12th October; rule to be published in the "Government Gazette," and made absolute without further application failing cause shown.

Post a (13th October.)

Mr. Schreiner stated that the husband had been in communication with the applicant's

attorney, and in order to give him ample time to appear asked for an extension of the return day.

The return day was extended to the 12th January, the rule to be sent to the husband by registered letter.

[Applicant's Attorney, C. C. Silberbauer.]

In re ROODT'S ESTATE. { 1897. Aug. 26th.

Transfer—Error in transfer duty—Receipt and declaration of purchaser—Transfer ordered to be passed on power of the seller.

Mr. Molteno, in the estate of the late Christiaan Johannes Roodt, applied for an order authorising the Registrar of Deeds to pass transfer of certain land purchased by the deceased to the estate, notwithstanding that the transfer duty receipt gives the name of one Oelofse as a joint purchaser.

The executrix alleged that her deceased husband had on the 16th January, 1854, purchased certain land from one Botha, but did not at the time take transfer; that he had himself paid the whole of the purchase price, and that immediately after the purchase he went into possession and remained in possession until his death and since then that his executrix had been in possession; that transfer had never taken place in consequence of a mistake having arisen in the transfer duty receipt and declaration of purchaser wherein Nicolaas Jacobus Johannes Cornelis Oelofse was mentioned as a joint purchaser; that the said Oelofse had never paid any part of the purchase price; that he had been dead for 15 years and his estate had long been closed and was unrepresented, the heirs scattered and their whereabouts unknown. Declarations of purchaser and seller were annexed, the former being in the names of Roodt and Oelofse.

The application was granted, the Registrar to pass transfer on the power of the seller, J. G. Botha.

SCHOLTZ V. VAN DER BYL AND OTHERS.

This was an application on notice to the respondents calling upon them to show cause why the interdict granted on the 31st May, 1897 (see *Sheil*, VII., p. 210), shall not be removed.

The order of Court containing the interdict had been granted subject to an action being brought during the present term, but no steps had yet been taken to prosecute the action except that during the present term an application had been made by the respondents for leave to sue *in forma pauperis*, upon which application, counsel had not yet reported.

Mr. Schreiner, Q.C., for applicant; Mr. Searle, Q.C., for respondents.

The portion of the rule operating as an interdict was discharged, the rule to stand as a summons. The costs to stand over.

VAN DER BYL AND OTHERS V. SCHOLTZ AND OTHERS.

Mr. Searle, Q.C., applied for a rule *nisi* calling on the respondents to show cause why they should not be allowed to sue *in forma pauperis* in the action ordered by the Court on the 31st May.

The rule was granted, returnable on the 13th September.

PETITION OF J. G. H. S. DU PLESSIS.

Mr. Joubert, on behalf of Jacobus Gideon Hendrikus Scheepers du Plessis, in his capacity as sole surviving executor of the estate of the late Jacobus Ludovicus du Plessis, applied for a rule *nisi* under Derelict Lands Act to be made absolute.

The application was granted.

DU TOIT V. NEL { 1897. Aug. 26th.

Costs—Expenses of witnesses to prove claim in reconvention.

Where the Court had given judgment for plaintiff with costs, except the costs of witnesses to prove the claim in reconvention, and judgment for defendant in reconvention with costs of witnesses to prove the said claim, and the taxing officer interpreted this to mean that the defendant should be allowed only the expenses of those witnesses who gave evidence solely on the claim in reconvention, the Court expressed an opinion that this interpretation was correct.

This was an application for an order to authorise the taxing officer to tax certain costs in the recent action, Du Toit v. Nel.

The judgment of the Court in the action was for plaintiff on the claim in convention in terms of clause 2 of the prayer of the declaration, &c., with costs except costs of witnesses to prove plea to claim in reconvention; and judgment

for defendant on the claim in reconvention for £10 damages, with costs of witnesses to prove the said claim. Plaintiffs to have their expenses as witnesses.

The defendant in the action filed an affidavit setting out the names of witnesses whom he had produced to prove his claim in reconvention, but said he was informed that the taxing officer had declined to allow the expenses of any of them.

The taxing officer's report was as follows: "I interpret the judgment to mean that any of defendant's witnesses who were called *solely* on the claim in reconvention should be allowed their expenses. But if a witness gave evidence on the claim in convention *as well as* the claim in reconvention, he should not be allowed his expenses.

"As far as I was able to judge from the bills of costs submitted to me by the defendant's attorneys, the witnesses brought forward by the defendant gave evidence on *both* claims.

The Court made no order as to the defendant's expenses as a witness, and therefore I had no authority to tax."

Mr. Searle, Q.C. (with him Mr. McGregor) for the applicant; Mr. Molteno for the respondents.

Mr. Searle: The plaintiff was allowed his witness expenses only on application after the trial without notice; we now ask that defendant should have his expenses as a necessary witness on the claim in reconvention. We do not wish to vary the order, but to show that certain witnesses come in under the order. We have to come to the Court because the taxing officer refuses to tax these costs.

The taxing officer stated to the Court that he refused to tax on the principle suggested, and that the bill was then withdrawn from him.

The application was refused, with costs.

The Acting Chief Justice said: The bill of costs has been submitted to, but withdrawn from, the taxing officer, who has not yet decided on the costs, and it therefore does not require an order of Court for that to be done. It was attempted to be argued that they should vary the order of Court, but instead of varying the order of the Court I think that the taxing officer has interpreted the order correctly. The application will be refused with costs.

With reference to defendant's witness expenses the taxing officer could not allow them without an order of Court.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Sauer & Standen.]

PETITION OF J. C. DE KLERK.

Mr. Close appeared in the matter of the petition of Johannes Christoffel de Klerk, who applied for leave to be examined in the English and Dutch languages, and if competent to be admitted as a translator.

The application was granted, applicant to be examined by the Interpreter of the High Court.

BLACKBURN V. MITCHELL.

Mr. Searle, Q.C., applied for a commission to take the evidence of the captain, officers, and certain of the crew of the vessel British Empire, which is about to leave Cape Town, in an action pending.

Mr. Schreiner, Q.C., consented to the commission.

The application was granted, and Mr. Advocate McGregor was appointed the commissioner *Postea* (August 27th).

Mr. Advocate Jones was appointed commissioner in place of Mr. McGregor, who was unable to act.

In re MINOR BAKER.

Minor's property—Sale.

This was an application by the executor of the late Annina Baker, and the mother and natural guardian of the minor Gadiga Baker The estate of Annina Baker was possessed of a half share in two houses in Cape Town, and the minor was possessed of the other half. Hessie Baker, the minor's mother was the sole heiress of Annina Baker. The houses were valued at about £200 each, and it was proposed to sell a half share in one of the houses to the minor for £100, and to transfer a half share in the other house to her mother for a similar sum. The minor would thus be the sole owner of one house. The petitioner asked for the sanction of the Court to this arrangement and the Acting Master recommended it.

Mr. Buchanan appeared for the petitioner.

The application was granted, the costs of the petition, transfers and other expenses to be paid by Hessie Baker individually.

LOESCHER V. KUMST. } 1897. Aug. 26th.

Attachment—Absence of debtor.

Application to attach property of defendant, who was temporarily absent from the Colony, before bringing action against him refused.

Mr. Graham applied for an interdict restraining Messrs. Van den Heever & Jacobsohn from parting with the sum of £35 2s. 4d. collected by them on behalf of respondent, pending the result of an action brought against him by applicant.

The respondent was still carrying on business in the Colony, but had been absent from the Colony for nearly a year and was still absent. The applicant wished to attach the money in order to prevent its being taken out of the jurisdiction: the money had been paid by the applicant himself; the only other asset was some property worth £50 and a few other very small sums.

The order was refused on the ground that the respondent possesses property in the Colony.

The Acting Chief Justice said that it had been frequently pointed out that a creditor could not attach the property of his debtor without a judgment. In this case the debtor was a man carrying on business in the Colony, he had landed property in the Colony, it was mortgaged to the creditor, he was absent from the Colony simply for a temporary purpose, and because there happened to be a sum of money coming to this man, the applicant sought to attach this money. No order could be made in this case.

VAN DER MERWE V. VOS. } 1897. Aug 26th.

Attachment.

Mr. Graham asked for an order attaching the amount of a certain promissory note in the hands of Messrs. Proudfoot & Nieuwoudt, pending the result of an action brought against respondent.

The applicant's affidavit showed that he lived happily with his wife and child at Prieska, until the defendant, who was employed in connection with the rinderpest, arrived. Defendant asked him to receive him into his house as a boarder, saying that he had found hotel life too expensive. Plaintiff told him that the house was too small. Subsequently plaintiff left Prieska for a journey, and the day after he left he received a telegram saying that his wife and child had gone away with the defendant. He at once returned to Prieska and found the statement to be true. One of the neighbours told him that his wife had asked her to tell him that she had gone away with the defendant, and would not return. Plaintiff at once gave up his employment and had been trying to find his wife and child, but failed. He had reason, he said, to believe that the parties were in Cape Town.

Counsel stated that his attorney informed him that the defendant had left Cape Town and proceeded to Johannesburg. A summons had been issued against the wife for divorce, and damages were claimed against Vos, who was made co-respondent.

The matter was allowed to stand over for affidavits that defendant had left the Colony in order that an order for attachment *ad fundandam jurisdictionem* might be granted.

Postea (August 27).

Mr. Graham read an affidavit, certifying that the defendant was now in Johannesburg. The promissory note was now on its way down from Johannesburg to Vos' father, and application was made for leave to attach the money as well as the note and to sue by edictal citation.

An order was granted for leave to attach the note and to sue by edictal citation, personal service to be effected, returnable on the second day of next term.

KAFFRARIAN COLONIAL BANK.

Mr. Buchanan, in the matter of the Kaffrarian Colonial Bank in liquidation, presented the first and final report of the official liquidators.

The report was ordered to lie for inspection in the usual manner.

THE MINORS AVENANT.

Mr. Molteno, in the matter of the minors Avenant, asked for the appointment of a *curator ad litem*

A sub-division of property in which the minors were interested had been called for by the other proprietors, and the curator was required to sign the necessary papers.

An order was given in terms of the Master's report, which approved of the appointment of Mr. Pritchard as curator.

REGINA V. DORA KELAMAN. } 1897. Aug. 26th.

Administering poison with intent to do grievous bodily harm is a crime known to our law.

K. was charged with administering poison with intent to do grievous bodily harm. She pleaded guilty to administering poison with the intention of making V. sick, and was sentenced.

Exception to the indictment was overruled.

Argument on point reserved at the last Criminal Sessions. The prisoner was charged upon the following indictment: That Dora Kelaman, a servant, residing at Claasenbosch, in the district of Wynberg, is guilty of the crime of administering poison with intent to do grievous bodily harm, in that, upon or about the 20th day of April, in the year of our Lord 1897, and at Claasenbosch aforesaid, the said Dora Kelaman did wrongfully, unlawfully, and maliciously administer to Katherine Wilhelmina Versfeld, the wife of John Versfeld, a farmer, there residing, a certain quantity of a certain deadly poison called carbolic acid, with intent then and there and thereby to do her some grievous bodily harm.

At the trial the prisoner pleaded guilty to administering the poison with the intention of making her mistress sick, and this plea was accepted by the Crown. Counsel, who appeared for the prisoner, excepted to the indictment on the ground that the offence, as charged in the indictment, was not one known to our law. After argument on the point, Mr. Justice Maasdorp, the presiding judge, overruled the exception and sentenced the prisoner to four years' imprisonment with hard labour. The learned judge, however, reserved for argument before the full Court the point raised in the exception.

Mr. Buchanan for the prisoner: This is not a crime in England by common law: *Taylor's Medical Jurisprudence* (Vol. I., p. 184). The evil was remedied by 24 and 25 Vict. c 100, sections 23, 24, 25. The administration of poison was formerly held to be an assault but this was overruled by *Regina* v. *Hanson* (C. & K. 2, 912). *Voet* (48. 8, 14) speaks of killing by poisoning or selling, &c., poison with intent to kill. *Carpzovius Prac. Nov. Sax. Rer. Crim.* (P.I., Q. 20, section 1; Q. 21, sections 1, 14); *Van Leeuwen, Censura Forensis* (I. 5, 15, section 1). In Germany administering poison with intent to injure was specially made a crime by statute. *Matthaeus de Crim.* (48. 5, 5). I can find no authority showing that administering poison is a crime unless there is homicide. *Van der Linden* (II., 5, 11) says an intention of depriving a person of his life or health is essential, and refers to *Leyser Med. ad Pand.* (9, 609, who says that a person may be punished for preparing poison, but the charge made must be one of attempting to kill. This appears to be the law only in Saxony. No number of convictions for the act can make it a crime. The Transkeian Penal Code, section 152, is probably taken from 24 and 25 Vict., c. 100.

Mr. Sheil: The essence of the offence charged is the doing grievous bodily harm: the indictment then states the means by which the harm is done. I admit that the authorities speak of the act being committed *necandi causâ*.

Mr. Justice Solomon: Then why was not the prisoner charged with administering poison with intent to kill?

Mr. Sheil: Because the medical evidence showed that the quantity of poison used was not sufficient to kill. But it is absurd to suppose that administration with intent to kill was the only crime of this nature known to the Roman-Dutch law. As far as I can discover, it has been the practice since 1882 to try on indictments similar to this. *Regina* v. *Kaplan* (J. 10 p. 259) as to the practice in criminal cases where the Roman-Dutch law is vague. *Van der Linden* (II., 5, 15) includes amongst crimes the infliction of wounds and personal injuries. *Regina* v. *W. Hennah* (13 Cox, p. 547) as to the quantity of poison administered.

Mr. Buchanan: *Regina* v. *Kaplan* is in my favour. If it is a crime to do personal injury the charge should have been doing the injury by means of administering poison. The injuries referred to by *Van der Linden* are those committed *corpore corpori*.

After argument the exception was overruled and the indictment sustained.

The Acting Chief Justice said: At the last Criminal Sessions Dora Kelaman was charged with the crime of administering poison with intent to do grievous bodily harm. An exception was taken to the indictment that it did not disclose a crime known to our law. I have no doubt that the wrongful and unlawful administration of poison is a crime, and the intent to do the grievous bodily harm is only a question of aggravation. Mr. Sheil has shown from the records that in drawing up the indictment in question the usual practice has been followed, and in my opinion the Court should adhere to the practice so long established. I am clearly of opinion that the wrongful administration of poison is a crime. The indictment will therefore be sustained.

Mr Justice Maasdorp concurred.

Mr. Justice Solomon, in concurring with the judgment, said: It has been pointed out that the Roman-Dutch authorities who speak of the administration of poison as a criminal offence all speak of poisoning *necandi causâ*, but I don't think it follows that the offence of administering poison is not a criminal offence according to the Roman-Dutch law even when not committed *necandi causâ*. I think it may be fairly said to come within the category of personal injuries treated of by *Van der Linden*. There is nothing in *Van der Linden* to limit these to injuries committed *corpore corpori* as

argued by Mr. Buchanan. Under the broad description, therefore, of personal injuries I think the crime set forth in the indictment is a crime known to our law.

[Defendant's Attorney, D. Tennant.]

REGINA V. KYBEE *alias* PUFF-ADDER.

Mr. Sheil applied for the removal of the venue in this case from the Supreme Court to the Malmesbury Circuit Court.

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

O'SULLIVAN V. WARBURTON. { 1897. Aug. 27th.

Sale of hotel—Payment of purchase price—Set-off.

This was an action for the fulfilment of contract.

Mr. Benjamin for the plaintiff, Mr. Joubert for the defendant.

Mr. Benjamin stated that the action was for payment of £510, part of the price of the goodwill and furniture of the Royal Standard Hotel, at Mowbray. About 4th March, 1896, the defendant purchased from the plaintiff the goodwill and the furniture of the Royal Standard Hotel, Mowbray, for the sum of £1,000, payable in monthly instalments of £40. There had accrued at the date of the summons fifteen monthly instalments, or £600, of which, however, defendant had since paid £90, leaving the balance of £510, the sum now sued for. The defendant pleaded a set-off equivalent to the amount claimed, by moneys advanced to the plaintiff and paid to her creditors on her behalf. The replication alleged that the moneys so set off were paid out of the profits of the business while managed by defendant on plaintiff's behalf.

Johanna O'Sullivan, proprietor of the Vineyard Hotel, Newlands, formerly proprietor of the Royal Standard Hotel, Mowbray, stated that in March, 1896, she told Mrs. Warburton that she had had an offer of £1,000 for the hotel, but that Mrs. Warburton should have the first offer. Mrs. Warburton accepted the offer, and purchased for £1,000, payable at the rate of £40 per month. Witness accepted those terms. At that time she was owing £1,000 to Isaacs & Co. Mrs. Warburton and she went to Isaacs together, and there saw Mr. Rothkugel, who agreed to take the money from Mrs. Warburton in monthly instalments. Witness was to remain liable until the money was paid off. About November witness had a difference with Mrs. Warburton, and the result was that witness paid a visit to Mr. O'Dowd. Mrs. Warburton again agreed to pay the money to Isaacs & Co. A document was prepared, but this she did not sign, although she promised to do so in a day or two. Six weeks later witness saw her, and Mrs. Warburton then said she would pay no more as witness had drawn quite enough moxey out of the business. Mr. O'Dowd had been acting for the defendant. The licence was transferred in September, 1896. There had been £90 paid to Isaacs in three instalments before the date of transfer. No money had been paid since the date of the transfer. Witness's husband died in 1883, and after that she carried on the business for herself and for her own benefit. From 1883 to 1887 Mrs. Warburton was engaged by witness and received wages at the rate of £2 per month. From 1888 witness left Mrs. Warburton in charge, but there were no profits, and witness was getting into debt through the Mowbray business. The business was to be carried on by Mrs. Warburton. Witness was to draw the profits monthly. That was for the first six months. At the end of that period a new arrangement was made that witness was to receive £10 a month, and in addition the bills from the other hotel—at Diep River—were to be sent to Mrs. Warburton. Witness all this time regarded the Mowbray business as hers. Mrs. Warburton was to make as much as she could for herself, allow witness £10 a month, and in addition pay all the bills that were sent to her. Mrs. Warburton, she thought, had paid about £1,000 for her. There was further the rent of a cottage, £4 a month, which Mrs. Warburton collected and paid to witness. At a certain time of the year the takings at the Mowbray Hotel would be £300 in winter and £500 in summer. The average yearly taking would be £4,000 or £5,000, and the profit would be about 20 per cent., or £800 a year of clear profit. Witness did not agree to lease the business. She had been very kind to Mrs. Warburton, and had brought her son out from England and also a servant for her. The other day witness called at Mr. Sellar's office, and there saw Mrs. Warburton, who offered to pay £750—

£350 down, and the remainder in instalments of £10 a month. Witness agreed to accept the settlement proposed, but when the papers were prepared Mrs. Warburton refused to sign them.

Cross examined by Mr. Joubert: If Mrs. Warburton had not taken the business at £1,000, witness would have disposed of the goodwill and furniture for that amount. The hotel was furnished by herself. In 1887 witness took the Criterion Hotel, and she took some of the furniture from the Mowbray Hotel. Six months later witness took the hotel at Diep River, and then she took away the billiard table, a bedstead, a chest of drawers, and some small things from the Mowbray Hotel. She bought other furniture for the Diep River Hotel. She had receipts at home for the furniture she purchased for the Diep River. Mrs. Warburton was a first cousin of hers. Witness never at Diep River, in 1888, told a Mr. Ford that the business at Mowbray belonged to auntie (meaning Mrs. Warburton), who paid her £5 a month. (Pass-book produced) Witness did not remember ever having seen the book. She never had any interview with Robert Warburton at which she advised him to take over the hotel, as it would be a home for him as long as he lived. There was a carriage costing £100, paid by the Mowbray business, and bills for liquor for the Diep River Hotel, also paid by Mrs. Warburton. Mrs. Warburton gave witness's daughter money when she went to Port Elizabeth, and she also advanced money to pay for the schooling of witness's son at Graham's Town.

Helen Mary O'Sullivan, daughter of the previous witness, said that in 1896 witness went to Mrs. Warburton and told her in consequence of her son, witness's mother wished to have the arrangements between them placed on a proper footing. Mrs. Warburton acknowledged that she had to pay the £1,0'. At one time she spoke about borrowing the money from Van Ryn, but the interest asked was too high, and it was then agreed that the £1,000 should be paid in instalments

Charles Bruce Sellar, merchant, Cape Town, said that recently he had an interview with the plaintiff and defendant at his office. Mr. Ford had been trying to effect a compromise between the two. Mr. Ford was acting for Mrs. Warburton. Witness was interested in both places, Witness asked if the plaintiff would agree to accept £750, and this Mrs. O'Sullivan agreed to accept. He suggested that Mrs. Warburton should borrow from her Colonial wine merchants, and his firm was prepared to advance a sum. She went to Van Ryn, who agreed to advance money and between the two £350 was to be advanced. Papers were drawn out, but Mrs. Warburton thought the terms too stringent, and later Mrs. O'Sullivan informed him that the business must be transacted through her attorney, and this witness had communicated to Mrs. Warburton.

THE DEFENCE.

Harry Hands, for the defence, as an accountant made up a statement, debit and credit, between the parties. The books were not carefully kept. They showed a large number of payments made by Mrs. Warburton on behalf of Mrs. O'Sullivan.

Cross-examined by Mr. Benjamin: The books were not particularly well kept, and they were not clear.

By the Bench: The books alone were not sufficient. Explanations had to be got from the parties.

Robert Warburton, son of the defendant, said he came out to the Colony in 1890. He went to live with and assist his mother. He received no salary. His mother never received any salary from Mrs. O'Sullivan since the death of Mr. O'Sullivan. The pass-book was kept by his mother and by Miss O'Sullivan. Witness had paid money on behalf of plaintiff. The payments entered in the pass-book were for accounts against Mrs. O'Sullivan's hotel, not against the Mowbray Hotel. About March, 1896, after his mother took over the business, Mrs. O'Sullivan said to his mother in his hearing: "Auntie, why don't you take the business over for yourself; it will be a home for you as long as you live and a home for your son after you are dead." It was arranged that the purchase price would be £1,00', and that defendarts should pay the balance of £852 to Isaac & Co.

Cross-examined by Mr. Benjamin: The items charged against Mrs. O'Sullivan which Mrs. Warburton paid might have been for goods supplied to the Mowbray Hotel.

William Ford said Mrs. O'Sullivan went to the Criterion in 1887, and left the Diep River in 1892. When Mrs. O'Sullivan left the Mowbray Hotel she literally stripped the hotel, taking the furniture to the other hotels. He had a conversation with Mrs. O'Sullivan at Diep River in October or November, 1888. He asked her "What position are you in with auntie?" The plaintiff replied that auntie paid her £5 a month, and discharged her liabilities, and that she (Mrs. O'Sullivan) had nothing to do with the Mowbray Hotel. As a broker he would say that the Mowbray Hotel was not worth more than £500.

Cross-examined by Mr. Benjamin: Witness's mother was staying at the hotel, but he visited Mrs. O'Sullivan as a private guest. If Mrs. O'Sullivan said she never received him as a private guest, she was making a mistake. Mrs. O'Sullivan on the occasion in question added that the Mowbray Hotel belonged to "Auntie." He was sure that was all the conversation then. After she said that the conversation changed.

The Acting Chief Justice: Did you make a note of this conversation with Mrs. O'Sullivan?

Witness: No, my lord, I simply recorded it.

The Acting Chief Justice: Recorded it—how?

Witness: In my memory.

The Acting Chief Justice: You profess to be able to give the exact words that were uttered by Mrs. O'Sullivan nine years ago. Were there any exceptional circumstances that enable you to remember?

Witness: No; I just remember.

The Acting Chief Justice: How long were you before seeing Mrs. O'Sullivan again?

Witness: I saw her soon after.

The Acting Chief Justice: Tell me what she said then.

Witness: I don't remember very well.

The Acting Chief Justice: But if you remember in the one instance you might be expected to remember in the other. You took no particular interest in the matter?

Witness: No, I took no interest.

The Acting Chief Justice: But how do you remember the one conversation and not the other?

Witness: Oh! I remember both.

The Acting Chief Justice: Well, what was said at the next meeting?

Witness: There was nothing particular said.

The Acting Chief Justice: But I want to know what it was.

Witness: She said, "How do you do?" and we had lunch together and dinner together.

The Acting Chief Justice: I don't want to know about the lunch and the dinner. I want to know what was said.

Witness: I cannot tell you that.

The Acting Chief Justice: That will do.

Mary Warburton, the defendant, deposed that she came out to the Colony with Mr. and Mrs. O'Sullivan. After Mr. O'Sullivan's death she continued with Mrs. O Sullivan until the time that the Criterion was taken. During that time she got everytning she required but had no salary. When Mrs. O'Sullivan left for the Criterion witness carried on the business at Mowbray with the assistance of plaintiff's daughters. About a year after Mrs. O'Sullivan went to Diep River, an arrangement was made that defendant would allow Mrs. O'Sullivan £5 a month out of the business and to do the best she could for herself. In 1892 Mrs. O'Sullivan went to the Vineyard. During that time witness was making advances for Mrs. O'Sullivan. In 1896 Mrs. O'Sullivan asked witness to take over the hotel, saying it would be a home for her and her son. She mentioned £1,000 as the price, and witness agreed to that. The next day Mrs. O'Sullivan came to her and asked her to go to Van Ryn's and borrow some money for her, as she did not deal with them. The money was not got. Witness had paid out many sums on account of the plaintiff. The accounts paid for Mrs. O'Sullivan and the moneys paid to her were entered into the pass-book produced. It was not true that witness promised Rothkugel to pay the £1,000 in monthly instalments. She said she would pay off the balance that appeared in the pass-book. There were no arrangements made that witness was to pay the bills for the Diep River Hotel. She simply paid the accounts, lending the money to Mrs. O'Sullivan. She refused to sign the document in Mr. O'Dowd's office because of the pass-book, which showed how much money she had lent Mrs. O'Sullivan. In Mr. Sellar's office she said she would rather pay the £750 than go into court. When her attorney heard about the proposal he would not allow it to be done. Her son was for a time working at Salt River and saved £47. That money had been lent to Mrs. O'Sullivan.

Cross-examined by Mr. Benjamin: When Mrs. O'Sullivan left the Diep River Hotel there was due an account to Van Ryn, and this account witness paid off in instalments. After leaving the Diep River Hotel,—Mrs. O'Sullivan ceased to do business with Van Ryn. Witness had to purchase a great deal of furniture after Mrs. O'Sullivan left. The hotel, however, could not be said to have been "stripped," as the witness Ford had said.

By the Bench: The drawings would be worth about £200 a month, perhaps a little more in summer. Witness paid Mrs. O'Sullivan about £200 a year, she had lived herself, and had bought furniture all out of the business.

Mr. Wrankmore, a manager for Van Ryns, deposed to Mrs. Warburton paying his firm for goods supplied to Mrs. O'Sullivan.

This concluded the evidence.

After argument.

Judgment was given for the payment of £510 with costs.

The Acting Chief Justice said that as might be expected where the parties were not businesslike people, the transactions between them were of the loosest nature, and very unbusinesslike. But there were certain facts which stood

out of their dispute. The first was that the business carried on at the Royal Standard Hotel at Mowbray from 1883 belonged to the plaintiff, Mrs. O'Sullivan. The next fact was that in 1896 that business was sold by Mrs. O'Sullivan to Mrs. Warburton, and bought for £1,000. The defendant admitted that. They had it, therefore, admitted that the £1,000 was agreed upon. But the defendant now said she had the right to set up against that certain claims. But the defendant alleged an agreement which was stated to have taken place as far back as 1888, that Mrs. Warburton was to take over the hotel from Mrs. O'Sullivan, and pay her £5 a month. The parties did not altogether agree as to the value of the business. Mrs. O'Sullivan said the amount was £800 a year, and Mrs. Warburton would reduce that amount to something like £400. It was a matter which raised the question of probabilities. Was it likely that a person owning a profitable business of that nature would hand it over for £5 a month? Mrs. O'Sullivan said that the amount she was to get was to be £10 a month, and such sums were to be paid out of the business as were deemed necessary. Mrs. Warburton paid something like £200, and that sum came out of the profits of the business. The business was therefore able to pay £200 a year, to pay expenses, and Mrs. Warburton was able to find a home for herself and her son. He held that the business belonged to Mrs. O'Sullivan, and therefore that the profits also belonged to her. The question of compensation to Mrs. Warburton was not before the Court. Mrs. Warburton had agreed on one occasion to pay £235, and last month had agreed to pay £70. In face of the contract he could not conceive a person who had a distinct clear claim agreeing to that. The business was Mrs. O'Sullivan's up to the date when £1,000 were agreed upon, and of that £1,000 only £90 had been paid. The amount due was £510, for which judgment would be given as prayed, with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorney, C. W. Herold.]

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

NOVEMBER v. NOVEMBER. { 1897. Aug. 30th.

Divorce—Affidavit under Rule 335.

This was an action for divorce.

Mr. Jones appeared for the plaintiff, Mrs. November: defendant put in no appearance.

Mrs. November said she was married to her husband at Fraserburg in 1864. They lived happily together, except when her husband drank, and then he abused her. In 1888 her husband committed adultery with a widow named Lena Steenkamp. Witness was told of what was going on, and went to the widow's house and found her husband in bed with the woman. Her husband remained with the woman until the following day. Afterwards he went and lived with the woman Steenkamp. Her husband was a mason. Witness was suing as a pauper, and had no funds with which to call witnesses from Fraserburg.

Reginald Douglas H. Barry, from the Colonial Office, produced a copy of the certificate of marriage between the parties.

Mr. Jones, by leave of the Court, under Rule 335, on the ground that plaintiff could not afford the expense of the witnesses' travelling to Cape Town, read an affidavit by Johan Gebhard Lyndenberg, Fraserburg, which corroborated plaintiff's statements.

Decree of divorce was granted, with costs.

[Plaintiff's Attorney, S. J. Mostert.

COOK v. WALKER AND CO. { 1897. Aug. 30th. „ 31st.

Contract of employment in writing—Evidence of prior verbal agreement admitted to show nature of employment—Manager—Wrongful dismissal.

The plaintiff agreed in writing with the defendants, who carried on business as drapers and general furnishers, to serve them to the best of his ability for a certain period, the defendants to retain the right of terminating the agreement at any time before.

expiry of the period should the plaintiff prove incompetent for his duties or should there be misconduct on his part.

Evidence of the verbal engagement of the plaintiff, prior to the contract being reduced to writing, was admitted to show the capacity in which he was engaged, and the nature of the employment which he was to perform.

Where the Court found that the plaintiff had been engaged to act as manager for the defendants, and that it was part of the manager's duties to keep certain books which he failed to keep in a proper manner,

Held, *that the defendants were justified in terminating the contract and dismissing the plaintiff.*

This was an action for £630, being damages for wrongful dismissal.

The plaintiff's declaration alleged:

1. That plaintiff resides in Cape Town, and the defendants carry on business as drapers and general furnishers in Cape Town under the style or firm of J. Walker & Co.

2. The defendants were carrying on the said business in July, 1896, at which date and in London they entered into an agreement with the plaintiff, whereunder he agreed to come to Cape Town, and to enter their employ as manager of the furnishing department and workshop for a period of three years upon certain terms and conditions, which were set forth in the agreement annexed.

3. Thereafter the plaintiff entered the employment of the defendants as manager as aforesaid, and duly performed the duties of the said office, but on or about March 19, 1897, the defendants broke their contract with the plaintiff, and purported to depose him from his position as manager, and thereafter wrongfully and unlawfully dismissed him from their employment as such.

4. By reason of the said breach of contract and wrongful dismissal the plaintiff has sustained damages in the sum of £630.

The plaintiff claims:

(a) The sum of £630 as damages, with interest *a temporae morae* and costs.

COPY OF AGREEMENT.

I, Frank Cook hereby agree to serve J. Walker & Co., Plein-street, Cape Town, to the best of my ability for a period of three years from my arrival in Cape Town in consideration of a salary of £240 for the first year, £270 for the second year, £300 for the third year, and a second-class passage out to Cape Town; and it is mutually agreed that J. Walker & Co. retain the right to terminate this agreement at any time before the expiry of three years should I prove incompetent for my duties, or on account of misconduct on my part; and it is further mutually agreed that should this agreement be terminated before the expiry of the period of three years, that I refund to J. Walker & Co. the proportion of the passage money for the unexpired part of the period of three years.

The defendants, for a plea:

1. Admit paragraph 1 of the declaration.

2. Admit, as to paragraph 2, that they entered into the agreement contained in the document annexed, and referred to it for the true meaning and conditions of the contract. They denied that it was specially agreed that plaintiff should enter their employ as manager of their furnishing department and workshop.

3. As to the third paragraph, they say that they duly ceded to plaintiff, when in their employ, the management of the furnishing department and the workshop, but that in or about the 20th March they terminated the said contract, as they had a right to do, on account of the plaintiff's neglect of duty and his misconduct in refusing to perform work duly assigned to him by the defendants, and in absenting himself from their business and refusing to fulfil his contract.

4. Subject to the above they denied the allegations in the third and fourth paragraphs. For a claim in reconvention they alleged that they had paid £25 6s. for a second-class ticket to the Cape for the plaintiff, in terms of the contract, and that he was bound to refund to them a proportion which amounted to £20 14s.; also that the plaintiff owed them £42 8s., the balance of an account for goods sold and delivered to him between 29th January and 29th March, 1897, from which they deducted £6 6s. owing to him for work.

Wherefore they claimed the sums of £20 14s. and £36 2s.

The replication joined issue on the claim in convention.

The plea to the claim in reconvention denied that plaintiff was incompetent or guilty of any misconduct, or that defendants had any right to terminate the agreement. It denied the defendants' right to claim a refund of any portion of the passage money.

It admitted the debt of £42 8s. and stated that plaintiff was always willing that £36 2s. should be deducted from the amount due to him by the defendants.

The rejoinder to this plea joined issue.

Mr. Searle, Q.C. (with him Mr. Close), for plaintiff; Mr. Schreiner, Q.C. (with him Mr. McGregor), for defendants.

Frank Herbert Cook, plaintiff, stated that last year he was manager of a furnishing establishment in England. He first met Mr. Walker about July of last year. Witness answered an advertisement, and after that he met Mr. Walker in London. He saw him about three or four times. He had nothing to do with either Mr. Cleghorn or Mr. Harris. Mr. Walker told him that he wanted a manager to take complete charge of the furniture and workshops. Witness showed him testimonials, and Mr. Walker made inquiries concerning him. He signed the agreement the day before he (Cook) left London.

Mr. Searle: In what capacity were you engaged?

Mr. Schreiner objected to the question: the agreement was in writing, annexed to the declaration, and was the only admissible evidence of the contract.

Mr. Searle: The declaration was specially drawn to meet this case; it alleges that the plaintiff agreed to enter the employment of defendants as manager of the furnishing department and workshop upon certain terms and conditions which were set forth in the agreement annexed. The point is put in issue by the pleadings. *Taylor on Evidence* (section 1,135); *Price* v. *Mouatt* (11 C.B. (N.S.), p. 508); *Mumford* v. *Gething* (29 L.J.C.P., p. 105); *Lindley* v. *Lacey* (17 C.B., p. 578). The general principle is laid down at p. 586. Here the contract says that the defendants may terminate the agreement should the plaintiff prove incompetent for his duties. Therefore we must know what his duties are. We say that he performed the duties of manager and the defendants say that they duly assigned to him his duties; those must be the duties of a manager.

Mr. Schreiner: The point of law is that there must be no evidence inconsistent with the written contract: it is not admissible to show that he was engaged as manager only: he was engaged to serve to the best of his ability. I admit that it was contemplated that he was to be manager, but not manager only.

The Acting Chief Justice: We are of opinion that the evidence is admissible to show the capacity in which plaintiff was engaged, though evidence is not admissible to vary the contract.

The plaintiff (resuming) said he was engaged as manager, one to thoroughly manage the furniture department and the workshops. Witness was to have sole charge of these departments. Mr. Walker said he himself did not understand the furniture business, being a draper, and he wanted a thoroughly capable, competent man to look after it. Witness was now over twenty-nine years of age, and he had been in the business since he was thirteen and a half years. At the time the agreement was made plaintiff was living in Longton, Lancashire and had a wife and two children. Witness did, not see the contract until he had sold his furniture. He signed the contract while passing through London. When he came out a Mr. Smith was in charge. Witness called as soon as he arrived at the Louvre, and was introduced to a Mr. Raffles, the head salesman in that department. Mr. Smith was bookkeeper, and was in charge of the place during Mr. Walker's absence. From that day witness managed the furnishing department. First he began and got the workshops in good order. When he went there the men were not under control, and they went in and out at all hours, some of them frequently getting drunk. After the workshop had been got into good order he rearranged the show-rooms. He used to make sketches and designs for furniture. Witness was a good draughtsman and colour artist, understood designing and draping, and knew how to make furniture. All this he did at Walker & Co. The business increased, and everything improved all the way through. Mr. Walker returned in October. The first "upset" was when a man named Pryce was engaged to take charge of carpets, which were part of his department. Pryce was appointed to the department without any reference to witness, who accordingly spoke to Mr. Walker. Mr. Walker told him that if he (plaintiff) did not like it, he knew what he could do, meaning that plaintiff could leave. Witness told him he did not want to leave, the only thing he wanted being proper treatment. A Mr. Hamp was after this engaged for the furnishing department, and Hamp and Pryce got to loggerheads. Pryce afterwards left and Hamp took his place. In March Mr. Walker called plaintiff's attention to some books belonging to the drapery and furnishing department. The books were for copying into. They had been kept by Mr. Raffles, and witness assisted him for the reason that Raffles had not sufficient time to write them up. It was not part of plaintiff's work to keep the books. Witness wrote out the original slips and entered the order into the book. Then the work and the quantities wanted were afterwards entered into the books. Mr. Walker, in October, told witness

that it was not his (plaintiff's) work to keep the books, and that he would get an extra clerk to do them. They were then handed over to one Davidson, and then to a clerk named Raymond. Witness continued to assist Raymond when he could spare the time. Mr. Walker, on March 18, said to witness that the books were not properly kept, and that he would put them into the hands of Hamp. He then told him that he had better go to the top showroom and re-arrange the furniture. There were no "boys" to assist, and witness did what he could. Later, Mr. Walker, in the presence of Hamp, told witness that he was to take the charge from him and hand it over to Hamp. Mr. Walker then asked witness if he knew the amount of his account - that it was about £40. Witness had been getting furniture with Mr. Walker's knowledge. He said he could not pay the entire amount, but would pay £27 or more. Later in the day, Mr. Walker told him that unless the goods were paid for at the end of the month the goods would be brought back. Plaintiff had only had the furniture for a fortnight at that time. During the next few days while witness remained there he was ignored by everyone in the place. He was not allowed to act as manager, and was not even allowed to see customers. Witness was willing to remain as manager, but not to do the work he was asked to do during the last days he was at the Louvre. Later plaintiff called on Mr. Walker and said that he could not remain unless he got charge of the workshops, and Mr. Walker declined to allow him to resume his duties as manager. He now claimed the of salary for the unexpired portion of the contract. Witness had endeavoured to find employment in Cape Town, but had failed.

Cross-examined by Mr. Schreiner: He did not remember that Mr. Walker said he wanted a first-class estimater. Mr. Walker told him that witness was to work out the estimates. That did not mean that he was to make out the cost. A manager was supposed to find out the cost. If the firm could not find out the cost of articles made, it would not find out its position. Mr. Walker did not make it clear to him that he was to find out the cost. The record of the cost was to be kept by whoever kept the books. The books were kept by Raffles, Davidson, and Raymond. Working out the costs was merely copying from the slips given out by the manager. Witness gave the slips out whenever necessary. It was not true that he told workmen not to bother him about slips. If the job required a slip, the workmen got the slip. He did not remember ever saying that he would not adhere to the system of giving out slips. Witness never took over the books. Woods, the previous manager, he believed, kept the books in question, and Raffles, who acted after Woods left, kept them. It was not his work to fill up the cost-book showing the quantities of material used and the time occupied by doing the work. The cost-book (produced) showed that the entries made by Raffles were complete, while the entries made by witness were often blank. The reason was that it was not witness's work to fill up the book. The book could be made up from the workmen's slips. The cost of material was put on the workman's slip. As a rule the cost would be stated there. Even up to the date when witness left Walker & Co.'s he did not understand the firm's cost mark. It was not often required. Down to October the upholstery book went on, each order being a series of blanks. On October 20 the books began to be fully kept. The explanation was not that Mr. Walker at that date returned, and finding the books so badly kept took them out of plaintiff's hands. The books were then put into Davidson's hands, and Davidson spent nearly his whole time on them. It was not true that Mr. Walker gave witness back the books in January, saying that by that time he must surely know how to keep them. From October to January plaintiff made no entries. It was true that entries were made by him in January. All books in his department were under his control. If the books were not properly kept, it was not his place to keep them. Witness knew that for three months Davidson kept the books properly, but witness did not consider that it was his duty to keep them in the same style. He gave verbal instructions, but it was not true that mistakes were often made through giving the verbal instructions. In the upholstery and cabinet departments there were stock work and order work done. He knew that the cost-books were kept by the previous manager, but plaintiff had other work to do, such as sketching plans. Plaintiff had not time to keep the books. Witness had to ask for assistance from Mr. Walker. Mr. Walker told him that he would place the books into the hands of Hamp. When he was changed to other work his salary was not reduced. He prepared a tender for mattresses for Valkenberg, and it was afterwards found to be some shillings below the cost price, but that was owing to Raffles having given him (witness) the wrong cost price. It was true that the Colonial Government, owing to the mistake, allowed the firm to tender again. The other articles for which witness estimated were all correct. Witness believed it was correct that his successor kept the books in question, and did all the manager work. He was

willing to accept any work which was not degrading. It was not correct that he was at present living pleasantly in expectation of getting £630. He considered it would be degrading to have to take orders from a man he considered inferior to him. Hamp, the present manager, witness considered was inferior to him.

Re-examined by Mr. Searle: It was possible to make up the cost from the slips. Whoever made up the slip, after the work had been done, could fix the cost. Most of the sketches witness made were done at home, and they had been the means of bringing £100 worth of business to the firm. Witness never undertook to keep the books as part of his employment.

Albert Edward Raffles, formerly employed by Walker & Co., was the next witness. He deposed that when the plaintiff came out witness was keeping the books, and Cook assisted him. Cook's services were given voluntarily. Witness frequently wrote the books up to date. There was more work to do than any employer could expect to have done. It was a case of working day and night to keep everything up to date. Witness at that time was first salesman, and wrote up the books. Mr. Walker was satisfied in every respect with Mr. Cook. Mr. Cook worked hard, and the business increased. The furniture department was greatly enlarged. There was not a sufficient number of men employed to cope with the business. Mr. Walker told witness that he had sent Cook to the top flat to shift the furniture, as that was all that he was fit for. The work that Cook had then to do was storeman's work. Mr. Walker added that he only wished that Cook would leave, to which witness replied that he was afraid Cook knew too much for that, and Mr. Walker responded, "I'm afraid so." Witness had formerly the charge of the furniture department, and he could say that Cook was thoroughly competent. It was not always necessary to give out slips for work. In the case of furniture being repaired a ticket was not necessary. When witness had to do the work, between Wood's departure and Cook's arrival, the books in question were generally behind. Often witness wrote them up on Sundays.

Cross-examined by Mr. Schreiner: When Wood was discharged witness took charge of the work. Witness kept the books as well as he could. So soon as Mr. Cook came the business began to improve. When customers came to the Louvre and Mr. Cook got a hold of them he knew how to handle them. Witness was not disappointed when Hamp was appointed manager. Witness had not much experience of furniture. He was a draper. He was not a manager now. He was first salesman in Baker's, in the drapery department. Witness had said that Cook had established a proper system of conducting a furniture workshop. He prevented men going out and drinking, and he frequently visited the workshops. The men might have got drunk when he (witness) filled the gap. They very likely did so in Wood's time. Then after Cook came the work was turned out in time. Witness did not think that Wood was so competent a man as Cook. The timber was not properly measured until Cook came. Often the men were allowed to do the measuring. While he (witness) was acting he told the foreman to cut the timber as far as possible. It was not the duty of the manager to give out the slips for furniture to be made.

Further examined: It was the duty of the manager to give out the slips. Mr. Cook gave out slips for all stock or order work. Witness knew of one case where a mistake was made through the instructions having been given verbally. While witness was acting, the foreman brought him the slips; if he did not witness went and looked for them. Before he could fill up the cost-book, he had to get the slips back. The quantities used would be put on the ticket, but not the price as a rule. It was not the foreman's duty to know the cost of the material used. The counterfoils of the slips formed the cost-book. When the slips did not contain the cost, someone had to go and find it. The goods were marked. Witness supposed that the manager would be expected to supervise the clerk's work. Raymond, for instance, often neglected the books If the firm often found it impossible to arrive at the actual cost owing to the want of slips, and the books not being properly made up that was the fault of the clerk. The manager could not be held liable for that. It was on the Monday, the day that Cook was sent upstairs, that Mr. Walker spoke to him, hoping that Cook would leave. Witness did not know about Cook's contract, but he knew that Mr. Walker could not treat him in the manner that he tried to. Witness never complained to Mr. Walker about Cook's work. Witness had complained to Mr. Walker that he could not get to his meals at a regular hour; it was often three or four o'clock until he got to lunch. It was not true that witness told Mr. Walker that he could not get on with Cook because Cook took no interest in his work.

Re-examined by Mr. Searle: Witness never thought Cook did not take an interest in his work.

John Coombs said he had frequently dealt at the Louvre. His order amounted to about £100. The articles he bought were in stock. At the time witness called he first saw Mr. Walker. After the purchase had been comple ed, witness remarked to Mr. Walker that he was very well pleased with the attention he had received from Mr. Cook, and Mr. Walker replied, "Yes, he is a good man."

THE DEFENCE.

Joseph Walker, one of the partners in the firm of Walker & Co., the Louvre: In July of last year, while in London, he had information that a manager was wanted for the upholstery and furnishing. As the result of an advertisement he met Cook. He told Cook that he wanted a thoroughly competent man, particularly one who could make estimates and work out the cost of all goods made. Cook said he would be able to undertake the duties, and witness made the offer to him, remarking that an agreement would have to be prepared and signed. Witness made inquiries concerning Cook, and a gentleman called and gave information about Cook. The result was that witness agreed to engage Cook, and the agreement was afterwards drawn up by his English house. Witness came out to Cape Town in October, and at once went through the different departments. All were very satisfactory with the exception of the furniture department. The furniture department was very unsatisfactory. He found that the cost-book (book produced) was in such a state that he could not understand anything in it. The book had been disgracefully kept. Cook was away for a day or two at the time, and immediately on his return he saw him and showed him the state of the books. Cook had nothing to say for himself. He did not say that keeping the books was not his work. Witness handed the books over to Mr. Davidson to see what he could make of them. There were many things in the books that could not possibly be traced, but he asked Cook to assist Davidson. Mr. Davidson might have been a little pressed for the first few days filling in back work, but after that he had no trouble in keeping the books. It was not true to say that Mr. Davidson had to neglect his work in the drapery department to keep the books. Witness never intended Davidson to do the work permanently. About 5th January, as a big sale was approaching in Davidson's department, witness wished him to prepare a sale budget, and he took Davidson off the furniture cost-books. One Saturday Cook complained to witness that Davidson had collected the time-books, adding that he was not being properly treated. Witness spoke to Davidson, and then told Cook that Davidson had said that he could not get the pay-books down in time to prepare the pay-sheets, and that on some Saturdays the men had to wait for their wages. Witness told Cook that Davidson would not be allowed to interfere with the time-books, but at the same time he said to Cook that he ought to get the time-books early on Saturday, so that the men should not be kept waiting. Later, in Mr. Davidson's presence, witness handed the books back to Cook, saying that there must be no more complaints, and that the books must be properly kept. He said that Cook could get the assistance of little Raymond in the office. Witness said the books would be properly kept. Raymond could not have been entrusted solely with the books. It was absurd to say so, as he did not know about costs. The workmen filled up the counterfoil so far as quantities were concerned. The workmen knew nothing about the cost of materials. It was the manager's duty to put down the figure of costs. In very small quantities of materials or articles the man who gave out the goods put the price on the ticket. Witness, after returning the books to Cook in January, did not examine them again until March, but between he frequently spoke to Cook about them. Eight days previous to examining the books he went downstairs one Saturday evening and found Cook sitting reading at a desk. Witness told him he was to go over the books the following week, and Cook replied that the books were all right and up to date. On examining the books on 15th March witness found that there was very little improvement upon them. Cook, when their state was pointed out to him, said he had done his best with the books. Witness said it was perfectly ridiculous to think that he (witness) could allow him to keep his books in that fashion. It was clear, he added, that Cook did not intend to keep the books or that he was incompetent; at all events, he would not be allowed to have anything further to do with him. Cook asked "What am I to do?" and witness replied that there was plenty of work to do, that he could sketch, take sales, or straighten the showroom. Cook did not complain about Raymond or any other one, and he did not protest. Witness decided not to give Cook the books again, and so with the removal of the books went the management of the workshops, but otherwise his duties remained unaltered. In January witness asked Cook to come to his house. Then he told Cook that he was not satisfied with the way he had been doing his work, and he asked if he had any complaints.

Cook replied that he had not been satisfied with the books having been taken away. Witness said that that was a thing of the past, and after a general conversation Cook left, saying that in future he (witness) would have no cause to complain. Witness discovered that Cook had run up an account of about £60, and he at once expostulated with him, as this was against the arrangements made with Cook, and against the rules of the place. The business was an ever increasing one, and it continued to increase while Cook was manager. Hamp took the position of manager in March, and he had carefully kept the books since, and attended to the other branches, giving pe fect satisfaction Cook did not always send out slips with work, which was directly against his (witness's) orders. and meant great trouble and expense to rectify. Witness had repeatedly found fault with Cook for not sending out slips with work.

Cross-examined by Mr. Searle, Q.C.: He believed the agreement was signed on August 14, and plaintiff sailed on the 20th. He contended that he had a legal right to put the plaintiff to any work he chose. Witness was present when the agreement was drafted. Witness had no experience of the practical part of the furniture department. In engaging the plaintiff witness particularly emphasised that he wanted a man who could give estimates and work out costs. The firm had a rough estimate book, which was kept by Cook. Rough estimates for special work could be prepared from that book. Stock goods would not appear in that book. Witness was prepared to swear that not a quarter of the orders appeared in that book. Raffles kept the books as well as could be expected, seeing that he was not a practical man. Witness had not gone into the details of Raffles's bo k keeping. He believed there might be only six or seven entries properly filled up by Raffles. Every item should be fully filled up. During the time Davidson had the books Cook continued to manage the departments. So long as Davidson got the required information from Cook he could keep the books. Cook never said to him that the keeping of the books was not his work. He, on the contrary, complained to witness because Davidson had the books. The statement made by Cook and Raffles that he (witness) told them that they had more important work to do than keep books, he could only say was a pure invention. Witness admitted that he had had trouble with some of his employés. He dismissed a man named Pryce, and Pryce recovered damages against witness. He dismissed a coloured girl named Miller, and afterwards "paid up" because he did not want any bother. He also dismissed a Mr. Dickson, but after getting a lawyer's letter took him back. All that occurred during the few months that Cook was there. Witness described in detail the mode of bookkeeping adopted in the departments in question. He complained that Cook did not carry on the system, and that he did not even attend to his (witness's) instructions on the subject. About a fourth of the slips that were necessary to keep the books were missing. Witness did not ask Cook to look for them. Hamp made a search for tickets, but got very few. Cook did not ticket the goods with the cost price. On one occasion Cook worked out an estimate without troubling to get the prices of some of the materials required. Witness did not engage plaintiff as a manager. The word "manager" was never used. He simply engaged him for the particular departments. Cook was credited with his salary for about a fortnight after he left.

Re-examined by Mr. Schreiner: Cook was not so busy that he could not keep the books. Witness had examined the sales between December 22 and March 22, and had found that out of 900 sales Cook had made 172. Cook ran up an account of £61 for furniture. The conversation which Raffles alleged to have taken place between him and witness was false. Witness never said to Raffles that he hoped Cook would leave. The whole story was untrue.

George Davidson, manager of the drapery department at the Louvre: He saw Cook when he arrived. Witness showed Cook round the place, and also showed him the slip-books, explaining how the books had been kept. He said to Cook that Raffles had been keeping the books as well as he could. Mr. Walker returned in October. Mr. Walker handed him the books, and afterwards kept them. On several occasions after that Mr. Walker told Cook that he particularly wanted the slips to be fully filled up by him (Cook). Witness could not keep the books without the slips. The slips were not brought regularly. They were brought by Cook when they were brought at all. Often witness had to go and collect the slips from the workshop. The workmen's time-books were handed to him on Saturday mornings by Cook, but often they were very late, and witness frequently had to ask Cook for them. It was not true that witness neglected his work in the drapery department to keep the books. Keeping the books occupied him about two hours per day. He generally wrote up the books in the morning, before business got heavy. In January the books were

taken from witness and given to Cook. Witness heard Mr. Walker tell Cook that he must keep the books in future, and he thought that he (Cook) would now see how they were kept. Witness did not hear Mr. Walker mention Raymond's name. The books were up to date when witness handed them over.

Cross-examined by Mr. Schreiner: Witness had difficulty in getting information to keep the books, but the writing-up he could manage. They, however, interfered with his own department. Sometimes the books only took half an hour to write up. It was very seldom that the slips were right. The great trouble was to get particulars.

Alfred Henry Hamp, who succeeded Cook as manager, gave details as to the breaks in the books which were caused by the want of slips and want of information. Witness kept the books, and discharged all the duties connected with the management of his departments. Witness watched the work closely, and saw that the slips were properly made out and returned, so that the cost-books could be made up. The work which Cook was asked to do, after witness took over the management, was not derogatory, and it was work that he (witness) did before and since his appointment. Witness generally corroborated as to methods adopted in the conducting of his departments.

Cross-examined by Mr. Searle: Witness was manager of the upholstery department and of the workshops, and he was first salesman of the furniture department. Witness did not do any sketching. In some cases he applied to Cook for assistance or information. Sometimes he got what he wanted; other times he did not. Witness entered the business in December, and he could say of his knowledge that since that time the business at the Louvre had been continuously increasing. After witness took over the books he found many blank entries in the cost-book. There were entries of orders entered for articles of furniture, and no information was given to show the material.

Re-examined by Mr. Schreiner: (Book produced.) The entries pointed out, made by Cook, did not contain the materials used, so that it was impossible to know the price of the article made.

Wm. Robertson, furniture manufacturer, Longstreet, and formerly manager for Mr. H. E. Richold, stated that as manager he was responsible for the proper keeping of the slip-book, and in his own business he kept such a book.

Harry T. Smith, bookkeeper, deposed that last year he was head of the bookkeeping department at the Louvre at the time Cook was there. He always knew that the keeping of the books was distasteful to Cook. He grumbled at having to do it.

Cross-examined by Mr. Searle: Cook complained not so much because he had not time to keep the books, but because he didn't care for the work. Witness lived with Cook for a time. Cook appeared to do his duty, but witness did not think he ever "put himself out." Cook did sketching work at home for the firm and for other people.

Alexander Martin, upholsterer in the employment of Mr. Richold, said he was formerly in the employment of Walker & Co., and was there when Cook came. Witness "gave notice" and left. There was a lot of trouble through Cook not giving slips. Cook often gave instructions verbally, and mistakes often happened. Before Cook came there were always slips. Soon after Cook came the system was not fully carried out. The quantities of materials had to be written on the slips. Cook began to ignore witness, and was in the habit of going direct to the workmen.

Cross-examined by Mr. Searle: Witness gave notice that he would leave, Cook did not give him notice. In most cases there were slips supplied.

Henry William Walker said he had been in the employment of Messrs. Walker & Co. for about two years. He had had ten years' experience of the work in England. Witness was foreman in the cabinet-making department, and had been since the time that Woods was manager. Cook did not give out slips regularly with the work. They were often late. For about three weeks after Cook came they got their slips all right, but after that time they began to fall off. Cook often neglected to give out tickets, and he was in the habit of giving verbal instructions to the men. The slips filled up with quantities, prices, and time were returned to the manager. Sometimes witness had to ask Cook for slips three or four times. Once, just after the "guv'nor." Mr. Walker, had in witness's presence found fault with Cook for not giving out tickets, witness had occasion to ask for a ticket, and the reply he got from Cook was, "Oh, hang the ticket."

Cross-examined by Mr. Searle: Since Cook left witness had received an increase in wages, and he now had more control over the workshops.

George Ayres, French polisher, Messrs. Walker & Co., stated that before Cook came to the place all the work that came to his department was accompanied with slips. After Cook came the tickets were very irregular, and often the work was put through without tickets.

Morris Lavine, a cabinet-maker, said he had been at the Louvre for three years. He corroborated as to the irregular manner that Cook sent the tickets for the work. Before Cook's time there was no trouble about tickets. Witness had worked for Isaacs and for Richold, and had always been accustomed to tickets. Since Mr. Hamp became manager at the Louvre the slip system was working all right.

Cross-examined by Mr. Searle: Witness entered his time in the time-book when he had not a slip.

Frederick Chapman, another French polisher from the Louvre works, gave corroborative evidence regarding the irregularity with which Cook sent out tickets. Lots of work had to be done without tickets.

F. Collard, from the Louvre, spoke to the necessity of the exact cost of each article being arrived at. If the slips were not fully made out and the cost-books not properly kept the exact cost could not be arrived at.

This concluded the evidence.

After Mr. Searle had addressed the Court, their lordships, without calling on Mr. Schreiner, gave judgment for the defendants with costs.

The Acting Chief Justice said: The plaintiff in this case was brought out from England by the defendants, under an agreement, to carry on certain work. The part of the agreement which had been reduced to writing stated that the plaintiff "agreed to serve the defendants." It did not state in writing in what capacity. From the evidence given both by the plaintiff and defendants, and from the circumstances of the case and the work to which the plaintiff was put on his arrival here, I have no doubt the plaintiff was brought out to act as manager in the defendants' furniture department. Mr. Walker himself does not seem to acknowledge that position, but I am assuming in this case that the plaintiff was brought out to act as manager, and as such it was his duty to control the departments placed under his charge. Before the plaintiff came it was the duty of the manager himself to keep books showing the cost of the articles manufactured in the furnishing department, to allow the firm to know the cost of every article made. No business could be properly or satisfactorily carried on unless such books were kept, and properly kept. How could the firm know the value of the manufactured goods unless the materials used and their prices were known to the firm? This was done in the defendants' place of business before the plaintiff came out, and it had been done after he left their business. Mr. Richold's former manager, who was called, said it was his duty to carry out a similar system at Mr. Richold's, and to see that the books were properly kept. Now, what is a manager? He is a person who is to supervise, it may be, certain departments. The manager of a business must look after the details of the business; he must know the business and take charge. It was no answer for a manager of a department to say it was not his duty to see that certain work was done. The plaintiff was for the time manager at Messrs. Walker's place, and as manager he had certain duties to perform, one of which certainly was the keeping of the books referred to. The plaintiff in his evidence all along said it was not his duty to keep the books. It was because of this that on 20th March, after he left, that the attorney of the defendants wrote, saying that it was for the simple reason that notwithstanding the terms of the agreement and the requests made to him he allowed the books to fall into a hopeless state of confusion and arrear. Is this allegation correct? I think it has been amply proved. I think the plaintiff allowed the books to fall into a hopeless state of confusion and arrear, hopeless because it has been found to be impossible to write up the books, and after the best had been done many entries had simply to be marked off. On this simple ground alone the plaintiff has failed to do his duty. I am sorry for the plaintiff. He appears to be an efficient man so far as sketching is concerned, and an efficient salesman. Had he only carried out the system which was in vogue in Messrs. Walker's establishment when he went there, and supervised what were really the essential books of his department, I think he would have proved a useful and profitable man for Messrs. Walker & Co. But no man can be considered an efficient manager who allows essential books of his firm to fall into a hopeless state of confusion as the plaintiff did. These books form such an essential part of the business that on that ground alone the plaintiff has failed. If Mr. Walker was justified in dismissing the plaintiff, as he was, he was perfectly justified in offering him a lower position. On these grounds, it is with very great regret, we find that the plaintiff is hopelessly wrong in this case. He did not see that the books were properly kept, and he has lost the situation he came out to fill through that fault alone. The judgment will be for the defendants; in reconvention for the plaintiffs. On the whole, the judgment is for the defendants, with costs.

[Plaintiff's Attorney, D. Tennant; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSIONS. { 1897.
Ex parte MINCHIN. { Aug. 31st.

Spencer Augustus Minchin was admitted to practice as an attorney and notary.

Ex parte HENDRIKS.

Henricus Wilhelmus Hendriks, was admitted to practice as an attorney and notary.

PROVISIONAL ROLL.

ALING V. BOBUS *alias* MARINI.

Mr. Gardiner moved for the final adjudication of the defendant's estate.

The application was granted.

THE MASTER V. CLOETE'S EXECUTOR.

Mr. Sheil moved for an order calling upon the defendant to file an account.

The usual order was granted.

THE MASTER V. ESTERHUYSEN'S EXECUTOR.

Mr. Sheil moved for an order calling upon the defendant to file an account.

The usual order was granted.

THE MASTER V. GELDENHUYS' EXECUTOR.

Mr. Sheil moved for an order calling upon the defendant to file an account.

The usual order was granted.

ZWARENSTEIN V. JONES.

Mr. Buchanan applied for judgment under Rule 329(*d*) for the sum of £44 19s. 7d., being taxed costs due to the plaintiff for professional services rendered to one Ada Liddl, now married in community of property to the defendant.

Judgment as prayed.

DE VILLIERS V. MILLER.

Mr. Graham moved for judgment under Rule 329(*d*) for £225 7s., less £175 5s. 6d. paid on account, for certain goods sold by public auction.

Judgment as prayed.

REHABILITATIONS.

Mr. Maskew applied for the rehabilitation of the estate of Jacob Walter, of Cape Town. The trustee's report was favourable.

The application was granted.

Mr. Buchanan applied for the rehabilitation of the estate of Alfred Bullen, of Port Elizabeth. The trustee's report showed that the insolvent, who had been town engineer of Port Elizabeth, had speculated in landed property, and had kept no books. He was now at Pietermaritzburg, and had failed to attend the meetings of his creditors.

The Court refused the application on the ground that the insolvent had not kept any books, and gave leave to apply to the Court again in twelve months.

RELEASE.

Mr. Buchanan moved for the release from sequestration of the estate of Isaac Levy, of Oudtshoorn.

The Court granted the application.

GENERAL MOTIONS.

MEDER V. MCLEOD.

Mr. Benjamin, on behalf of the defendant, applied under Rule of Court 25 for leave to have judgment signed against the plaintiff for not proceeding with the action within the time fixed by the Rules of Court. The action was to recover £267 for work and labour done. Appearance had been entered by the defendant, but the declaration had not been filed within the requisite time.

Judgment was ordered to be signed as prayed.

In re THE ESTATE OF JOHANNES HENDRIK SCHOEMAN.

This was the petition of Mrs. Schoeman, who set forth that she was married in community of property to the late J. H. Schoeman, who with her had made a mutual will, by which certain immovable property was bequeathed to their children, subject to a life interest in favour of the survivor, and under which will she was the executor; that there were eight minor children of the marriage; that there were certain debts due by the estate, which it was unable to pay without selling part of the property; and that she had been called upon by the neighbouring proprietors to fence certain portion of the farm. She alleged that £375 had been offered for the sale of a portion of the property, and prayed for leave to sell for that amount, and

raise a loan of £600 on the remainder, in order to pay the debts and defray other necessary expenses.

The Master had reported in favour of the petition being granted.

Mr. Buchanan for the petitioner.

The Court granted an order in terms of the prayer which referred to the raising of the loan; as the petitioner was executrix, she did not require authority to sell in order to pay debts of the estate.

SWEMMER V. STRYDOM.

Mr. Joubert applied for leave to attach certain landed property to found jurisdiction, and for leave to sue by edictal citation in an action for debt. The debt had been incurred at Oudtshoorn, and a promissory note had been given payable at that place. The application was granted, service to be personally effected, and the citation made returnable on the 12th October.

Ex parte JAN SNELL. { 1897. Aug. 31st.

Cancellation of mortgage bond—Absent holder—Payment.

This was an application for the cancellation of a mortgage bond, passed in favour of one J. P. Thies by the petitioner.

The petition set out that the petitioner had mortgaged certain landed property to J. P. Thies; that he had paid off the whole amount and annexed receipts given by one Louw. Thies had ceded the bond to Robertson & Bain, and Louw had acted as agent for both Thies and Robertson & Bain. Thies had absconded, his property had been sequestrated, and his estate liquidated. Robertson & Bain's estate had also been fully liquidated. No claim had been made by either estate upon the applicant. One of the partners in the firm of Robertson & Bain admitted that the bond must have been paid off. Applicant was an illiterate man; he wished to sell his property, but the bond could not now be found, and he was on that account unable to pass transfer.

Mr. Molteno for the applicant.

The Court granted a rule *nisi* calling on all persons concerned to show cause on the 12th October why the bond should not be cancelled; if no objection raised the rule to become absolute without further application. The rule to be published in the "Government Gazette."

MARNEWICKE'S EXECUTOR V. SOUTH AFRICAN MUTUAL LIFE ASSURANCE SOCIETY. { 1897. Aug. 31st.

Removal of suit.

Mr. Graham applied on behalf of the plaintiff for the removal of the suit between the parties to the Circuit Court at Oudtshoorn. The action was upon an insurance policy and the plaintiff stated that he had not sufficient means to bear the expense of bringing witnesses from Oudtshoorn at which place all the witnesses whom it would be necessary to call were living. The plaintiff was suing *in forma pauperis*.

Mr. Schreiner, Q.C., for the defendants opposed: The plaintiff himself is the only material witness on his own side; the defendants offer £15 towards payment of his witness expenses. The issue is almost purely one of law.

The Acting Chief Justice: The plaintiff's affidavit states that he wishes to call his witnesses at Oudtshoorn, and the pleadings are such that apparently there may be no other witnesses necessary except the plaintiff himself. He does not speci y any witnesses. The defendants are willing to pay £15 for the plaintiff's expenses, and as the balance of convenience is not in favour of the case being heard in Oudtshoorn, no order will be made but if the plaintiff can show that he has other witnesses to call he may renew the application.

[Plaintiff's Attorney, P. M. Brink; Defendants' Attorneys, Messrs. J & H. Reid & Nephew.]

In re SAKEER'S ESTATE. { 1897. Aug. 31st.

Transfer of property to heirs upon waiver by person entitled to life interest.

Mr. Close applied for leave to the executors of the late Sakeer to pass free and unburdened transfer of certain land to the children of Nasie Omar on payment of the sum of £551, and for leave to Nasie Omar on behalf of her minor children to join in mortgaging the said property for £450. The children were the heirs of half Sakeer's estate subject to a life interest vested in their mother. Galiebie Sakeer was the heir of the other half. A house situated upon the land in question was appointed by the will to be occupied by Galiebie Sakeer and Nasie Omar. Galiebie Sakeer was dead but her executor and heirs consented to the arrangement. Nasie Omar, the mother, waived her

rights. The mortgage was necessary to enable the purchase price to be paid. The Acting Master recommended that the application should be granted and that a bond not exceeding £450 be passed for such amount as the Master approves of.

The Court ordered that a bond be passed for such amount as the Master should approve of.

THE MINORS SCHMIDT.

Mr. Buchanan applied to vary the order made on August 1, 1896, and to raise a loan of £1,100 on behalf of the minors.

The order originally made was for leave to purchase on behalf of the minors the Victoria West Hotel and to mortgage it. See *Shiel* (6 257). The holder of the bond was now threatening proceedings and the applicants wished to pass a bond for £1,100.

The Master reported favourably and an order was made in terms of his report.

IN THE ESTATE OF THE LATE JAMES, OTHERWISE CALLED NAJIEMODIEN.

Mr. Graham applied for an order authorising the Registrar of Deeds to cancel a certain mortgage bond, which is supposed to have been paid in full, passed by deceased in favour of one Hendrik Justinus de Wet, Oloff's son.

The Court granted an order authorising the Registrar to cancel the bond, unless cause to the contrary be shown by October 12, notice to be published in the "Gazette."

TRUTER V. TRUTER.

This was the return day of the edictal citation in this action, but the citation had not been returned.

Mr Buchanan applied for a postponement until the 1st November.

The application was granted, but the Court intimated that if there had been no service a fresh order for service would have to be obtained.

SUPREME COURT.

[Before the Hon. Mr. Justice BUCHANAN (Acting Chief Justice), the Hon. Mr. Justice MAASDORP, and Hon. Mr. Justice SOLOMON.]

DU TOIT V. CILLIERS. { 1897. Sept. 1st

Syndicate—Sale of shares—Company—Flotation.

The plaintiff bought from the defendant for £25 in terms of a written agreement, all the defendant's right, title and claim to twenty-five £1 shares in the Elkan Syndicate, which he undertook to deliver as soon as the scrip should be ready.

The defendant had in his possession at the time a certificate to the effect that he held one £25 share in the Elkan Syndicate, and another certificate stating that he was entitled to 200 fully paid £1 shares in a company to be floated by the syndicate, to be delivered on the flotation of the company.

The company had not been floated and no scrip had been issued.

Held, *that in the absence of any allegation of fraud, the plaintiff could not claim either delivery of the twenty-five shares or a return of the £25 paid.*

This was an action in which the plaintiff claimed specific performance of a contract for the delivery of twenty-five £1 shares in a syndicate known as the Elkan Syndicate, or in the alternative repayment of the sum of £25 with interest from July 28, 1889.

Both parties reside in the division of Hanover. The plaintiff alleged in his declaration that on July 28, 1889, he entered into an agreement with the defendant in terms of which the latter, in consideration of the sum of £25 to be paid to him by plaintiff, ceded to plaintiff all his right, title and interest in certain twenty-five £1 shares in a syndicate called the Elkan Syndicate, which the defendant stated had been formed at Johannesburg, and further promised to deliver scrip of the said shares to him. An agreement in writing was signed by defendant

on the same day, and plaintiff thereupon paid the £2 . That the defendant, though requested to do so, refused to deliver the shares or scrip, or to repay the £25.

The written agreement was in Dutch, and the following was the translation: "With this, I, the undersigned A. J. Cilliers. of Johannesburg, declare that I have made over and ceded to J. D. du Toit, of Richmond, all my right, title and claim to twenty-five £1 shares in the Elkan Syndicate, and I further undertake to deliver them up as soon as the scrip of the above mentioned shares shall be ready.—A. J. Cilliers."

The plea denied the facts as above stated, but alleged that at the date of the agreement referred to the defendant was the holder of one fully paid-up share in the Elkan Syndicate, a syndicate formed at Johannesburg to acquire rights to work certain twelve gold-bearing claims on the farm Waterval That it was the intention of the syndicate to float a company to work the claims, and it was understood that each holder of a syndicate share would be entitled if and when the said company was floated to receive 200 fully paid £1 shares in the company. That in July, 1889, the defendant was residing at Johannesburg, but was on a visit to Richmond; thereupon plaintiff requested him to sell him his right to receive twenty-five shares in any company which might be floated, and paid him £25, and the defendant thereupon signed the document above mentioned; that plaintiff was at the time aware of the facts as now set forth by the defendant. Thereafter the claims re erred to were taken possession of by other persons, and the syndicate failed to recover them. No company had been floated and no scrip issued in respect of the shares, and he, therefore, denied any liability.

Issue was joined on these pleadings.

Mr. Graham appeared for the plaiutiff.

Mr. Searle, Q.C. (with whom was Mr. Maskew). for the defendant.

Jacobus Daniel du Toit, Richmond, the plaintiff, said he had known the defendant for a long time. Defendant lived at Johannesburg, and in 1889 he returned to Richmond. He saw him about the beginning of July, when he came to his house while he and his family were sitting at breakfast. He said, "Now, uncle, there is a good chance for you to buy some shares." He said that a syndicate had been formed called the Elkan Syndicate, which had a capital of £120,000, and they had discovered quarts on a farm in the Transvaal. Witness and his son decided to buy twenty-five shares each. He took the money some time afterwards to the defendant at a farm called Sterkfontein, and was given a receipt. Witness never had any share speculation before that time, and he had had nothing to do with shares since. He did not know the difference between a syndicate and a company. He was prepared to receive shares in a syndicate. About a fortnight after the defendant left witness started to go to Johannesburg. but he turned back at Winburg. He wrote to the defendant but received no reply. A couple of years afterwards he instructed an attorney to write to him, and last year he himself went to Johannesburg and saw the defendant. He said, "I want to know what has become of my money?" Defendant said that before the company was floated they came to grief. Witness reminded him that at Richmond he had told him the company was floated, and to that the defendant made no reply. Witness arranged to meet him the following day, but defendant did not turn up. When the defendant returned to the Hanover district, witness instituted these proceedings against him. Witness emphatically denied the defendant's allegation that he simply bought the shares. The brother of the witness was married to the defendant's stepmother. When he bought the shares there was a good deal of talk about shares, and many people at Richmond bought them. The defendant offered the shares to witness. Witness saw no documents in the possession of the defendant. Defendant gave him a receipt.

Charles Petrus du Toit, son of the plaintiff, corroborated his father's evidence concerning the interview with the defendant at Richmond. Defendant produced a piece of quartz, and said, "As an old friend, you have a chance now of taking shares in this company. Here is the gold" (showing the quartz). Witness and his father then agreed to take twenty-five shares each. Defendant told them that as soon as he arrived in Johannesburg he would send them the shares. That was witness's sole share transaction.

Johannes Paulus du Toit, another son of the plaintiff, said he was in the employ of the Free State Government, and had been away from home for six years He was at home in 1889, and was present at the interview between his father and the defendant. Witness said he would take five shares, but his mother told him to leave them alone. Witness therefore did not buy the shares.

William Park Cressy, law agent, Richmond, produced his letter-books, and spoke to letters he had written to the defendant on behalf of the plaintiff, to which, however, he had received no replies,

Abraham Jacobus Cilliers, the defendant, stated that in 1889 he visited Richmond, his native place. The plaintiff came to him at his house and said, "I hear a good deal of talk about the Elkan Syndicate." Witness told him he was the holder of a share, and showed the certificate to him. Du Toit asked him to sell him some, and witness told him he wanted them. Witness obtained 200 shares in the company, for which he paid £2 0. He had previously paid £25 for a share in the syndicate. Some of the 200 shares he kept, some he sold to various people, including the plaintiff and his son. He sold them at the same price he paid for them. Some of the people to whom he sold were relatives of his, and the rest were personal friends. A number of people asked him for shares. He kept twenty-five of them for himself and sold the remaining 175 at £1 each. The plaintiff left his house without saying whether he would take the shares or not. Witness went to see him, and said he wanted to know whether he would take the shares or not. Witness's companion said, 'Now, understand, if you take the scrip you take the risk," and he pointed out that if the company was not floated he would get nothing. Du Toit said, "If I can take the loss, I can also take the chance of gain," and he said he wanted the shares. Witness explained to him expressly that it was a syndicate and not a company. He stated that as far as he had seen of the quarts it was rich. He had no quarts with him on that occasion, but his companion had a small piece. The syndicate was never floated into a company. Experts reported that the reef was pinched out. Fifty shares of £25 each were paid up, and that amount was expended in the working. Witness himself lost £50. He received no letters from the plaintiff. The first he heard was the letter from Mr. Cresy, but that was in English, and he could not read English. He took the letter to a Mr. Rademeyer, who was now in Bulawayo. Rademeyer was his broker. The shareholders had a meeting before it was decided to abandon the syndicate. The meeting took place about the middle of January, 1890.

Other witnesses spoke in corroboration.

Mr. Graham: We claim twenty-five £1 shares practically in the company. There is nothing in the document to show that it was only intended that a right to receive shares was being sold. What was sold was a right to the shares themselves. The document was similar to the ordinary endorsement usually found on a share certificate. The undertaking must be construed to mean that delivery shall take place within a reasonable time.

Mr. Searle was not called upon.

The Acting Chief Justice, in giving judgment, said: This is an action brought by the plaintiff to compel the defendant to deliver to him twenty-five shares in the Elkan Syndicate, or in the alternative to repay £25 which he paid for these shares. There are two things that one must notice in this action, and that was the very stale nature of this transaction—a transaction which took place in the year 1889. The second remarkable fact is that there is no allegation of fraud or misrepresentation alleged against the plaintiff. Under these circumstances the transaction being as stale as 1889 it is not at all surprising to find great conflict of testimony. It is therefore very desirable that the case should be decided mainly on the documents which passed between the parties at the time. Mr. Du Toit says there were a lot of people investing in the syndicate which was looked upon as something very promising, and people were running after the shares. The defendant, who had been in the Transvaal, was at Richmond at this time, and had in his possession a certificate that he held one share in the Elkan Syndicate of the value of £25. He also held in his possession a certificate from the secretary of the syndicate certifying that he was entitled to 200 fully-paid £1 shares, to be delivered on the flotation of a company. With these documents the transaction between the plaintiff and the defendant took place. The plaintiff says he saw documents of any kind. The defendant, on the contrary, says that he produced these documents and showed them to the plaintiff. The transaction was clearly not 25 shares in the original syndicate, but 25 shares of the value of £1, which would have come out of the company to be floated upon the Elkan Syndicate property. It was not a sale by plaintiff to defendant of 25 shares in any company, but, as the receipt showed it was a sale of right, title, and claim to the 25 shares in the Elkan Syndicate, which he undertook to deliver as soon as the scrip in the above-mentioned shares should be ready. It was clear that these shares were to be delivered on the flotation of a company which was not then in existence: All that was in existence at that time was this syndicate, which had very golden prospects. As the defendant himself knew the company was not floated, he could not without fraud have sold shares in a company not in existence. No fraud is alleged in this case. It may be that the dealings of syndicates which were new things at the time might be beyond the comprehension of a farmer in the back districts. In this case there had been no fraud, no misrepresentation, and in such a transaction the documents must be relied upon. The property, instead of being

a golden property, turned out to be valueless. In giving judgment for the defendant judgment will have to carry costs, and the costs of all necessary witnesses will be included. Mr. Mei ing (a witn ss for the defence) was not a necessary witness, and he sho ld call the taxing officer's attention to this, and he will only allow the expenses of such witnesses as were necessary.

Mr. Justice Maasdo p and Mr. Justice Solomon concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorney, aul De Villiers.]

REHABILITATION.

An application was made for the rehabilitation of John McDonald, East London.

Mr. Graham for the applicant, and Mr. McGregor opposed.

After argument, the application was granted.

LISCHTTY V. WORCESTER MUNICIPALITY. { 1897. Sept. 1st. " 2nd.

Criminal appeal—Review—Irregularity in proceedings—Municipal prosecution—Agent or Municipal Councillor.

An irregularity in the proceedings in a criminal prosecution in a Magistrate's Court, held, by a majority of the Court (Solomon, J., *diss.*), *to be capable of being brought before the Supreme Court by way of appeal as well as by way of review.*

Per Solomon, J., *the distinction between an appeal and a review is that an appeal lies upon the merits of a case whilst a review is upon some irregularity in the proceedings.*

Where, in a prosecution at the instance of a Municipal Council, the Magistrate refused to permit W., *a duly qualified and enrolled law agent, to appear for the accused because* W. *was also a Municipal Councillor, and the accused was in consequence undefended and was convicted, the conviction was quashed on appeal.*

This was an appeal from the conviction of the appellant by the Resident Magistrate of Worcester. The appellant was charged on the 19th August with contravening section 169 of Act 45 of 1882, in that he obstructed a municipal driver in the execution of his duty. He pleaded not guilty, and Mr. Winterbach appeared on his behalf. Mr. Lindenberg, the Town Clerk, thereupon objected to Mr. Winterbach appearing, on the ground that he was a member of the Town Council, and virtually prosecutor in the case. The objection was allowed, and after some evidence had been taken, the case was postponed in order to enable the appellant to secure legal assistance. A further hearing took place, when the appellant stated that he had been unable to obtain any other assistance. There were at the time several agents in court whom he might have employed. He handed in a written document stating that he wished to have the facts recorded referring to the refusal of the Magistrate to allow Winterbach to appear; also that it would cost him a large sum to employ another agent, and that he could not defend himself without legal assistance. The Magistrate then took the evidence, and appellant was convicted and fined 10s.

The defendant now appealed.

Mr. Molteno for appellant, and Mr. Searle, Q.C., for respondent.

Mr. Searle raised the preliminary objection that the matter should not be heard on appeal. *Regina* v. *Sampson* (J. 8, p. 229). *Barnard* v. *Mabson* (J. 2, p. 95) is a case very much in point; that matter would not have been heard on appeal. The practice has always been to bring matters relating to the procedure in review.

Mr. Justice Maasdorp: What would be the effect of the Court ordering the conviction to be quashed?

Mr. Searle: If quashed on review fresh proceedings could be taken; if quashed on appeal I should think that no fresh proceedings could be taken because the merits have been gone into. *Regina* v. *Taylor* (9 Juta, p. 382).

Mr. Molteno: The appeal is brought under Act 21 of 1876, section 4. No grounds of appeal are there stated. The Act gave an appeal where no appeal existed before. In *Barnard* v. *Mabson* S. was not an enrolled agent at George and the Magistrate was within his rights. Winterbach is an enrolled agent at Worcester and entitled to appear. *Cronje* v. *Halse and Hudson* (1869, p. 170).

Postea (September 2nd).

The Acting Chief Justice said the case was an appeal from the Resident Magistrate at Worcester, in which the appellant was charged with a contravention of section 169 of Act 45 of 1882. At the trial a duly qualified and enrolled law-agent appeared for the accused. The

Town Clerk, who appeared to prosecute on behalf of the Municipality, objected to the duly qualified law agent appearing for the accused on the ground that he was a member of the Town Council, and thus virtually prosecutor in the case. That objection the Magistrate sustained, and that ruling of the Magistrate was now appealed against. In the opinion of the Court the objection taken up by the Town Clerk to the agent appearing for the prisoner was improperly sustained by the Magistrate. The prisoner had a perfect right to be defended, and it was ridiculous to say that because the agent happened to be a Town Councillor that he could not exercise his professional functions. The Magistrate was wrong in thus not allowing the accused to be defended by the agent selected by him, and as he was an ignorant man, and unable to cross-examine or to call evidence on his own behalf, his lordship thought the prisoner was materially prejudiced in his trial, and being so prejudiced by the improper ruling of the Magistrate, the conviction must be quashed. A technical objection had been raised by Mr. Searle that the proceedings were improperly brought before the Court; that they should not have been brought before the Court by way of appeal, but by way of review. The Act 21 of 1876 distinctly gave every person convicted by a Magistrate the right of appeal against his conviction, provided that he noted his appeal within four days. This appeal had been duly noted, and was against an erroneous decision of the Magistrate, which decision appeared on the record. It might be that this decision of the Magistrate, besides being erroneous, amounted to so great an irregularity as also to give a right of review. But the fact of the appellant's having two strings to his bow did not take away the right of appeal given by law.

The conviction having been improperly obtained must be quashed, and the appeal allowed.

Mr. Justice Maasdorp: During the hearing of this case in the Court of the Resident Magistrate an objection was taken on behalf of the prosecutor in respect of a matter which materially affected the defence of the accused. The objection raised, and the finding of the Magistrate upon it, appear upon the record. It is now admitted for the respondent that the finding of the Magistrate was wrong in law, but it is contended that the question involved should be raised in this Court by way of review, and not of appeal. No ruling of this Court has been referred to directly supporting this contention, but it was argued that if the decision of the Magistrate was wrong it constituted an irregularity, and formed one of the grounds upon which, under Ordinance 40 of 1828, the proceedings may be brought under review. That may be so, but it does not follow that what is a ground of review is not also a ground of appeal. I am of opinion that some of the grounds of review given in the Ordinance are clearly also matters which may be raised on appeal, but they are provided for in the Ordinance to meet cases in which for special reasons no right of appeal exists. The record in this case contains all that is necessary for the decision of the point raised, and I can see no reason why the Court should not deal with it on appeal. The conviction must be quashed.

Mr. Justice Solomon said: I quite concur in finding that the ruling of the Magistrate was wrong on the merits. As to the objection raised by Mr. Searle, I don't see much object in it, because even if the Court upheld it the appellant could still take out a summons for review under Rule 190, but at the same time I think it is a good objection. A distinction has always been drawn between an appeal and a review of criminal cases in the Magistrate's Court, and this distinction has been recognised in Acts of Parliament. In my opinion the distinction is that an appeal lies upon the merits of a case whilst a review is upon some irregularity in the proceedings. It is said that Act 21 of 1876 does not limit the right of appeal: that is so, but it does not seem to me that Act 21 of 1876 affects the case. Then it is said that the real distinction is that in an appeal the irregularity must appear on the face of the record. But I cannot find that any such distinction has been drawn in the practice of the Court. In all cases of this kind the proceedings have been by way of review. That course has been followed in several cases, for instance, in *Regina* v. *Erfurt* (5 Sheil, p. 432), That case recognises the principle that though an appeal will not lie, still a review may be allowed. So also in *Gabb* v. *Fraser and Greenshields* (6 Sheil p. 489) in which case the Chief Justice said: "If there had been gross irregularity in the proceedings the proper course would have been to bring the case in review on that ground. The appeal is upon the merits, and with the evidence before the Magistrate, he was bound to give judgment for the plaintiff." It appears to me that that practice has always been recognised. The distinction appears to me to be an important one, because the Court has larger powers in the case of an appeal than in the case of review. I am of opinion on these grounds that the objection is a good one.

[Appellant's Attorney, V. A. van der Byl; Respondent's Attorney, Messrs. Van Zyl & Buissinné.]

ments necessary to carry out the said agreement and to enable the company to obtain transfer of the said property, the defendant company undertaking to pay all costs connected with the survey and transfer thereof.

Wherefore the defendant company prays that the plaintiff's claim may be dismissed with costs.

And for a claim in reconvention the defendant company, now plaintiff in reconvention, says:

1. It craves leave to refer to the matters above pleaded.

2. All things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle it to call upon the defendant in reconvention to deliver up all documents in his possession necessary to carry out the contract above referred to, and to cause transfer to be passed to the plaintiff company of the land belonging to the defendant required for the purposes of the said line of railway to the works of the plaintiff company, the plaintiff company tendering to pay the sum of £8 and all expenses connected with the survey and transfer of the said land. But the defendant in reconvention, although called upon and requested so to do, neglects and refuses to comply with the said demand.

The plaintiff company claims in reconvention:

(*a*) That the defendant be ordered forthwith to deliver up all documents in his possession necessary to carry out the said contract, and to cause transfer to be passed to the plaintiff company of the land belonging to the defendant required for the purposes of the said line of railway, the plaintiff company tendering to pay the sum of £8 and all expenses connected with the survey and transfer.

(*b*) Alternative relief.

(*c*) Costs of suit.

For a replication, the plaintiff admitted that the contract had been entered into, and referred to its terms.

He admitted that his daughter was present when the document was presented to him for signature, and that she signed it as a witness.

The rest of the replication was general.

Mr. Schreiner, Q.C. (with him Mr. Buchanan), for the plaintiff; Mr. Searle, Q.C. (with him Mr. Benjamin), for the defendants.

Carl Frederick Wilhelm Schoeneman, the plaintiff, stated that he was an emigrant from Germany. He came to South Africa fourteen years ago and got a piece of quitrent land from the Government near the Eerste River, lot No. 7. Under the old Act he got a licence, and last year he handed in his papers and got a title for the ground. Witness built a house on the property and cultivated the ground. He was married and had three married daughters. Three sons were unmarried. Last year he went to Johannesburg, and returned in April. Hesse, his son-in-law, had land next to his. Hesse's lot was No. 6. Lots Nos. 8 and 9 had been sold to a man named Scharm, who did not live there now. Witness knew Mr. Blake by name. When he returned from Johannesburg his wife gave witness certain information, and after that he saw Mr. Blake. Witness went to Mr. Blake's house. Mr. Blake told him that he wanted to make a railway line across witness's ground. He asked how much quitrent witness paid, and he was told the amount, £1 9s. Blake then said he would pay the rent for one year, and give him £7 10s. in addition. Witness said he wished to consult his wife about it. In the afternoon of that day Blake came to witness's house. At that time witness, his wife, and Mrs. Hesse were present. Blake produced a document from his pocket and asked if witness could read English. Witness said he could not, and Blake began reading the document in English. At witness's request Blake read the document in Dutch. It stated that witness was to give him so much ground for the line for £7 10s. Blake said he would not require more than a breadth of seven or eight feet. Witness's wife asked Blake how it was that he had offered her £20, and now only promised £7 10s. His wife asked if the Government were so bankrupt that it could not make up £3. Blake said he would make the amount £8, and added, "That is, the Government." He next said, "If you don't allow it, I will go over your ground, because it is the Government." After that Blake wrote down something, and witness signed the paper. His wife and daughter also signed the paper. Blake never mentioned the company that was wanting to take the land. He did not say that witness would have to give up document and grant a transfer. Blake said that Myburgh would not allow him to go over the ground, but that he (Blake) had gone to Cape Town, and seen Pieter Faure, who had given him permission to go over the ground. Mr. Faure, Blake told him, was the chief man in the Government. He next said that the Government had the right to open lines or roads on any ground they chose. Blake did not ask him to give up any documents. Witness never gave his consent for a survey to be made over his farm. The railway they had laid down did not go over Hesse's ground. Witness first heard that it was not the Government that was making the railway at the end of June. Employés of Blake were the

first to tell him. They had not then begun to work on his ground. They were then working on lots 8 and 9. At the end of June one morning he was talking to the workmen, who at the time were next to his line, but not on his ground. He spoke to one of the men, named Thomas Mehelm, and said that he could work up to his (witness's) ground, but would not be allowed to go on to it. Martin and his wife were there. Next day his wife went to Cape Town in connection with the matter. That day the men went on to his ground and were working there. Witness sent a message to another farmer, Max Schindler, and they went to the men and told them that they were not to work further. The men replied that the ground was no longer his, that the ground belonged to Blake. They added that if he (witness) came back they would knock him on the head with a shovel. The men said they must go to one Jameson, and witness sent a message to Jameson asking him to come to him, but this Jameson did not do. Before the work started Mr. Blake paid witness £1 for ducks, and at that time he asked witness when he would pay for the ground, when Blake replied that it would be paid when the line was finished. In July, after the proceedings were started, two clergymen and another were at his place, and the subject was discussed. Rev. Mr. Wagener, Roeland, Rev. Mr. Baumgarten, Herbst, and Ulbert were there. Witness, since he found that it was not the Government that was making the railway, had not asked for the money. He did not want the railway across his ground. He thought the Government was making the line, and that they had the right to do that. The ground, apart from the railway, was worth £1, 00 to him, and the railway had depreciated its value The railway went right across the ground, cutting it into two portions. There was an embankment about two feet high. He would say that the line depreciated the value of his ground to the extent of £30 . It would be a considerable work to remove the embankment, and it would cost a lot of money. He would be satisfied if the company would level the embankment and leave it, paying him for his loss.

Cross-examined by Mr. Searle: Witness had been absent in Johannesburg for about six months, and he returned without giving his wife or friends notice that he was going home. When he went to Blake's after his return from Johannesburg he asked for work, and on the following Thursday he began work for Blake on a building which was being prepared for convicts. Witness worked for about a month for Blake, until the building was nearly finished. The building was about half an hour's walking distance from the Lime Company's works. At that time witness did not know but what Blake was in the employment of the Government Blake, the day he came to witness's house, said that he must get sufficient ground to make the line for £7 10s. Blake said the ground was required by the Government, and if witness would not give it, they would go over it all the same, and then probably witness would not get anything by way of compensation. The ground over which the line went was not cultivated. Recently witness had a valuation of his house before getting it insured, and the value given was £250. Witness wanted to get a bond on his property. Some lots close to his place had been taken over for the quitrents alone, practically, for nothing at all. That was about two years ago, Hesse asked witness if he had permitted Blake to make the line, and he replied that he had. He also said that he had signed something. Mehelm was not working on his ground for a week before witness spoke to him. It was not correct to say that the work was nearly finished across his ground before he objected. By the 8th July, when witness objected, they were about twenty yards into the ground. They took about two weeks to cross the ground. By 8th July they might have been half-way across the ground. The ground was about 500 yards broad. Mr. Blake did not say that he would give witness the £8 when he received the papers. Witness told him that he would not allow any work to be done until the money was paid. Blake never asked witness for the papers. At the meeting with Mr. Wagener and others witness told him that he might be satisfied with £50, and if all the costs were paid. Afterwards witness found that Myburgh had got £150. That was shortly before he stopped the work. While he was at Johannesburg there had been a survey made of his ground. He saw flags at some of the corners.

Pietrus Jacobus Bosman stated that on Monday last he visited the plaintiff's farm, and valued it. He was familiar with property in that neighbourhood. The marketable value of the property at present he would place at £750. With the line the value would be from £500 to £550. The line had depreciated the property to that extent. It would cost from £25 to £30 to level the ground. The soil had been taken to make up the embankment.

Cross-examined by Mr. Searle: Witness would not recommend anyone to advance £750 for the property. Property varied very much. A couple of years ago he sold property at £300 which recently changed hands at about £1,000. It was unimproved ground that the line passed

over. Witness thought that, before the line passed over it, he could easily have raised £500 on the farm. The line was dangerous for cattle and children, and if it were fenced in a man would be required to attend to the gates. Plaintiff's house was worth about £250, and the land from £15 to £20 per morgen.

Maria Schoeneman, wife of the plaintiff, stated that while her husband was away at Johannesburg Mr. Blake came to the place. He asked if if she was master, and she said that when her husband was not at home she was master. He said they wanted to make a line across the ground, and said "It is the Government." Witness did not know what to say to that, and he said he wanted to make the line close to the house, by the garden. Witness said he would do a great deal of damage, and Mr. Blake said that the Government paid for any damage that was done. At that time nothing was said about money. Later Koos Fourie and Blake returned. They came in a cart. Mr. Faure asked if they would allow the line to go across the ground. She said that because Blake told her that it was the Government that was to do it. She said she would not like to have the line go near to her house, but added that she supposed she would have to like it. Later Blake came back and was staking out the line with white flags. Her daughter had a conversation with Blake. Blake then asked witness and her daughter to come to Jameson's house to talk over the ground. She and her daughter went to Jameson's house, and there met Blake. Witness told Blake that it was her ground he proposed to go over, and he said he would give her £20 if she allowed him to get the ground. The line would go over a portion of Hesse's ground, and Blake said he would give witness the £20, and she would have to give portion of it to her daughter, Mrs. Hesse. Lots 8 and 9 were then vacant, and Blake said he would arrange with the Government to give her the e lots. One lot, he said, he would make her a present of, and he would give her money to pay for the other, and for which she would pay him interest. She did not agree to take the £20, and shortly after this her husband returned from Johannesburg. Later Blake came to her house, and taking a paper out of his pocket, said they would have to sign it. He read the paper in English. Witness only knew a few words of English. Then he said he would say it in Dutch. The paper set forth that he would give £7 10s. for as much ground as he would required for the line. She asked him what he meant by only offering £7 10s. after he had promised her £20. She asked, "Is the Government so bankrupt that they cannot even pay £8?" Blake said he would make it up to £8. Blake certainly never said that the contract was on behalf of the Lime Company. He did not read that part of the contract. Blake then said if they were not satisfied with the £8 he would go over the ground all the same because it was the Government. Blake said he had been to see Pieter Faure in Grave-street, who told him that Myburgh must allow the line to go across his ground. Her husband signed the paper, and Blake wrote something. Up to that time witness never heard anything about the Cape Lime Company. On the day before witness came to Cape Town she had seen Myburgh. On the morning of the day she came to Cape Town Blake's men were working about a couple of yards from her ground. She, her husband, and others went to the men and told them they must not cross on to her ground. Next day she went to Cape Town to find out whether the ground had actually been wanted by the Government or not. On getting to Cape Town they met Blake on the street. Witness said to him that he had always said the ground was for the Government, but they had found out that it was not. Blake then said that the ground was not for the Government but for himself, and he asked for the documents, so that he could go to the Government about the ground. He then said if she brought him the papers he would pay her the £8. Witness said she would not give up the papers, and he replied that he would force her to give them up. Witness then went to the Civil Commissioner's office. Martin, her son-in-law, was with her. By the time she got home that afternoon the men had crossed on to her land. Next day she went to Stellenbosch, and consulted a law agent. In the Civil Commissioner's office in Cape Town she saw Mr. Bickley.

Cross-examined by Mr. Searle: Witness did not understand that Blake asked her on his first visit if she could act for her husband in his absence. When Blake and Fourie came, they did not say anything about surveying the ground. The only condition she made the first time was that they did not go over her cultivated ground and did not come near her house. She could not say she was satisfied with the proposal, as she said she would wait until she heard from her husband. Blake said that if Hesse objected to the line, he (Blake) would make him lose his ground, as he was behind with his rent. He never mentioned that he would give £7 10s. for a certain route. She agreed to take the £8 because Blake told her it was for the Government. Witness knew that the line was to be from the

Lime Company's works to the station. She did not know that Blake was manager for the works. Afterwards she was told that Myburgh had to get £150 for his ground. That was after the agreement had been signed. Blake afterwards advised her to drop the case, saying she was a poor woman, that the case would cost £200, that she would lose it, and lose her farm. She never said that if Blake gave her husband work she would allow the matter to drop. Witness never asked Blake for the £8.

James Bickley, secretary Divisional Land Board deposed to seeing the previous witness and Martin, who made a complaint about their land. He could not fix the date of the visit.

Anna Hesse, daughter of the plaintiff, said she and her husband lived on lot 6, adjoining her husband's ground. She was at Johannesburg early in the year. She remembered when Blake was setting out stakes for a line over her father's property. Blake told her that the Government was making a line. He said that if her husband objected to the line he (Blake) would make him lose the place, as he was behind with his rent. Witness said to him that it was her mother's ground he was putting the flags on, and he said it was not, that it was Government ground. Shortly afterwards Blake came to her mother's house and said they had better go to Jameson's house and talk the matter of the ground over. Witness corroborated her mother's evidence as to the offer of £20 having been made by Blake. She did not hear Blake read anything about the Lime Company.

Cross-examined by Mr. Searle: The line did not run by the route first flagged out, and it did not run over any of her ground. Her mother did not ask any more than the £8. Her father agreed to sign the document after Blake said the line was for the Government.

Re-examined by Mr. Schreiner: Witness's husband was and is in the employment of Blake's company.

August Martin, son-in-law of the plaintiff, said he was at his father-in-law's place on 28th June last, when he saw workmen very near his father-in-law's ground. They were told not to cross the boundary. Witness accompanied his mother-in-law to Cape Town to see Mr. Blake. He heard her tell him that he had always said the line was for the Government. Blake told them that whether he got the papers or not he would get permission from the Government to go over the farm.

Cross-examined by Mr. Searle: Witness did not hear his father-in-law tell Mehelm that he must not cross the boundary until Blake paid the £8. Blake in Cape Town said that when he got the papers he would pay the money.

Mary Kingstrom, another daughter of the plaintiff, said she accompanied her mother and Martin to Cape Town to see Blake. She corroborated as to what took place between them and Blake.

David Steven, principal clerk, Telegraph Department, had been subpœnaed to produce the message sent from Blake to Jameson, Faure Siding. On the application of Mr. Schreiner the Court ordered the telegram to be produced. [Telegram put in.]

The Acting Chief Justice: The telegram is: "Under no consideration allow Schoeneman to stop you going on. Will pay him as soon as we get transfer ground." The date is 28th June.

Max Schindler, who occupies a lot of ground near the plaintiff, spoke to accompanying the plaintiff to the workmen when they were over Schoeneman's boundary. Plaintiff told Mehelm that he must stop, as he had no right to be there. Plaintiff definitely told Mehelm that he had found out that the line was not for the Government, and that his wife had gone to Cape Town to make inquiries. The men used abusive language and threatened to knock the plaintiff down with a shovel.

Cross-examined by Mr. Searle: He did not hear plaintiff ask for £8. He would not ask a workman for the money.

A. Difford said he was Acting Chief Traffic Manager of the Cape Government Railways in June. Mr. Blake had no authority to represent the Government in expropriating land. Blake was not in the Government service, and had not been. Letters were produced which stated that Blake intended to get a private Bill introduced for the construction of a railway. The private Bill was never introduced. The company had no authority to represent the Government in any respect.

Cross-examined by Mr. Searle: A draft agreement was prepared for signature by Blake and others, but it was not signed, as witness was not authorised to sign it. When a siding was constructed the usual method was for the land to be expropriated by the private company and afterwards transferred to the Government, that was when the Government bore any of the cost. The Government, in connection with the siding in question, were to bear part of the cost.

This concluded the evidence for the plaintiff.

James D. Shannon, C.E., in the employment of the Cape Government, stated that he was instructed by the Resident Engineer to proceed to Faure siding to make a survey there. He with Blake and Faure went to the plaintiff's house. Plaintiff and Blake had a conversation in Dutch which witness did not understand. Witness went over the route of the proposed line, and

made a plan. He did not hear plaintiff's wife object. There was no necessity to make a detailed survey.

Jacobus Faure, farmer, Eerste River, spoke to visiting Schoenemann's house in March. He drove Blake and Shannon there. They spoke to Mrs. Schoenemann, and witness told her that Blake wanted to make the line. He asked her which route would best suit her. She did not make any objections, and appeared to be quite satisfied with the route suggested. He believed she said she did not want the line to go over her cultivated ground. Witness knew Schoenemann's property, and not long ago he valued the property at £250. Witness did not think the house and land were worth more. Plaintiff was raising money in connection with the case and asked witness to value his property. Witness did not think the line would damage the property, rather the reverse. Witness would place the value of the unimproved land there at £2 per morgen.

Cross-examined by Mr. Schreiner: Witness was not interested in the Lime Company. The line ran over his property. The company had purchased the lime rights, not the farm. He would not buy Schoenemann's property for £250. Witness heard Mr. Beaman's evidence, but did not agree with him as to the value of the property. He did not believe that the railway did any damage to the plaintiff's farm. Witness's property adjoined the plaintiff's. Were he to sell his property he would ask £6,000 for it. A good deal of his ground was also unimproved. He had 1,000 morgen.

Selfrid W. Blake, managing director of the Cape Lime Company, deposed that his company had been working the lime deposits on Mr. Faure's farm for the past two years. The lime had to be carted to the siding a distance of about two miles. In January of the present year negotiations took place between him and the Government concerning a siding. Witness in March went to the plaintiff's wife and told her that he intended to build a line of railway from the works, and he asked her if she would have any objections provided they decided to cross her ground. He said that if they crossed her ground he would pay her reasonable compensation. He said nothing about the Government. The line across plaintiff's ground measured 436 yards. On March 22 he went out to the place with Mr. Shannon and Mr. Faure. He spoke to Mrs. Schoenemann, saying they had come to decide upon the route for the line, and they asked her if she had any particular route she would prefer. They decided to carry the line round the cultivated ground. After that the rough survey was made by Mr. Shannon. Witness saw Mrs. Schoenemann frequently. She told him that her husband was at Johannesburg, that she did not expect him back, and she did not want him back. He inquired whether they had an ante-nuptial contract, but this she did not appear to understand. She, however, stated that while her husband was away she was "boss." Halleck, a Government surveyor, went over Myburgh's ground, and made a survey for the line. The line went over Government property, and a corner of plaintiff's property. After that survey was made he had a meeting with Mrs. Schoenemann and others at Jameson's. Witness asked Mrs. Schoenemann and her daughter if they could make a contract in the absence of their husbands, and they said they could. He made them an offer of £20, and said that Mrs. Schoenemann would have to arrange with her daughter as to her compensation. He then said if they took up the neighbouring plots he would advance the money, for which they would pay interest. He knew that the Hesses' rent was in arrear, and he warned Mrs. Hesse not to allow the land to be forfeited. To guard himself he agreed to pay the rents for the first year. Witness then saw Mr. Difford and Mr. McEwan, but the Government objected to Halleck's survey. Shortly after that Schoenemann came and asked witness for work, and he was started as a mason at Bleak House. Plaintiff worked there about a month. In April, after arranging with Myburgh, witness went to plaintiff's house. Before that plaintiff told witness that his wife had spoken to him about the line, and he had no objection to it being made. When the route was changed witness agreed to give them £7 10s. Witness never said a word about the Government. He took an agreement to the house that day to be signed. They made no objection to the agreement, and Mrs. Schoenemann asked if he could not make the amount £8, instead of £7 10s. Witness asked if plaintiff could read or write Dutch, and he said he could not, but as Mrs. Hesse was there who could speak English, he first read the document in English and afterwards in Dutch. He did not think that the word Government was ever mentioned. Plaintiff and his wife discussed the matter, speaking in German, and afterwards they signed the document. Witness said to them that if they had not agreed they would not have got the £8, meaning that he would have taken another route. Witness, on a previous occasion, told plaintiff's wife that he could get the Government ground which adjoined. That was while there was a difficulty with Myburgh. Witness saw the Hon. Mr. Faure about the Government ground. After

this he gave the railway authorities notice that he would proceed with the original scheme, and a draft agreement was prepared, but the agreement was never ratified. Subsequently the the General Manager wished to have a clause in the agreement altered, and this witness did not object to. When Bleak House was finished Schoenemann again asked witness for work. He was prepared to do any work, and wanted to be employed on the line. Witness met plaintiff at Faure Station. At that time the line over plaintiff's ground was about half finished. That day the plaintiff asked for payment of £1 for ducks witness had had, and he then asked when he would receive the £8. Witness said that when he got the papers he would get the money. He asked for the money for the line on one occasion before. On one occasion he met Mrs. Schoenemann in Waterkant-street, and she asked, "What about the money for the ground?" He said that as soon as he got the papers he would pay the money She refused to give him the papers. She wanted the money, and was very excited, so he walked off and left her. The first time he heard that the plaintiff objected to the line was when he was served with the interdict papers. Later he saw plaintiff's wife in Adderley-street, and he said to her that they were foolish to go on with the case, as if they lost it it would ruin them. He said if they dropped the case he was willing to pay his own costs. She said that the line had been the means of taking away their water, and he told her that if he had known that he would have put in pipes for water. Witness never made them understand that he was acting for the Government, and it was his opinion that they knew perfectly well that the arrangement was with the Cape Lime Company.

Cross-examined by Mr. Schreiner: Witness was the Blake who was defendant in the case *Koster* v. *Blake*. He made precise statements then, but the Chief Justice might have disbelieved his evidence. Judgment was given against him. He made an affidavit against a man named Braude and was called as a witness against him. He stated that he told his clerk to stop delivery of lime, and the clerk swore that that statement was not true. He was in the employment of the Equitable of New York from 1890 to 1893. During that time there were thirteen cases on promissory notes. At that time he was travelling for the Equitable, and got a lot of promissory notes from people. Shortly after that he left the Equitable. Mr. Lindley did not dismiss him. Mr. Lindley did not tell him that he would not have him in his office. There were thirteen actions brought on promissory notes due to him. He believed his name was used in suing for the notes. He was in the employment of the Equitable from 1890 to 1893, about three years. Witness denied having been at Port Elizabeth in the employment of a brandy company. Before he joined Mr. Lindley he was on the New York Mutual for a short time. He was also on the farm of Mr. Homan, near Beaufort West. He assisted on the farm, and acted as teacher.

Mr. Schreiner: Where were you in 1885?

Witness: I think I was in New York.

Mr. Schreiner: You think you were! And in 1886 and 1887?

Witness: I think in New York.

Mr. Schreiner: Very well.

Mr. Schreiner: When did you come to this country?

Witness: I came out in 1888.

Mr. Schreiner: You were born, where?

Witness: I was born in New York.

Mr. Schreiner: And when Mr. Lindley engaged you, you gave him certain references to people in New York?

Witness: It is possible that I did.

Mr Schreiner: It is only possible. Did you not give Mr. Lindley references to people you said you knew in New York, and Mr. Lindley made inquiries from them about you?

Witness: I do not know.

Mr. Schreiner: Don't you know that Mr. Lindley made inquiries, and these people all declared that you were utterly unknown to them?

Witness: They might have done.

Mr. Schreiner: Then if they informed Mr. Lindley that they did not know you, they had not been particularly proud of the acquaintance. You are a frequent litigant in the Magistrate's Court?

Witness: No.

Mr. Schreiner: You say you are not?

Witness: I have been at the Magistrate's Court in the ordinary course of business, if you are very anxious to know.

Mr. Schreiner: I am not very anxious to know. I want you to speak the truth.

Witness: About two years ago I may explain that I was in unfortunate circumstances, and I tried to surrender my estate. It was at that time that I was sued in the Magistrate's Court, but I have since paid all the accounts.

Mr Schreiner: You have been thirty-five times before the Magistrate's Court between 16th January, 1894, to 21st April, 1897, as a litigant?

Witness: I was not a litigant.

Mr. Schreiner: You were defendant?

Witness: Yes.

Mr. Schreiner: So you think a defendant is not a litigant?

Witness admitted that writs of imprisonment had been taken out against him. He had lost all his money, and the cases were brought against him. He had since paid all the accounts.

Mr. Schreiner: Might I ask you, have you always taken the name of Blake?

Witness: Yes.

Mr. Schreiner: Never had another name?

Witness: That is the name I got, and I suppose I will stick to it until I'm finished with it.

Mr. Schreiner: You'll stick to it until you are finished with it! Quite so.

Witness reckoned that the plaintiff and his people were absolutely making up a case against him, and that they had "cooked" the story that he had misled them. He never said anything about the Government to any one of them. He believed he told them that he wanted the papers because he would have to transfer the ground to the Government. He first asked for the papers when the plaintiff asked him for the money. He was positive that he never mentioned the Government at all.

Mr. Schreiner: But you have just told the Court that you did.

Witness: I never mentioned the Government.

Mr, Schreiner: You say you never mentioned the word Government?

Witness: I don't think the Government was ever mentioned.

Mr. Schreiner: On no occasion?

Witness: I do not think so.

Mr. Schreiner: It is a question of memory you see. You say you never used the word Government?

Witness: The word Government was mentioned by me when I advised Mrs. Hesse and Mrs. Schoenemann to try and get from the Government the two plots of ground adjoining theirs. I did not say that I would use my influence with the Government, so that they might get the ground. There was no influence required.

Mr. Schreiner: Then the story of Mrs. Schoenemann's, that you were to use your influence with the Government, is quite incorrect?

Witness: I suppose, if you let me explain——

Mr. Schreiner: Answer my question, and tell me, "Yes" or "No." You are charged with fraud, and you must answer me very directly.

Witness: I say their story is quite incorrect.

In reply to further questions, witness said he could have gone round about plaintiff's farm if they had objected to the line. It was immaterial to him whether he got plaintiff's ground, as he could easily have crossed Faure's ground. The plaintiff's wife appeared to be perfectly satisfied with the terms he offered. He did not tell Mrs. Hesse that the line was a Government matter. That was also a mistake on their part. He told her he was on Government ground, as he thought he was. He considered the arrangement made with the two women was right. He denied ever having obtained the signatures of other married ladies without the consent of their husbands. He knew nothing of any such case. It was entirely wrong of plaintiff's wife to say that at first she declined to make any arrangements with him until she had written to her husband. He never looked at the papers that she brought to Jameson's house. They were not brought for the purpose of examining them. He was almost certain he did not look at the papers. If they said he did they must be wrong. On 21st April he took the document to the plaintiff completed, with the exception of the amount. He could not say when he saw Mr. Pieter Faure, but it was after Hallack made the survey. It was, he thought, between the 7th and 12th April. He was not certain as to the date. He told the plaintiff's wife and her daughter that he had seen certain people in Cape Town, and that there would be no difficulty in them getting plots 8 and 9. He saw Mr Faure about plots 8 and 9. and a ked him if there would be any objection to him crossing these plots, they being Government ground. Witness did not mention Myburgh to them, and if they said he did they must be mistaken. He read and translated the agreement to them. They were wrong if they said that he did not mention the Lime Company. He did not think that he translated the top part of the agreement, which set out the parties to the agreement. After the agreement was signed he told them that if they had not accepted his terms they would not have got anything. He thought that the price he offered was three times the value of the ground. He thought that he had dealt more than fairly with the plaintiff. When plaintiff's wife saw him in Cape Town she did not accuse him of misleading them as to the Government making the line. She only asked for the money. He could not fix the exact date, possibly it was June 28. He contradicted her when she said that the workmen had been stopped. He never said to her that he would send a telegram to the men not to stop. On that date he sent a telegram to the men not to stop.

Mr. Schreiner: How do you think that the plaintiff's wife came to know about the telegram?

Witness: I think Jameson must have told her.

Mr. Schreiner: That is your theory?

Continuing, witness said that he did not know about the petition for the interdict in Chambers.

Re-examined by Mr. Searle: He had nothing personally to do with the Equitable cases. The notes were handed over to Lindley & Wood, and they sued in his name.

H. Morris, farming near Faure Station, stated that he would value plaintiff's ground at £1 per morgen. The house would be worth about £150. Witness bought his ground at £2 a morgen in 1887. About eleven years ago the Government expropriated certain of his ground and paid him compensation at the rate of £14 per acre.

Cross-examined by Mr. Schreiner: He could not very well tell the value of his own ground.

Mr. Schreiner: You can easily tell the value of plaintiff's ground. Why cannot you tell the value of your own?

Witness: Well, it is peculiar.

Mr. Schreiner: Your ground is peculiar, so funny that you cannot tell the value of it?

Witness (after some delay) thought his own ground would be worth £600, which would mean a value of £4 10s. per morgen.

Mr. Faure (recalled) said he remarked to Mrs. Schoenemann that the railway across her ground would be convenient for her getting manure and the like.

Bernard Hesse, son-in-law of the plaintiff, spoke to working for Blake for about thirty-three days. He could remember asking the plaintiff whether he had given Blake the right to go over the ground, and he replied that he had. Plaintiff said he was to get £8 for it, and that he had signed a paper which had been read to him in Dutch. Witness remarked that he should have waited a little and he might have got more, and the reply was that it was all right. Once he heard his father-in-law ask Blake, who had just paid him, whether the money was for the ground or for wages, and he heard Blake say that he would be paid for the ground when he gave up the papers.

William Kerrif Jameson, foreman to the Lime Company, said he was present that night in April when Mrs. Schoenemann and Mrs. Hesse met Blake at his house. Blake called witness into the room and in presence of the two women said he had offered them £7 10s. for ground to make the line across their ground. Mrs. Schoenemann asked him to make it £8, and Blake agreed. Later, he heard the plaintiff ask Blake at Faure Station for the money for poultry, and he heard Blake tell him that he would pay him for the ground when he got the papers. Witness spoke to plaintiff's wife, asking for the money for the ground.

Cross-examined by Mr. Schreiner: He twice heard Blake ask the plaintiff for the papers. When the duck money was paid the work had not commenced on plaintiff's ground. Witness swore to an affidavit in which he stated that the money was paid about a week after the work had commenced on plaintiff's ground. In the same affidavit he swore that Blake looked over the papers he got from the plaintiff's wife at his house, and took one away. He had stated that day that Blake did not look at the papers.

Thomas Mehelm spoke to the plaintiff coming to him and asking him to stop work on the line when he reached his boundary. He said that before they came on to his ground Blake must pay the £8.

Cross-examined by Mr. Schreiner: He did not stop work at the request of the plaintiff. Blake had told him that if the plaintiff tried to stop him he was to go on.

Christian Carl Roeland gave evidence that the plaintiff told him he had given Blake the right to build a line over his ground for £8.

William Carl Aldersen said he was at Jameson's house the night plaintiff's wife and Mrs. Hesse were there. He heard Blake speaking to them in Dutch. They came to some agreement about land, but the exact details he did not know. He did not hear anyone say that the line was for the Government.

Cross-examined by Mr. Schreiner: There was mention made of the plots 8 and 9. He heard Mrs. Schoenemann say that she would prefer her husband to be there before settling.

Thorvold Naude said he lived at Erste River and knew plaintiff's ground. He would value the ground at about £1 per morgen. It was very poor ground. He valued the house at from £80 to £100.

Cross-examined by Mr. Schreiner: Witness was a shopkeeper, and had never been a farmer. He could not be called a valuator. He knew something about land; he had a garden. Eight years ago he sold about a morgen of unimproved land for £24. That was for a building lot in the village.

This concluded the evidence.

Postea (September 6th).

Mr. Sheil (Government Law Adviser) appeared to watch the case on behalf of the Government.

Mr. Schreiner: Plaintiff did not know Blake as manager of the Lime Company. Blake was in charge of Government convicts at a convict-station close to plaintiff's house and the plaintiff went to him for work in the belief that he was in the Government employment. As soon as he found out that the line was not a Government line he protested against its being carried on. The contract is void on the ground of

fraud. *Justus error* also vitiates the contract. As to authorities dealing with fraud see *Gous* v. *De Kock* (5 J., p. 405); *Beyers* v. *McKenzie* (F., p. 125); *Hunter's Roman Law* (pp. 417, 852); *Tait* v. *Wicht* (J. 7, p. 158); *Standard Bank* v. *Union Boating Co.* (J. 7, p. 257); *Betz* v. *Worcester Exploration Co.* (J. 6, p. 82). as to *Justus error*. Counsel referred also to *Voet*, *Savigny*, *Pothier*, and *Van der Linden*. Even if there was error not induced by the defendant nevertheless true consent would be excluded and the contract rendered void. The only condition necessarily then is that it should be timeously repudiated. *Pollock on Contracts* (p. 407); *Boulton* v. *Jones* (2 H. & N., p. 564). It was reasonable for the plaintiff to believe that Blake had authority to contract on behalf of the Government. *Mitchell* v. *Lapage* (Holt, N.P., 253); *Cundy* v. *Lindsay* (L.R. 3, App. Ca., p. 465); *Anson on Contracts* (p. 116); *Foster* v. *McKinnon* (L.R. 4, C.P., p. 704); *Cooper* v. *Phibbs* (L.R. 2. H.L., p. 170).

Mr. Searle: In order that a contract may be invalidated by fraud, not only must the false representation be proved but also that the contract was induced by such false representation. *Tait* v. *Wicht*, *Gous* v. *De Kock*. Fraud must be proved as clearly as in a criminal prosecution. *Kerr on Fraud and Mistake* (pp. 440, 450), and the onus is on him who alleges fraud. Blake had no motive for acting fraudulently. The eighth paragraph of the declaration founds on misrepresentation of Blake, but that is fraud not mistake. *Anson on Contracts* (5th ed., p. 126); *Heatlie* v. *Colonial Government* (5 Juta, 353). Plaintiff must show that he has not been guilty of negligence. *St. Marc* v. *Harvey* (10 Juta, p. 267).

The Acting Chief Justice said that on 21st April last the plaintiff and the defendant met together at the plaintiff's house, when an agreement was signed to the effect that in consideration of £8 sterling the plaintiff, who was the registered owner of plot No. 7, gave the Cape Lime Company the right to expropriate certain ground to allow a line of railway to Faure Siding. That memorandum was signed by the plaintiff, the defendant, and was witnessed by Mrs. Hesse, the daughter of the plaintiff, who was present on the occasion. That agreement was now attacked on the ground that Blake, the defendant, who acted for the Lime Company, fraudulently represented that he was acting on behalf of the Colonial Government in making the railway, and that the plaintiff, believing his representations, contracted with the defendant, whereas if he had known the actual facts he would not have so contracted. The issues to be determined were questions of fact rather than of law; and they were whether false and fraudulent representations had been made by Blake, and whether these false and fraudulent representations induced the contract which had been entered into in the case. It was important to consider whether the representations would be material, that is, whether they would affect the plaintiff in consenting to the contract or not. His lordship thought that it was a matter most material for the plaintiff to know whether he was dealing with the Colonial Government or with the Cape Lime Company, because he held his land under certain rights which were reserved by the Colonial Government, and one of these rights was that of making railways. The Government had thus the legal right to compel him to permit the making of the lime. The plaintiff was placed in a very different position when dealing with the Government than he would be in when dealing with private individuals. His lordship thought it was clearly in the mind of the plaintiff when he entered into the contract that he was doing so with the Government. That was proved both by his wife's conduct as well as by his own evidence. The first negotiations took place with the wife, and afterwards were continued and concluded with the husband, and it was evident that the wife thought she had to accept the terms offered by Blake. From what Mr. Faure said it was generally understood that the Government had something to do with the railway, That the Government was interested is shown by the correspondence put in, for as far back as the beginning of this year there were negotiations going on between the company and the Government for the construction of the line. By the agreement come to with the Lime Company, the Government were to pay part of the cost, and ultimately the lime was to be taken over by the Government. In one way, therefore, the Government were interested in that railway, they were helping Blake in the construction of the siding, which was to be mainly for the use of the Lime Company. But it is a very different thing for the Government to assist a private individual, and for the Government itself to expropriate the land. The Government had not and could not confer its statutory powers on the Lime Company. The plaintiff, his lordship thought, had shown that he was possessed of considerable shrewdness and of natural ability. He was a man who had been at work in Johannesburg and elsewhere, and who showed that he knew pretty well what he was doing. His wife also showed herself a clever woman. Under these circumstances there was some difficulty in say-

ing that the parties had been deceived. But it was clear from the evidence of the husband, the wife, and the daughter that Blake distinctly stated that the Government was doing the work, and further he told them that if they had not agreed to it the Government would have taken their land for nothing. It was curious when Faure came on the scene and asked Mrs. Schoenemann whether she had given Blake the right to make the railway, she said "Yes"; she did not say, "I gave the Government the right." That was in favour of the defendant, but his lordship thought that it was quite apparent that Blake at the first interview made her understand that the Government was doing the work, and that she relied on the truth of that statement. At the other interview, when the mother and daughter met Blake at Jameson's house, there was no doubt that the Government was there referred to, and that the name of the Government was used as an argument for inducing them to agree to the contract. Without going further into the case, his lordship said that there had been misrepresentation, wrongful and wilful representation of a material fact, which had been made to induce. and had induced the plaintiff to enter into the contract. The contract having thus been obtained by misrepresentation—it had been obtained by fraud, because wilful misrepresentation amounted in law to fraud—it must be set aside. The contract having been declared null and void, the interdict asked for was unnecessary. On the question of damages, Mr. Bosman had stated that £25 would be sufficient to restore the land to its original condition judgment would be given for £25. An order would therefore be granted decreeing the contract null and void, and for £10 for damages for the trespass committed, and further for the payment of an additional sum of £25 of damages, unless within six weeks the Lime Company, the defendants, levelled the ground and restored it to its original state. The judgment would carry costs.

Mr. Justice Maasdorp concurred. There had been a very serious conflict of evidence, and the Court was called upon to decide as to the credibility of the witnesses. A very good way of testing that question seemed to be to consider the evidence given by the different witnesses as to the last interview, that which took place in Cape Town, it being the most recent occurrence and the facts would be clearly in the minds of the witnesses. With reference to that particular interview they had got the assistance of two disinterested witnesses. The defendant said that what took place amounted to Mrs. Schoenemann saying that unless Blake paid the £8 she would not allow the work to proceed. On the other hand, Mrs. Schoenemann declared, and she was supported by two witnesses, that she protested against the false representations that Blake had made, and on his asking for the papers she said she would have nothing to do with him because of the falsehoods. Other witnesses spoke to the protest being made where the work was going on, on the ground of the misrepresentation, and the wife immediately afterwards went to Cape Town to carry out her husband's intentions of stopping the work because of the false representations which had been made. As to what actually took place at that interview in Cape Town his lordship said he would accept the evidence of the witnesses for the plaintiff as reliable, and he could not accept the evidence of the defendant. All through it would appear that Mrs. Schoenemann was under the impression that the defendant was acting for the Government, and that impression arose from Blake having positively said so. Having so represented himself at the first interview, she understood that that was so all through. It was apparent that the plaintiff would not have been satisfied to accept the small sum offered by the defendant had he not thought that the defendant was representing the Government. He agreed to the contract, because he knew the Government had the right to take the ground for a line. And there was a material difference between the defendant acting for himself and acting for the Colonial Government.

Mr. Justice Solomon concurred. It was, he said, one of those very unpleasant cases in which there was a direct conflict of evidence between the witnesses. but it was one of those cases in which the Court should determine and not hesitate to say on which side the truth lay. He was bound to say that the truth in this case lay with the witnesses for the plaintiff, with Mrs. Schoenemann, and their daughter Mrs. Hesse. He could not believe the evidence given by Blake, corroborated as it was to some extent and in some small matters. His lordship was satisfied from the manner in which the witnesses for the plaintiff gave their evidence that they were speaking the truth; he had been favourably impressed by the plaintiff in giving his evidence, and he had been favourably impressed by his wife and daughter's evidence. But he was bound to say that he was not favourably impressed by the manner in which Blake gave his evidence. As for the witness Jameson, his lordship was satisfied that he was not to be believed, and therefore not the slightest importance was to be attached to what he said. There was no

difficulty in saying that the truth lay with the plaintiff and not with the defendant. The evidence of the plaintiff and his wife was conclusive to his mind. To believe Blake, the defendant, it was necessary to believe that the plaintiff and his wife had concocted the charge, and that could not be believed. That Blake said he was acting for the Government his lordship had no doubt. Had they thought they were dealing with Blake there would have been a good deal of bargaining. They would not quietly have accepted the terms that he offered them. And there was the fact that Mrs. Schoenemann could not know of Blake sending the telegram from Cape Town, unless her version of what took place was the true one. His Lordship had not the slightest difficulty in coming to the conclusion that the truth lay with the plaintiff and not with the defendant, and that the judgment should be as stated.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

Ex parte CROSSLEY AND WIFE. { 1897. Sept. 6th. „ 13th.

Post-nuptial contract.

Where husband and wife, the former domiciled in the Colony and the latter in England, were married in Scotland in ignorance of the fact that their rights to their property would be altered unless they executed a contract before marriage, the Court allowed a post-nuptial contract to be executed, and to have the effect when registered of an ante-nuptial contract.

Mr. Searle, Q.C., applied, on the petition of Robert Charles Crossley, for leave to execute and have registered a post-nuptial contract between himself and his wife, Susan Crossley. The petitioner was domiciled in the Colony, and while on a visit to Europe married his wife in Edinburgh on the 1st of July, 1897. He alleged that he was desirous of marrying by ante-nuptial contract, but was under the impression that the contract could be executed on his return.

Mrs. Crossley also filed an affidavit saying she was desirous of executing the contract.

The Court desired before granting the order to have some clear evidence that the parties at the time of marrying had determined upon entering into a contract, and the matter was allowed to stand over until the 12th September.

Postea (September 13th).

Mr. Innes, Q.C., renewed the application and read the further affidavit of Mrs. Crossley, in which she alleged that she was under the impression at the time of her marriage that she would still have the control of her property afterwards, such being the English law, and was not aware that it would be necessary for her to enter into a contract before marriage; that she married under the belief that her property would be her own and under her own control, and had the matter been brought to her notice as it was now she would have insisted upon an ante-nuptial contract being signed before marriage; and that immediately she ascertained what the effect of her marriage was she asked her husband to take the necessary steps to execute a contract excluding community of property in the usual way and upon the customary conditions. She further annexed the form of contract which she desired to execute

The Court ordered that a post-nuptial contract be executed embodying the intention of the parties at the time of marriage—to have the effect of an ante-nuptial contract upon registration. Rights of creditors accruing before registration reserved.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Hon. Mr. Justice BUCHANAN (Acting Chief Justice) the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

BLACKBURN V. MITCHELL. { 1897. Sept. 7th

Salvage of ship—Agreement—Duress—Reasonable remuneration — Evidence.

The defendant's ship being in distress and danger on a sandbank, and the night being dark and stormy, the plaintiff's tug put out to her assistance and on board the ship a written document in the following terms was signed by the master of the ship:

"On demand please pay to the order of (the plaintiff) the sum of

£2,000 for services rendered to the defendant's ship, towing her from beach to the safe anchorage and giving anchor and warp."

The defendant wished to sign the document under protest, but the captain of the tug threatened to leave the ship unless a clean document was signed; the master thereupon signed it but made a verbal protest.

A second tug was employed by the plaintiff, and the two tugs hauled the ship to safety.

The ship and cargo were valued at £6,000.

Held, *that the document was signed under duress and that there was therefore no mutuality of agreement.* Held, also, *that £1,000 was an equitable amount to be paid for the services rendered.*

Evidence of assistance rendered to another vessel on the same night, and of the amount paid for such assistance held admissible.

This was an action in which the plaintiff, owner of the tug John Paterson, sued the defendant as master of the British ship British Empire for the sum of £2,(00.

The declaration alleged that the British Empire arrived in Table Bay on the 23rd June and during the night drifted on to the beach; that the tug John Paterson went to her assistance and that the defendant thereupon entered into a contract in writing with the plaintiff in the following terms: On demand please pay to the order of Alfred Lagden Blackburn, owner of the steam tug John Paterson, the sum of £2,00) for services rendered to the ship British Empire towing her to safe anchorage, and giving anchor and warp. "John Mitchell, master of British Empire.' That the plaintiff duly caused the British Empire to be towed from the beach to a safe anchorage and gave her the requisite anchor and warp. The claim was for £2,00) in terms of the contract, or alternatively for £1,000 as reasonable remuneration for the services rendered.

The plea alleged that the document was signed under compulsion, and tendered the sum of £500 as reasonable remuneration.

Mr. Schreiner, Q.C. (with whom was Mr. Graham), appeared for the plaintiff; and Mr. Searle, Q.C. (with whom was Mr. Benjamin), appeared for the defendant.

David Hinman, captain of the tug John Paterson, said the British ship British Empire arrived in Table Bay on the 23rd June, and cast anchor in the berth assigned to her. Mr. Blackburn was a member of the firm of Messrs. Anderson & Co., who were agents for the ship. His engineer told him that a ship was ashore about 8.30 that night. In consequence of signals of distress being shown he went out to her assistance. There was a strong north-west wind blowing, strengthening into a gale, and a heavy sea running. He passed a vessel which was in distress, but he did not stop, as he went on to the ship which had called him. He found the British Empire lying on the beach between the Castle and the reef. She was bumping and rolling heavily, and with broadside on the beach, her head pointing towards the Castle. He fastened to her on the lee side, and went on board. He saw Captain Mitchell, the master of the ship. Before going on board Captain Mitchell asked him how much he wanted to tow her off, and he replied £4,000. Captain Mitchell then said, "Let us settle it by arbitration." Witness replied that he wanted a figure to work upon. Captain Mitchell then invited him to go aboard and try and settle the matter. He went on board and discussed the matter with Captain Mitchell for about an hour. It was all wrangling about the price. Captain Mitchell asked if £2,000 would not satisfy him for towing her off and giving her a berth, on the no-cure-no-pay principle. He wrangled with him and tried to get a little more. Then Captain Stevens came on board by the port launch. Witness then said he would write out the bill for £2,000 if Captain Mitchell would sign it. After he had filled in the bill for signature, Captain Mitchell said, "I protest against this." Witness told him he would not write the bill unless he would sign it without any protest whatever. Mr. Sinclair, the berthing master, who was present on board, told Captain Mitchell he would have to hurry up or they would never get the ship off. Captain Stevens also told him that he would have to sign the bill and "see about it after." Captain Mitchell then signed the bill, but he said something to the effect that "You will never be paid." All this time the ship was bumping and rolling so badly that he was afraid she might roll over the top of his tug. The ship was in peril. She could not have been kedged off the shore that night or the next day. If they had had fine weather they might have

got her off if they had discharged her cargo, and had not "holed herself." The weather was getting stronger all the time. It blew a whole gale the next day, with a heavy sea. At the time the document was signed the tug Alert was lying at anchor close by, and he called to her for assistance. He had sent for the Alert. One tug could not have towed the British Empire to safe anchorage. The arrangement was that the tugs shared all the money received. Four tugs did the work and shared the profits. The Alert got a line on the starboard quarter and the John Paterson got one on the port quarter. The tugs started towing a little after ten o'clock, and they slipped their cables in a little over half an hour. In getting to the berth which was assigned they passed four or five ships in the Bay. The night was very dark, and there was considerable risk incurred in the work, which was not completed until about two o'clock. Captain Mitchell told him he could not do anything more for him, and he bade him "good night" and left him. If the ship had been left where she was the probability is it would have been a total wreck.

In cross-examination witness said when the boat was stranded on the sandbank she was within the protection of the breakwater. She was then in twenty-one feet of water, but his tug drew only six feet, and he could therefore run in between the ship and the shore. On that night there was very little shelter from the breakwater. Two or three days after the accident there was fine weather, and she might have been kedged off if they had discharged the cargo, and if nothing had happened. He thought she might have been injured on the following day. There was great difficulty in towing the vessel off the beach. He took the vessel about 600 yards. If there had been an anchor ready on the ship the whole thing would have been over in about half an hour. There was always great risk in towing a ship, and the danger was always greater when there were two tugs. He was quite sure that he took the job on the no-cure-no-pay principle, but he did not put that in the bill, because Captain Mitchell did not say anything about that until after it had been drawn. If he had not got the boat off he might have asked for some pay, but he could not have charged anything. He did not know whether Captain Stevens said to Captain Mitchell, "You are in the hands of the Philistines, and you can't help it." But that was an old quotation of his. He threatened to leave the ship unless the bill was signed, but he would not have done so, as it was his duty to stand by the ship. He was trying to make the best bargain he could. When he asked for £4,000 Captain Mitchell told him he had better go aboard and take the ship. The value of the tug was about £2,000. It was necessary to get the ship off as soon as possible, so as to take advantage of the high tide.

Captain Swan, of the tug Alert, corroborated the previous witness. There was a great deal of risk in towing the British Empire.

Alfred L. Blackburn, the plaintiff, and registered owner of the tug John Paterson, said he valued the tug at about £3,0 0. He was a member of the firm of Anderson & Co., who were the agents for the British Empire, which was conveying 2,120 tons of coal for the Colonial Government. The British Empire was an iron ship, classed A1 at Lloyd's, and her registered tonnage was 1,499. The value of the ship was about £3 a registered ton, although he did not profess to be an expert in these matters. He valued the cargo and freight at £7,300 afloat, or about £3,500 delivered on shore.

Cross-examined: He said the John Paterson was an old boat, built in 1882, but it had been entirely refitted. He bought her from the Port Elizabeth Harbour Board for about £1,000, but she was refitted about four years ago.

Re-examined: The original cost of the tug was £6, 00 or £7,00 , and he believed the present value was £3,000.

A. R. McKenzie said he was the owner of the Alert, which had cost him £14,000 four years ago. In suing in this action, Mr. Blackburn represented himself (witness), and they would have to settle together afterwards. He had had considerable experience of the amounts received for towage, but he did not remember quite a similar case.

Cross-examined: The British Empire was considerably damaged, and had to go into graving dock.

Richard Daniel Steel, master of the steam tug Tiger, said the Eildenhope parted her cables on the night of the 23rd June, and he had to go to her assistance. The weather was very bad. He supplied a patent anchor and warp to the Eildenhope. The captain took it, and as a consequence did not drift ashore. The sum paid for the service was £500.

Mr. Searle objected to this evidence; they did not know the circumstances under which this amount was paid.

Mr. Schreiner said he gave the evidence to throw some light on what was a reasonable amount to be paid.

The Acting Chief Justice said he did not think the evidence was entirely irrelevant.

In reply to the Acting Chief Justice, the witness said if the captain of the Eildenhope had not accepted the anchor he might have gone ashore.

John Beal, shipping clerk of Messrs. Thomson & Watson, gave evidence of the payment of £50) to the Tiger for services rendered to the Eildenhope. The payment of £500 was paid after cables had passed between the owners of the ship and the agents. The settlement took place next day. No doubt the underwriters would pay the damage.

Duncan Andrew, joint agent of the Castle Company, gave evidence of payments made to certain distressed ships eight years ago for the purpose of showing that the amount now claimed was a reasonable one

This closed the case for the plaintiff.

William Stevens, the Port Captain, said he remembered the night of the 23rd June. The weather was dark and gloomy, with a fresh northerly wind. The British Empire was berthed under the South Arm. Between eight and nine it was reported to him that a ship was ashore, and he afterwards went out in the steam launch. He reached the ship British Empire about nine o'clock. When he arrived the John Paterson was fastened to the British Empire. On going aboard he found Captain Mitchell and Captain Hinman were arguing about the price to be paid for towage. He advised Captain Mitchell to sign the bill under protest, for the purpose of getting the ship afloat, but Captain Hinman refused to accept it with the protest. Captain Mitchell then signed the bill, and said they could fight it out after. As far as he knew Captain Mitchell did not withdraw his verbal protest. The vessel was not bumping violently by any means, although they knew she was ashore. The ship came off easily, and he thought the tugs were towing for about ten minutes, although no one took much notice of the clocks. There was no risk to the tugs whatever. The tugs towed the vessel out to an anchorage. From the time the tugs started until their arrival at a safe position would be about half an hour. The tugs were to leeward of all ships in the Bay all the time until the anchor was ready to be let go. He was not afraid of the vessel going over on her beam ends. It might have listed over a little. If the vessel had remained on the beach possibly about 500 tons of cargo would have had to be put into lighters. At the request of Captain Mitchell he surveyed the vessel, and found that she had not sustained any internal damage, and a diver afterwards went down to examine it externally. The John Paterson was worth about £2,000, and the Alert about £8,000, but as there was no market for such vessels out here it was difficult to form a definite opinion on that point.

Cross-examined: He was not an expert on the value of such vessels. He did not think there was any danger to the vessel or cargo, but it might have done some damage to have left her on the beach all night. Vessels had been stranded there before, and iron vessels were not damaged so readily as the old wooden ones. The vessel would naturally make a bed for herself, and the consequence might have been to lighten her cargo. The day following there was a heavy gale and strong sea, but he persisted in saying that a vessel in such a positi n could not have sustained much damage. He urged Captain Mitchell to sign the document, because it was always advisable to get ships afloat as soon as possible. He did not think that Captain Hinman would have taken the vessel off unless he was satisfied he would receive payment. He thought a fair and reasonable payment for the service rendered was £1,000, but £2,000 was excessive. It was just a little risky to tow a vessel in the Bay in the night, and especially when they were towing a vessel by the stern. Two tugs were needed for the job.

Re-examined: He did not think his estimate of £1,000 was a liberal one. He could not order a tug to go to the assistance of any vessel in distress. He had not a tug under his control, but there was some talk of the Government getting one out here.

Alexander Young, master of the British barque Poltalloch, said he had been waiting in Cape Town for seven weeks awaiting a berth. He commanded the Persian Empire, which was the sister-ship of the British Empire, until five months ago. The British Empire might fetch at a public sale £2,500, but he doubted that very much. The ship was twenty-eight years old, and the builders never thought of building such boats now. He had been in command of ships for twenty-five years.

William Grimsditch, a ship's overlooker, said he had had thirty years' experience of shipping. If the British Empire were uninsured it would be worth about £2,000. A tug like the John Paterson could be got on the Tyne for £200 or £300, and the Alert between £3,000 and £4,000 if put up for auction.

This concluded the case, with exception of the evidence taken on commission, which was read.

In this Captain Mitchell said he refused the offer of £4,000 when it was made to him by Captain Hinman. They were bargaining for a

long time. Captain Stevens told him he was in the hands of the Philistines, and must do something. When he signed the bill he intended to write "Under protest," but he did not write this, because Captain Hinman would not allow him to do so. Captain Hinman said he would leave the ship if he would not sign the bill. Neither of the tugs ran any risk in the towage. The vessel did not roll very much. He had not been in the Bay before. There was no danger to life or limb, but there was danger to property. He valued the ship at under £3,000, and the freight at £1,500 or £2,000. He still thought that £500 was a fair and reasonable sum to pay for the service rendered. He did not offer £2,000, and he did not use words about it being on the no-cure-no-pay principle.

Mr. Schreiner, Q.C.: The issues are, first, was this contract a binding one? Secondly, if not binding, what is a fair amount? The principles to be observed are laid down in *Maule and Pollock* (Library Ed, p. 647); *Akerblom* v. *Price* (72 B.D., p. 129). This contract must not be looked upon as made under stress: plaintiff's own evidence is that everything was quiet and that there was nothing alarming taking place. Captain Mitchell was quite competent to contract. The Court of Admiralty only interferes with contracts which have been entered into when there is some considerable danger to life or property actually impending. The protest was withdrawn, because from the point of view of the parties there was no protest unless it was a recorded one. The ordinary law as to contract must be applied because Captain Mitchell did not think he was in any extraordinary risk, therefore we are entitled to the £2,000. But if the Court finds that there was duress, then the question is what is reasonable as a *quantum meruit*. The bay was crowded with shipping, there was a strong sea, and the tugs were compelled to do service on a dark night, which service they rendered efficiently and well; one tug could not have done the work alone, and the risk to themselves was increased by there being two tugs. *United Kingdom* v. *Syria* (14); *Law Times* (p. 833); *Fisher's Dig.* (6, p. 1,635). The value of the thing salved is material; here the value was not less than £6,000. The smallest fraction allowed in such out-and-out cases of salvage is one-sixth.

Mr. Searle, Q.C.: The Admiralty Court has very frequently set aside agreements made under compulsion or exorbitant, when the parties have not contracted on equal terms. One of the earliest cases is *The British Empire* (6 Jur., p. 608). Since then the tendency has been less and less to abide by such agreements *The Phantom* (L.R. 1, Adm. and Ecc., p. 58), (1866); *The Silesia* (5 P.D., p. 197), 1880); *The Mark Lane* (15 P.D., p. 138); *Rialto* (P. D. 1891, p. 175), in which case Court held that the two conditions were pres namely, that the parties were not upon e terms and the sum was exorbit n't. *Amerique* (6 L.R.P.C., App., p. 468); *Waverley* (3 L.R., Adm. and Ecc., p. 369).

Mr. Schreiner: *The Shathgarry* (11 Reports, 1895, p. 783) is a later case.

Mr. Searle referred further to *The He and George* (Swabey's Adm. Rep., p. 3 *The Theodore* (*ibid* p. 351); *The He* (15 Jur., 183). The tendency in the later c is to widen the equitable jurisdiction of Courts. In this case the parties were not equal terms: defendant was a stranger in Bay: he could not have been towed off by other tug because the two tugs appear to h been acting in concert: there was danger cargo: he was urged to sign and fight af wards: he signed because he thought the was going to leave.

As to what is a reasonable amount, *The L* (5 Sh., p. 338); *The Blairhoyle* (5 Sh., p. 3 *The Westminster* (1 Rob. Adm. Rep., p. 2 *Maclachlan on Merchant Shipping* (p. The principles by which the amount is fixed set forth in *The Cheetah* (2 P.C. p. 3 *Maclachlan* (p. 654); *Anderson & Mar* v. *The Gulielms D.* (6 J., p. 134). In *The Me* and *The Silesia* each party was ordere pay his own costs. In the Court of Ap affirmed the view that there should be no c

Mr Schreiner in reply: *The Georg Lawrence* v. *The Calcutta* (B. 1878 p. 1 *Haartje* v. *Maaselyk* (1876, p. 208); *The Pet* (2 E.D.C., p. 394).

The Acting Chief Justice in giving the j ment of the Court, said: This is an ac brought by the plaintiff, the owner of the John Paterson, to recover the sum of £2,000 salvage services rendered to the ship Bri Empire. The claim is put on two grounds, that an agreement was come to between captain of the ship and the captain of tug to pay this amount; and then alternati if the Court held that the agreement could be enforced, that the amount claimed wa reasonable sum to award for the servi rendered. This is a case which, by the Gen Law Amendment Act of 1879, is governed the law of England. There is no dispute as to the nature of the services which w rendered. It is admitted by the defendant t salvage was earned, and the facts show t the requisities of salvage were present. ship was in distress and in great danger, assistance stated was rendered by the plain

d that assistance led to the safety of the sel salved. There is no dispute neither as to fact that an agreement to pay the sum imed was come to before any services were dered, and that this agreement was made what the witnesses called the "no pay cure principle." The authorities which have en cited, however, show that by English law lvage agreement will not be upheld against owners of the vessel saved, where it is shown be exorbitant, or to have been obtained by pulsion or fraud, or is manifestly unjust or quitable. The English Courts reserve to mselves the right to control such agreements, ing regard to the circumstances of each case. was said by Mr. Justice BUTT, in the *Mark* ne* (15 Prob. Div., 137), "what is at the root the question is this,—where it is found that a lly unreasonable price has been insisted on by the salvors, and an agreement incorpo- ing it has been signed, the Court looks rather the position of the parties than to the reason- leness or unreasonableness of the amount. re the parties, in fact, contracting on equal ms?" Looking at the evidence of the captain the tug alone, in this case I am of opinion re was not that mutuality and free consent ich would entitle the plaintiff to claim the istance of the Court to enforce the contract up. Indeed the conclusion might even be duced from the evidence that the contract s signed under protest, a verbal protest it is , and not appearing on the document but a test nevertheless. Captain Hinman said it when the captain of the British Empire the Port Captain he said: "I protest inst this," and Captain Hinman replied: won't take the bill without you write it clean hout any protest whatever." At that time berthing master was urging on the parties ing "You will have to hurry up and do some- ng or you will never get this ship off," and Port Captain advised the master to sign the now and fight it out after. The master signed bill saying "I'll sign the bill, but you will er get paid." All this while the ship was aping and rolling considerably. Captain Hin- n candidly admitted that he threatened to re the vessel if the master did not sign, though dds that of course he would not have done so, e was only attempting to get as much as he ld. Under these circumstances I think we are ified in holding, and that the English Courts uld not hesitate to hold, that there had been ess and that the parties were not contracting qual terms. Whether the amount stated in contract is manifestly unjust or inequitable, ends upon what the Court is of opinion uld be just and equitable amount to award to the salvors. A substantial tender has been made, and in these cases the Court always encourages such tenders. Some evidence was led as to the remuneration paid in other cases, but as each case depends on its own circumstances, such evidence can not be relied upon. Mr. Searle objected to the evidence given as to the Kildenhope, but the evidence was held admissible rather to show the condition of the weather on the very night in question, than as a guide for the remuneration to be paid. The ship and cargo fully of the value of £6,000 probably more, were in a position of great peril and danger. The ship was actually a ground, and it was a dark and stormy night. If she had been left alone she would have been in still greater peril, for the weather got so much worse that the next day it was found impossible to land mails and passengers from the mail boat. There can be little doubt that in the rising storm the ship would have either injured herself by bumping or been so imbedded in the sand, or perhaps both, that she could have been refloated only at great expense. The captain of the tug kept on his negotiations only till the most favourable moment and got the ship off at full tide. The services of two tugs were necessarily used, as the John Paterson alone could not have succeeded in the task. It is common cause that the remuneration now to be awarded covers the assistance rendered by the second tug. By this assistance the ship was refloated and taken to a position of safety. There was some risk run, though not very great risk. In arriving at a decision as to what is a fair and reasonable amount to award, we have been materially assisted by the evidence of Captain Stephens. Captain Stephens occupies an official and totally independent position. He is a man of considerable experience in shipping matters, and is one on whose evidence the Court can rely He was in a peculiarly favourable position to judge of the danger run and of the services rendered. He was on board the ship while she was aground, and was present during the whole of the time occupied in rescuing, towing, and berthing the vessel, and his opinion was that £1,000 was a fair and reasonable amount. Captain Stephens' opinion fully coincides with one I formed from hearing the evidence. The amount is as generous as the circumstances require, and is not excessive considering the advantages gained by the ship. Judgment will therefore be entered for this amount. As to costs, I see no reason to depart from the general rule that when a tender is substantially insufficient, costs should follow the judgment. Judgment accordingly for the plaintiff, for £1,000 and costs.

Mr. Justice Maasdorp and Mr. Justice Solomon concurred.

[Plaintiff's Attorneys, Messrs. W. E. Moore & Son; Defendant's Attorneys, Messrs. Van Zyl and Buissinné.]

SUPREME COURT.

[Before the ACTING CHIEF JUSTICE and Mr. Justice MAASDORP.]

BEGLEY V. DENTON AND THOMAS. { 1897. Sept. 9th. „ 10th.

Misrepresentation of material fact—Sale by auction—Statement by auctioneer.

The plaintiff advertised certain land for sale as having plenty of clay and blue stone, suitable for building purposes.

The advertisements were addressed to brickmakers, builders, and contractors.

The defendants saw one of the advertisements, and went to the sale in consequence.

At the sale, which was by public auction, immediately after the conditions of sale were read, the auctioneer, acting on instructions, stated that there was enough clay on the ground to make twenty kilns of bricks.

The defendants, relying on this representation, which proved to be false, purchased the ground, but as soon as they discovered the true state of facts they repudiated the sale and refused to sign the conditions or pay the price.

The plaintiff, acting under the conditions of sale, put up the property again to auction at the defendants' risk and sued for the loss occasioned thereby.

Held, *that he was not entitled to recover.*

This was an action in which the plaintiff claimed the sum of £184, the difference between £271, the price of a piece of land as sold by auction to the defendants, and £87, the price at which it was sold subsequently to one G. Nettleship after the first sale had been repudiated by the defendants. He also claimed interest at 6 per cent. on £271 from the date of sale, and £10 expenses in connection with the sale.

The declaration set forth that in June, 1897, the plaintiff sold certain land by public auction, through Messrs. G. C. Behr & Co., to defendants for £271, and that the said sale was in accordance with certain conditions in writing annexed.

That the defendants thereafter refused to sign the conditions of sale, to produce sureties, or to pay the purchase price, but repudiated the contract. That the plaintiff thereafter, as he was entitled to do under section 5 of the conditions, had the property again put up for sale by auction at defendants' risk, and sold on the 10th July, 1897, to G. Nettleship for £87.

He therefore claimed £184, together with interest at 6 per cent. on £271, and £10 expenses.

The plea alleged that on the 11th and 12th of June the plaintiff caused an advertisement to be inserted in the "Cape Times" describing the piece of ground as "with plenty of clay and bluestone, suitable for building purposes."

That by reason of the advertisement, and relying on the allegation contained in it, the defendants, who were carrying on business as brickmakers and builders, attended the sale.

That during the progress of the sale, Behr, the auctioneer, stated that there was a sufficient quantity of clay on the ground for twenty kilns of bricks.

That, relying upon that statement and the advertisement, the defendants purchased the ground, but that they discovered thereafter that it contained no clay, but was portion of an old and disused municipal quarry.

That the representations in the advertisement and by the auctioneer were false and fraudulent, and defendants would not have purchased but for those representations; and that as soon as they discovered the facts as to the nature of the ground they repudiated the sale.

The defendants denied that the land was put up for sale the second time at their risk.

The replication denied the allegations and conclusions in the plea save that it admitted that on the 11th and 12th June plaintiff caused the advertisements to be published, and that the auctioneer during the sale stated that there was clay upon the land, but gave no guarantee as to the amount nor in any way varied the conditions of sale.

Issue was joined on this,

The conditions of sale, after describing the land to be sold as it is, included the following: "Section 5.—Should it happen that the purchaser fails in producing such sureties (to the satisfaction of the seller) or in depositing the purchase money, the property shall be put up again for sale at the expense and risk of the defaulter, who shall submit himself to any loss the renewed sale may occasion without benefiting by any eventual profit thereon. . . . Section 8. —Should it happen that the auctioneer makes any error, the same shall not be considered binding, but be redressed."

Mr. Searle, Q.C. (with him Mr. Buchanan), for the plaintiff.

Mr. Graham (with him Mr. Gardiner) for the defendants.

G. C. Behr, auctioneer, Cape Town, said that in consequence of instructions received from Mr. Begley, he put the advertisement produced in the "Cape Times." The advertisement appeared three times. The ground was sold on the stoep of the Commercial Exchange. Witness read out the conditions of sale, and after doing so he said that the ground commanded a splendid view of the bay, and there were clay and stones on it, sufficient clay to make twenty kilns of bricks. The bidding was principally between McMillan, a builder, and Denton. It went on from £200 to £271 - McMillan offered £270 and Denton £271, and thus became purchaser. Thomas then came forward and said that he was in conjunction with Denton. Denton or Thomas said if witness allowed the matter to stand over until the Monday, they would come and bring the £271. Witness agreed to so leave the matter over. There was then nothing filled in on the articles of sale. Witness read from a different slip. On Monday he had the articles of sale filled up and ready for signing. The conditions of sale were that the price was to be paid in two instalments. On Monday, Denton and Thomas came. They refused to sign the conditions of sale. They said they had been to the ground and had found that there was no clay on it, and that they wanted the sale cancelled. Witness said he could not do this, as they should have inspected the ground before the date of the sale. He, however, said that he would inform the owner, with the result that they and Begley proceeded to the ground. Later witness went to the ground. He found clay there. He would not say there were twenty kilns there. As to its presence, he satisfied himself. There were stones amongst the clay, so that it would require screening. No questions were asked at the sale, and nobody asked him to give a guarantee. About a month afterwards the ground was again put up for sale, and advertised exactly as before; the same advertisement was again inserted. On this occasion Mr. Nettleship bought the ground for £87. The smaller price was due to it being a rainy day and a small attendance. He supposed also that news of the dispute got wind, and had prejudiced matters. On the second occasion he did not say that there was clay sufficient for twenty kilns of bricks. At the first sale Begley told witness that he thought there would be clay for about twenty kilns of bricks.

Cross-examined by Mr. Graham: There was a brickfield on his property. Witness's son acted as manager. The kilns of bricks varied from 20,000 to 100,000 bricks. After he read the conditions of sale, he stated that it was said there was sufficient clay for twenty kilns of bricks there. That was not part of the articles of agreement. He did not say definitely that there would be the twenty kilns. He said that it was said that there was that amount. The price got at the first sale was a good one. The plan put in did not show that a quarry existed on the ground. He had not seen the original plan. On the second occasion he said nothing about the clay. He should say that, by screening, there was clay for about one kiln of bricks on the ground, but he was not an expert. The ground might have been an old municipal quarry. Most of the stones had been worked out, although if they went deeper, to a depth of twenty feet, they would strike blue stone. (Shown photographs.) He could not definitely fix the spot where the clay could be found. He had only been on the ground for about ten minutes.

Mr. Graham: You would not suggest that it would pay anyone to make it into a brickfield?

Witness: No. It is valuable only as a building plot.

Witness, continuing, thought the defendants did not delay signing the articles until they had seen the ground. It was not correct that, when they said there was no clay on the ground, he laughed and said that an auctioneer could say anything he liked. He said that unless the purchasers got a guarantee an auctioneer was not responsible for what he said. Begley told him that there would be the twenty kilns. Witness would have made no such statement without authority.

Re-examined by Mr. Searle: He had made no holes in the ground to test how deep the clay was. If the clay ran deep they would be able to make perhaps more than twenty kilns of bricks. Denton had been making bricks in Cape Town for many years. There could be a kiln of 10,000 made, but it would hardly be worth while, as it would be so small. When Denton

and Thomas came on the Monday they said there was no clay on the ground, and that they had bought it with the object of making bricks.

Edward Begley, the plaintiff, said he was in the Harbour Board employ. He was owner of the ground sold on 12th June. He became owner in 1889 under a lease from the Town Council, under which he paid £2 5s. a year. If he did not build on the ground within two years he had to pay rates yearly amounting to £5. So long as he did not build he had the ground rate to pay. He did not pay any purchase price except £16 for transfer duty. On 10th, 11th, and 12th June the ground was advertised in the "Cape Times," and he instructed Mr. Behr to sell the property. Witness saw the advertisement Behr put in. That advertisement said there was plenty of clay and bluestone on the ground. There was, as a matter of fact, plenty of clay and plenty of bluestone on the ground. He was present at the sale. Mr. Behr asked him if there was sufficient clay on the ground to make twenty kilns of bricks, and he replied that he thought there was. Witness heard the bidding, and heard Thomas offer the last £', making his offer £271, and adding that he would pay cash. On Monday morning Mr. Behr sent for him, and on going to his office Denton said there was no clay. Witness offered to take them up in a cab. Denton went up with him and pointed out the clay, but Denton said he was not going to screen the clay. It would be necessary to screen the top formation; the rest was pure pot-clay. Denton had never complained to him that there was not clay sufficient for twenty kilns of bricks. He had only seen Denton twice. There is clay all round the neighbourhood. In one part of his plot the clay was fifty or sixty feet long, two or three feet deep, and three or four feet broad. Part of that was pot-clay, other parts would have to be screened. Witness had had holes made at various points to test the presence of clay. He found good pot-clay there. There might be twenty kilns of clay on the ground.

Cross-examined by Mr. Graham: He went to the ground last Wednesday and made the tests. The holes were made on the left side of Whitford-street, about four or five feet from the road. There were seven or eight holes made. Witness knew the ground well. About eighteen years ago he had made bricks in the neighbourhood, and he believed, if he went sufficiently deep, that he would get clay to make twenty or thirty kilns of bricks. He could not explain why it was that no mention was made of clay at the second sale. It was not correct that at the first sale he (witness) was standing near Mr. Behr laughing. Denton told him that he did not want the ground because there was no clay on it. He did not say that he would not have it because there were not twenty kilns of bricks. He knew a man named Foster. He told him that he would take less money to save going into court. He did not say he would take less because there was no clay on the ground.

Re-examined by Mr. Searle: He had been in the employment of the Harbour Board for fifteen years. Before that he made bricks in the neighbourhood of the plot in question.

Carl Darkow, from the Harbour Board brickfields, Green Point Common, said he had been a brickmaker for sixteen or seventeen years. He inspected the ground in question on 23rd of last month. He found clay in good quantities Witness did not test for quantity, but he should say that they could make from the top clay 60,000 or 70,000 bricks. If it ran deep with pot-clay the numbers would be very much larger. It was easy to see that there was clay on the ground. There was also blue stone.

Cross-examined by Mr. Graham: From what he saw of the clay he would place the number of bricks at from 60,000 to 70,000. It would not pay to start a brickfield there, but it would pay to make bricks sufficient to build a house. He did not think there were twenty kilns there. His kilns averaged 50,000 bricks. At the outside they might be able to make two kilns of bricks on the ground, but they would have to do a lot of screening. About nine-tenths of the material there would be stones and one-tenth would be clay. There would be nine buckets of stones to be thrown away for one bucket of clay.

Re-examined by Mr. Searle: At one part there was more clay than stones, and in another part it was all stones.

David Samuel Hagar, builder, Cape Town, said he knew the piece of ground and knew there was a good deal of clay upon it. There was a sluit passed through and he had seen pot-clay in it. A lot of the clay was mixed with stones and would require screening. Witness had often had to do screening. There was also what was known as dead stone which looked like clay. When the stone was ground it could be used for clay. Witness was at present building near the ground, and knew that clay was all round the neighbourhood.

Cross-examined by Mr. Graham: He saw quite enough to prove to him that they could not make the place into a payable brickfield. He thought that 70,000 bricks would be a pretty liberal estimate of the number of bricks that could be made.

Mr. Graham: Would you call the place an old quarry?

Witness: It's a very fine place for building. There is a splendid view.

Mr. Graham: Do you live there?

Witness: Yes, and I know that the place is very fine for building with this fine view.

Mr. Graham: Have you any sites to sell?

By Mr. Justice Maasdorp: The value of bricks was 45s. per 1,000 on the ground.

Salie, a builder and mason, deposed to having inspected the ground. He made about a dozen of holes, about 18 inches deep. He found clay and stones. The clay was good for brick-making. One portion of the clay was clean; the other portion would have to be screened.

Cross-examined by Mr. Graham: Witness had never made bricks. Along the sluit there was a lot of clay, but he could not say whether it would pay to make bricks there or not.

George Nettleship, Sea Point, said that he bought the ground by auction for £37. He had been at the ground, and could say that there was clay and bluestone on the ground. He considered that he got the ground very cheap. He expected to resell the ground at £200.

Cross-examined by Mr. Graham: He could not speak as to the quantity of clay there. A small portion of the ground was a disused quarry. The major portion of the ground was very good, and suitable for building.

By the Acting Chief Justice: He bought the ground merely as a speculation.

This closed the evidence for the plaintiff.

John Henry Denton, brickmaker, said he was in partnership with Thomas, the other defendant. He knew Mr. Behr, who had a brickfield behind his house. Mr. Behr some years ago asked witness to make bricks for him. Witness had for some time been on the outlook for a brickfield. He saw the advertisements in the "Cape Times," and he went direct and saw Thomas on the matter. Witness did not see the ground. He went to the sale and heard Mr. Behr say, while he had the articles of agreement in his hand, that there was clay sufficient for twenty kilns of bricks. Witness understood that that was part of the articles of agreement. Witness offered for the ground and it was knocked down to him. On Monday morning witness went to Mr. Behr's office and said that he was to go and see the ground, to make sure there was clay, before signing the agreement. Mr. Behr sent for Begley, and the two went to the ground. Witness said to Begley that there was not sufficient clay for one kiln of bricks instead of twenty kilns. The ground was all stones. There was a little clay. All the clay that witness saw was a little near the sluit. He thought there would be clay to make 30,000 bricks, but if all the clay was screened they might manage to make 60,000 bricks, but it would not pay to do so. Witness, therefore, refused to sign the conditions of sale. Immediately after purchasing the ground he sold bricks to the number of over 30,000 bricks. He bought the ground for a brickyard.

Cross-examined by Mr. Searle: Witness had not tested the ground. The advertisement said the ground contained clay "suitable for building purposes." He admitted there was clay there suitable for that purpose. When he bought the ground he did not know exactly where it was. Mr. Behr knew witness, and knew that he was a brickmaker. The conditions of sale were that half of the price would be paid in three months, and the second half in six months. Thomas said he would pay cash. Witness went to Mr. Behr's office on the Monday morning to find out where the ground was. He never said that there was no clay at all on the ground.

Henry Thomas, partner of the previous witness (Denton), spoke to going to the Commercial Exchange that day, and to the buying of the land. He heard Mr. Behr say that there was sufficient clay on the ground to make twenty kilns of bricks. Witness thought he read that statement from the conditions of sale. Had that statement not been made he and his partner would not have bought the ground. But they would not sign the articles of agreement until they saw the ground. On Monday Denton and he went to Mr. Behr's office and asked for some one to go and show them the ground. Denton went to see the ground, and on returning told him the state of matters, and they therefore declined to sign the articles of agreement. Mr. Behr said they must sign the paper, for he, as an auctioneer, could say what he liked. Witness corroborated as to the orders being given for bricks. He was not a brickmaker himself, but his opinion was they could not make any bricks there. The place appeared to be nothing else than an old quarry.

Cross-examined by Mr. Searle: Witness did not test the ground for clay. He did not think it worth while to do so in an old quarry. He and Denton had bought ground and property in and near Cape Town. While the sale was proceeding witness told Mr. Behr that he would pay cash if the ground was knocked down to him. The ground would have been very cheap for £271, as had there been twenty kilns it meant that it would yield a million of bricks. The profits on brickmaking averaged £1 a thousand, more or less. He did not know if he told his attorneys that there was no clay on the ground.

As far as he was concerned, he would say there was no clay on the ground. There was too short time to go and inspect the ground before the sale. He did not care where the ground was so long as it had clay to make the twenty kilns of bricks.

Re-examined by Mr. Graham: Had there been a sufficient quantity of clay there to make a respectable number of bricks he would not have objected.

E. W. Jecks described himself as a land speculator. He saw the advertisement and attended the sale of the ground in question. Mr. Behr, after reading the conditions of sale, said there was sufficient clay on the ground to make twenty kilns of bricks. Witness would not have understood that the clay was in the conditions of sale. He wished to buy the land as a building site, and would have given from £90 to £100 for it. He was not in town at the second sale.

Cross-examined by Mr. Searle: Being used to attend sales he knew the reference to the clay was not in the conditions of sale. There was a good deal of building going on in the neighbourhood, and property was going up in value.

Christian Fester, general dealer, Cape Town, was present at the sale in question from the start. He corroborated as to Mr. Behr mentioning that there was clay for twenty kilns of bricks.

Johannes F. S. Smit, builder, &c., who was at the sale, corroborated as to the statement about the clay having been made after the conditions of sale had been read. After Denton bought the ground witness gave him an order for bricks.

Robert Alexander, who was at the sale, corroborated. He thought it was possible the reference to the clay was in the conditions of sale.

Alfred C. Ashley, quarryman and brickmaker, said he had been over the ground several times. There was no free clay on the ground. By incurring great expense through screening he thought it possible to get 60,000 bricks, but the work would not pay. For a paying brickfield they must have free clay. The ground in question was useless as a brickfield.

Cross-examined by Mr. Searle: The clay varied much in that neighbourhood in width and depth. Being an old prospector, he knew there was not much chance of clay being there in quantity. The rocks cropped up in several places. There was a deal of rotten reef there, and when it was exposed to the atmosphere for a time it looked like clay. That crumpled reef after being pulverised could be made into bricks. The soil on the plot in question was not nearly so deep as on his ground.

Re-examined by Mr. Graham: By scraping everything together of which a brick could be made he thought they could make 50,000 bricks. There was no chance of deep clay being there as the outcropping rocks clearly showed.

William Thomas Oliver, M.I.C.E., deposed to examining the ground in question on several occasions. There were two levels in the ground, the half high and the half low. The high level was covered with rotten rock, and no free clay. There was a sandy loam, and it was possible to make bricks out of that. He would place the number of bricks that could be made at 30,000, and they would be very bad bricks at that. On the other half of the ground there was no clay whatever.

Cross-examined by Mr. Searle: He had made no holes in the ground. There was no real clay there. He believed it was possible to make bricks out of other material than clay. He had heard of bricks being made out of sawdust, and very good bricks too. He had had a large contract in England for brick-making. He insisted that there was no clay there, although there might be brick-making material. Witness had made very careful calculations, and on these he based his estimate that the maximum number of bricks that could be made would be 30,000.

By the Acting Chief Justice: The place could by no means be regarded as a brickfield. Half a mile off there was clay.

Thomas W. Cairncross, City Engineer, said that previous to the Council leasing the ground in question they used it for a quarry, from which they took stones to repair the streets. He had the sluit which passed through the ground constructed. The sluit had a rocky bottom.

Cross-examined by Mr. Searle: The opening of the quarry and the making of the sluit through the ground allowed him to have a good idea of the nature of the soil there. There was no clay there, but rotten rock. Ashley had very much better soil than was found in the ground in dispute. There was very little real clay about Cape Town. The so-called pot-clay did not contain more than three parts of real clay in every 100 parts.

Theodore McKay stated he examined the ground that morning. There was no free clay on it, but there was stuff on it that could be converted into bricks. Even of that inferior material he thought there could not be a kiln of bricks made.

Cross-examined by Mr. Searle: He did not test the ground by making holes. He only looked at the ground.

This concluded the evidence.

Mr. Searle, Q.C.: The defendants could not have raised any objection on the day of the sale, inasmuch as the conditions were filled in before they came on the Monday. In *Durr* v. *Bam* (J. 8, p. 22) an expression of belief had been given by the auctioneer and the, purchaser was nevertheless held bound by the conditions of sale. *Hofmeyr* v. *Clear* (J. 1, p. 239); *Stellenbosch Municipality* v. *Lindenberg* (S. 3, p. 345). The defence in the plea is that there was no clay; not that they repudiated on the ground of Behr's statement. *Vlotman* v. *Landsberg* (J. 7, p. 301). There is no evidence of fraud, and fraud would have to be found in order to support the plea; otherwise the conditions of sale must be acted upon. The auctioneer's statement cannot be held to vary the conditions of sale: it does not amount to a warranty. *Van Wyk* v. *Sauer* and *Ormond* (S.C., 11, p. 142); *Von Ludwig* v. *Van Renen* (1868, p. 244); *Addison on Contracts* (p. 447); *Benjamin on Sale*. It was impossible for a definite statement to have been made as to the number of bricks which could be made; the ground was still unworked; the statement was a mere matter of opinion, too vague to be a warranty or to give ground for an allegation of fraud. A sufficient number of bricks can be made on the property to build the houses for which there is room.

The Acting Chief Justice: Was there not a representation on the part of the seller that the land was sold as a brickfield?

Mr. Searle None of the people who came to the sale came under that impression: the advertisement was intended to attract builders, not brickmakers; the boundaries were described so that anyone could see it. The conditions describe the land to be sold as it is.

Mr. Graham: The cases cited simply go to show that the evidence of the statement was inadmissible; but it was not objected to. In those cases also the conditions were signed. *Hofmeyr* v. *Clear* (1 J., p. 239). The English judges are haunted by the Statute of Frauds. *Vlotman* v. *Landsberg*; *Durr* v. *Bam*. It is not necessary to allege fraud; it is sufficient to show that a false statement was made recklessly regardless of its truth or falsity; the defendants were deceived and so were other people. *Forbes* v. *Behr* (6 Sheil, p. 341); *Hare* v. *Kotzé* (2 M., p. 94); *Blore* v. *Chiappini* (2 M., p. 96); *Buyskes* v. *Holl* (2 M., p. 110); *Van der Linden* (p. 140); *Grotius* (3, 17); *Voet* (21, 1, 4); *Bateman's Law of Auctions* (p. 190); *Winch* v. *Winchester* (1 Vesey and Beamas, p. 375); *Hill* v. *Gray* (1 Starkie, p. 435); *Dimmock* v. *Hallett* (2 Ch. App., p. 27); *Smith* v. *Land and House Property Corporation* (L.R. 28, Ch. D., p. 7); *Taylor* v. *Green* (8, C. and P., p. 316). The representation was material.

Mr. Searle: In *Dimmock* v. *Hallett* the representation was in written particulars.

Judgment was given for the defendants with costs.

The Acting Chief Justice said: This action is one to recover the purchase price of a certain plot of land sold to defendants by the plaintiff at public auction. The defendants allege that certain representations were made at the sale, which representations were false and fraudulent. The representations were that the land sold was land upon which there was clay, and clay sufficient to make twenty kilns of bricks. The land was sold by public auction after the conditions of sale were read, and there is no doubt that the conditions of sale as a rule form the basis of a contract like the one in question. These conditions simply refer to the locality of the piece of land, they do not even give its extent. But there were certain advertisements which were published before the sale. These advertisements did not conflict in any way with the conditions, and they must be taken as representations held out by the seller to intending purchasers. The first advertisement was addressed to brickmakers, builders, and contractors; the second advertisement was addressed to builders and others. This advertisement said that on this land there was plenty of clay and blue-stone suitable for building purposes. This advertisement attracted the attention of the defendants, and they went to the sale. They went for the purpose of buying a brickfield. At the auction, immediately after the conditions of sale were read, the auctioneer said distinctly that on this ground was clay enough to make twenty kilns of bricks. The defendants bought this property relying on this description of the property. The property has a value no doubt as a building site, but its value as a brickfield is quite a different thing. In my opinion the defendants were entitled to set up this misrepresentation. It was a material misrepresentation, and it is clear that but for this misrepresentation the defendants would never have bought this ground. This representation was not founded on fact. I acquit the auctioneer of making any fraudulent representation, but he acted on the instructions of his principal, who was standing by. There is, strictly speaking, no clay on this ground to make it valuable for building purposes. Under these circumstances, the plaintiff must fail in this action, and judgment will be for the defendants with costs.

[Plaintiff's Attorney, D. Tennant; Defendant's Attorney, —. Steer.]

SUPREME COURT.

[Before the ACTING CHIEF JUSTICE and Mr. Justice MAASDORP.]

THOMAS V. THOMAS. { 1897. Sept. 10th.

This was an action for divorce on the ground of adultery.

Mr. Close appeared for the plaintiff.

Reginald Barry, from the Registrar's Department, produced the marriage certificate of the parties.

Kate Thomas said she was married to John Thomas in March, 1895. After living with her husband for a year, she left him. One day she went to a house in Riebeek-street and found her husband in a room with a woman named Martha Dryer. When she asked him what he wanted there, he told her she had no right. There was a child in the room, and her husband said the child was his. It was after that that witness left her husband. They had lived together up to the time she caught him. He had been absent a day and a night just before, and as a result of inquiries she made the discovery. She afterwards saw her husband and the woman together in a house in William-street. Witness and a woman, Rebecca Smith, last week went to a house in Shortmarket-street and saw the two together there. Witness went to live with Thomas when she was fourteen years and three months old, and there were two children born before they were married.

Martha Thomas, mother of the defendant, deposed that her son was living with a woman Dryer, and that Dryer had had a child of which he was the father.

Rebecca Smith corroborated as to seeing the defendant and the woman Dryer together in a house in Shortmarket-street last week.

Decree of divorce was granted, plaintiff to have the custody of her children and costs of the action.

[Plaintiff's Attorney, D. Tennant.]

BOEBERG V. BOEBERG. { 1897. Sept. 10th.

This was an action for divorce on the ground of adultery.

Mr. McGregor appeared for the plaintiff.

Amelia Frederica Boeberg said she was married to the defendant on 9th February, 1893. The certificate produced, which was dated in 1895, certified to the marriage. The document was signed by the priest who married them. After marriage they lived first in Copenhagen, and they came to South Africa in 1895. Mr. Boeberg preceded her by nine months. They lived first in Adderley-street, Cape Town, and then removed to Sea Point. In December, 1896, witness went to Denmark to get a divorce. The defendant gave her the money to go home. He gave her a document promising to pay £5 per month even after divorce, and £50 for her share of the furniture. He had only made two payments. She tried to get a divorce in Denmark, but failed. An order of separation had been sent her from Denmark. While she was in Denmark she heard something about her husband, and in consequence of that she returned to Cape Town to get a divorce.

By the Acting Chief Justice: When she went to Denmark to get a divorce she intended to return to South Africa.

Witness said she knew a Danish woman, named Gerda Saubrey, who formerly lived in Johannesburg. Dr. Boeberg had landed property at Green Point, Maitland, and Observatory, and also two houses.

By the Acting Chief Justice: They were married in community of property in Denmark.

Eric Raunkilde, Green Point, said he knew the parties in the suit. For some time he had been Dr. Boeberg's assistant. Since 1st January this year he had lived in the same house as Dr. Boeberg. He knew the woman Gerda Saubrey. She lived a fortnight with Dr. Boeberg, and after that time she went to Wellington, but returned every week, and remained two and sometimes three days. Dr. Boeberg told witness that the woman slept in the parlour. He frequently saw her in Dr. Boeberg's bedroom, and he had heard voices in the bedroom. One night he wanted something from Dr. Boeberg's room and tried to get in, but the door was locked. One morning he went into the room and found the woman in the room partly undressed, with Dr. Boeberg in bed. Witness knew both parties in Denmark.

Mr. McGregor read an affidavit deposed to by Frank Boulger, formerly a groom in the employment of Dr. Boeberg, in which he stated that he had seen the woman in the doctor's bedroom, and had frequently seen hers and the doctor's boots at the bedroom door.

Johannes Burgen, a newspaper correspondent and a student of law, who had the *jus practicandi*; spoke regarding the law of Denmark. When there was no contract there was community of property. If spouses wished to avoid community of property they made a contract.

Decree of divorce was granted, and an order given for the division of Dr. Boeberg's estate with the plaintiff, costs to be paid by the defendant.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

AMYOT V. AMYOT AND GARRETT. { 1897. Sept. 10th.

Divorce—Damages.

This was an action for divorce and £100 damages against Garrett, the co-defendant.

Mr. Graham (with him Mr. Buchanan) for plaintiff; Mr. Close for the defendants.

Albert Thomas Amyot, hairdresser, Cape Town, the plaintiff, said he was married in 1880 at S. George's Cathedral, Cape Town. After marriage he lived in New-street for three years. He lived at various places in Cape Town until 1892. He then discovered that his wife had become addicted to liquor, and in consequence he removed to Rondebosch. While living there he received many large accounts from liquor merchants, one account being as large as £16 When he expostulated with her she abused him and left the house. In 1896 she returned, promising to reform, and they again lived together, but before long it was necessary that he should leave her, and he got a deed of separation and came and lived with his sister in Cape Town. There had been three children of the marriage, only one of whom was alive. She remained at Rondebosch, and he allowed her £8 a month. On 6th July last he, with detectives, went out to Rondebosch. About eleven o'clock he saw his wife and the defendant (Garrett) enter the house. They sat in the dining-room for about half an hour and then entered the bedroom. Witness then gave the man Hill his walking-stick and he smashed in the shutters. When they did so he saw his wife and Garrett jumping off the bed. Witness then returned to the station to come to Cape Town by the last train, and at the station he saw Garrett, who travelled to Cape Town in the same train. He was not particularly anxious about the £100. Other facts about his wife had recently come to his knowledge.

Cross-examined by Mr. Close: It was not true that his wife took to liquor because of his bad treatment of her. He could see a light coming from the bedroom that night at Rondebosch, but it was not until the shutters had been "bashed" in that he saw his wife and Garrett. He was quite positive he saw them in the bedroom. His wife was dressed in black, and Garrett wore a light overcoat and a cap. The two must have come from Cape Town, arriving at Rondebosch at 11.5.

Re-examined by Mr. Graham: Mr. Hill took witness to Gordon & Gotch's, in Cape Town, and pointed out Garrett. Witness said, "Oh, this is the man we saw at Rondebosch." Garrett denied that he was the man.

In reply to Mr. Close, Mr. Graham said they were not now pressing for damages. They, however, asked for costs.

William Hill, private detective, Cape Town, said he accompanied Amyot to Rondebosch on 6th July last. He met him there by appointment between eight and nine o'clock. They heard Mrs. Amyot had gone to Cape Town. About eleven o'clock they saw Mrs. Amyot and a gentleman. The gentleman was Garrett, although they did not know his name at first. Mrs. Amyot and the gentleman went into the dining-room and afterwards into the bedroom. Witness got a walking stick from Mr. Amyot and knocked a piece of wood off the shutter. There was a light in the room, and witness saw Mrs. Amyot and the man jump off the bed. Garrett at once rushed to the dressing-table and got his cap. Witness ran to the back of the house, and when he got there Mrs. Amyot was there in the act of letting Garrett out, but on seeing him they went back into the house and bolted the door. Mr. Amyot left but witness remained. Witness could see into the kitchen, and saw the two there In about a quarter of an hour both came out and went over to a house occupied by one Langner, and knocked at the door. Just as the door was opened witness appeared and Garrett attempted to rush into the house. Witness told him not to be afraid as he would not harm him as he only wished his name. Garrett did not give any reply. Langner dressed and went to the station with Garrett. Witness saw Garrett at the railway-station at Cape Town, and followed him to his house. Garrett was a married man. The next time he saw Garrett was at Gordon & Gotch's. Witness took Mr. Langner there to identify him. Garrett said they had made a mistake, and that he was not the man. Witness had watched the house and had seen several men enter Mrs. Amyot's house.

Cross-examined by Mr. Close: He had been watching Mrs. Amyot since June by Mr. Amyot's instructions. On the previous Saturday he knocked in the window because he saw a man go in with Mrs. Amyot. The night Garrett was there, the door was locked when they entered.

James C. Ferguson said he met the previous witnesses at Rondebosch on the night in question. He had heard what Amyot and Hill said, and he corroborated their statements.

Henry Langner, Rondebosch, said that on the night of 6th July, Mrs. Amyot and Garrett

knocked at his door shortly before midnight. When witness opened the door Garrett ran into the house. At Garrett's request witness went to the station with him, Garrett saying that he would give him a good present. Two or three days afterwards witness went to Gordon & Gotch's, and saw Garrett, who, however, said he did not know witness.

William Henry Garrett (26), defendant, said he was a married man, and lived at Woodstock. He was employed at Messrs. Gordon & Gotch's, Cape Town. On the evening of 6th July he was working until about ten o'clock. After leaving he met a Mr. Hutchins and a Mr. Glover, and they had some drinks at the railway bar. He left for Woodstock at five minutes past eleven. He had had a busy time before that, and he tumbled off asleep before reaching Woodstock and didn't wake up until he arrived at Rondebosch. He arrived there at 11.25, and he took a walk down the village, returning by the line. While he was waiting at the station a lady (Mrs. Amyot) accosted him, saying "Good evening." She said she was afraid to go home, because it was a very dark night. The house was about five minutes' walk from the station. When they got to the door she asked him inside to have a drink. He entered, going into the dining-room. If the door was locked he did not see it done. They had some beer, and just as they were drinking it there was a smash at the window. He and Mrs. Amyot were in the dining-room at the time. They didn't go into the bedroom. When the knock on the window came he and Mrs. Amyot went out at the back door to call the neighbours They knocked at Langner's door, and Langner went to the station with him.

Cross-examined by Mr. Graham: Witness had been about three years in South Africa, and he had been married two years. On the night of the 6th July he was working late. The manager, Mr. Tucker, was there that night as well. He had had several drinks that night, but he was not drunk. He had had enough. When the woman accosted him he did not know what she was after. It was false that he entered the bedroom, that he ran back into the house from the back door, or that he ran into Langner's house. All these statements were false. Neither was it true that he promised Langner a good present.

Mr. Graham: So all the statements these witnesses have made are false. Do you say so?

Witness: I do.

Mr. Graham: Why did you not make your explanation to Mr. Amyot before this case?

Witness: I don't know.

Mr. Graham: When you got the summons why did you not instruct your attorney then?

Witness: I simply put the matter into the hands of my attorney. Witness denied that any impropriety took place between him and Mrs. Amyot.

Harriet Caroline Amyot, wife of the plaintiff, said that on the evening of the 6th July she saw a gentleman at Rondebosch Station who said "Good evening" to her. She did not speak to him first; he spoke to her. The gentleman was Garrett. He walked home with her, and she asked him to sit in the house until his train came. They had some drink in the house, but no improprieties took place. When the smash came they went out at the back door and across to Langner's. Garrett did not go into Langner's house.

Cross-examined by Mr. Graham: he arrived at Rondebosch Station from Cape Town that evening at five minutes past eleven. Just as she arrived Garrett spoke to her. She denied having seen a great many men at her house. It was a mistake that the Wynberg authorities had interfered, and had classed her as a loose woman. All that was false.

William Glover, machinist, spoke to seeing Garrett leave Cape Town on the night in question with the 11.5 train.

Mrs. Gillespie, sister of the witness Langner, gave evidence that Mrs. Amyot and Garrett came to her house that night about midnight, and asked for someone, a girl, to stay with her, as she was afraid. When they came first Garrett went into the house.

This concluded the evidence.

After argument, a decree of divorce was granted, the plaintiff to have the custody of the one child of the marriage, the costs to be paid by Garrett, the co-respondent

The Acting Chief Justice said the plaintiff's version of what took place was supported by the detectives Hill and Ferguson. It might well be said that as a rule the evidence of private detectives was of a suspicious kind, and of a nature which the Court was apt to scrutinise very closely. It seems clear that the two defendants were in Cape Town that night, and that they travelled to Rondebosch by the same train Garrett said that he fell asleep between Cape Town and Woodstock, which meant between three and four minutes. This was not an impossibility, but looking at all the circumstances it was a very great improbability. Garrett's story was that he went for a walk on getting to Rondebosch, while Mrs. Amyot said that Garrett accosted her immediately when she arrived at the station. Both agreed that they went home together. They were not friends, and there

seemed to be no proper reason why at eleven o'clock at night he should have gone to her house. They were in the house apparently alone, and when the alarm came they went out at the back. Garrett must not be surprised if the Court could not accept his version of the story. From the facts the Court could fairly arrive at the conclusion that adultery had been committed. The plaintiff was therefore entitled to a decree of divorce by reason of that adultery with Garrett. He was entitled to the custody of the minor child, as under no circumstances could it be handed over to the custody of the mother. The wife brought no property into community, and the plaintiff was entitled to the forfeiture of any benefits arising from the marriage. Damages had not been pressed for, but from the fact that the husband and wife had been living apart, it is doubtful if the Court would have allowed damages. The judgment would carry costs against the second defendant.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorney, D. Tennant.]

SUPREME COURT.

[Before the ACTING CHIEF JUSTICE and Mr. Justice MAASDORP.]

ADMISSION. *Ex parte* DE WAAL. 1897. Sept. 13th.

Mr. Innes, Q.C., applied for the admission of Mr. Jan Hendrik Hofmeyr de Waal, barrister-at-law, as an advocate.—Ordered.

Ex parte ASHBURNHAM.

Mr. McGregor applied for the admission of Mr. Lawrence Piers Ashburnham as an advocate.—Ordered.

Ex parte TRUTER.

Mr. McGregor applied for the admission of Mr. Abraham Robertson Truter as an attorney and notary.—Ordered, the necessary oaths to be taken before the R.M. of Beaufort West.

Ex parte KENEALY.

Mr. Innes, Q.C., applied for the admission of Mr. Arthur Plantagenet Kenealy as a conveyancer.—Ordered.

PROVISIONAL ROLL.

BOARD OF EXECUTORS V. HEYNS.

Mr. McGregor applied for provisional sentence for the sum of £113 18s. 6d., interest on a mortgage bond.—Granted.

REDELINGHUYS V. VAN DER MERWE.

Mr. Sheil applied for provisional sentence on a promissory note for £32 18s. with interest.—Granted.

LOESCHER V. KUMST.

Mr. McGregor applied for provisional sentence on a promissory note for £190, less £145 paid on account, with interest.—Granted.

LANG V. AHMED ISSAC AND CO.

Mr. Jones applied for judgment under Rule 329 (*d*) for the sum of £200, being the balance of the purchase price of certain landed property, with interest.—Granted.

REHABILITATIONS.

Messrs. Daniel Hendrik Coetzee and James William McGregor were rehabilitated.

GENERAL MOTIONS.

Ex parte TYFIELD. 1897. Sept. 13th. „ 21st.

Sale of minor's property.

This was the application of Fisher Tyfield, father and natural guardian of Mark Tyfield, a minor, who alleged that in July, 1896, he bought with his own money but for the benefit of his son certain property in Cape Town and took transfer in his capacity as guardian.

The purchase price was £270 and in August, 1897, with the consent of his son he sold the property for £900. He therefore prayed for an order authorising him to pass transfer on behalf of his son.

Mr. McGregor appeared for petitioner.

The matter was ordered to stand over for report by the Master.

Postea (21st September).

Mr. Molteno renewed the application and produced the Master's report, which stated that he was satisfied that the price was a fair one, but recommended that the amount be paid into the Guardian's Fund until re-invested by the father with the approval of the Master.

The Court made an order in terms of the Master's report.

In re RYKLIEF'S ESTATE. { 1897. Sept. 13th.

Fidei-commissum—Prohibition of sale —Decay of property.

Where a testator had bound up his property for four generations by fidei-commissum *prohibiting its sale, desiring that his descendants should live on the land and occupy the buildings thereon, and cultivate the land on joint account or each for himself as they might agree, and the buildings fell into disrepair and decay, and the heirs could not afford to maintain them, the Court refused to allow a sale to three of the grandchildren who were willing to purchase the property.*

This was an application by the executors dative of the estate of Philip Ryklief, which set out that by the joint will of the said Philip Ryklief and one Sophia, as had been decided by the Supreme Court on the 2nd March, 1896 (6 Sheil, p 88) a *fidei-commissum* limited to the fourth generation had been imposed upon certain landed property: this property had been recently valued by Mr. J. J. Hofmeyr at £3,000; there was also the remaining extent of certain property valued by Mr. Hofmeyr at £1,200 which did not appear to be subject to the *fidei-commissum*; the aforesaid properties had also been valued independently by another appraiser at a total value of £3,300. It was further set out that the buildings on the aforesaid land were in a ruinous and dilapidated condition, and in urgent need of a considerable outlay to put them in order and save the estate from further loss; that the Master of the Supreme Court had called upon the petitioners to pay succession duty amounting to £135; that the income of the estate was in its present condition only about £142 per annum, subject to fluctuation and deduction for rates and taxes, and that this income was not likely to be maintained owing to the dilapidated condition of the buildings; that the executors are without any funds to pay the succession duty or to incur the necessary outlay.

Three grandsons however of the testator, being representatives of the three branches of the Ryklief family, were willing to take over all the landed property as it stands free and unburdened at Mr. Hofmeyr's valuation, the amount thus paid into the estate to be subject to such order as the Court might make. It being practically impossible for the large and increasing number of Ryklief's descendants to "live on the said piece of land with the buildings now existing or the buildings hereafter to be erected thereon, and to cultivate the same either for their joint account or each for himself according as they shall agree" as provided by the will, the executors considered that it would be greatly to the advantage of all concerned if the Court would sanction the proposed sale, the proceeds of the unburdened land being distributed amongst the heirs, and of the burdened land being invested for the benefit of the testator's descendants. They therefore prayed for leave to transfer the aforementioned land to the three grandsons named. The seventeen surviving grandchildren of the testator, being all the grandchildren then living, and all being of full age, consented to the application.

Mr. Schreiner, Q.C., for the applicants: It is no doubt the duty of the fiduciary heirs to keep the property in repair, but the heirs in this case are seventeen grandchildren of the testator who have no means; there are three of them who are sufficiently well-off to buy the small interest of the others. The testator's intention was that all the heirs should live on the property and cultivate their shares in such manner as they shall agree upon; this cannot be done because they cannot agree. The testator did not want his children to sell the property in order that strangers might not come in and possess it, but the application is for leave to sell to members of the family. We do not ask for an order in opposition to the will. *In re Moodie* (Sheil 6, p. 213). That case shows that the Court has power, not to set aside the will, but to interpret it so as to discover the real intention of the testator. The present case is analogous to those in which the Court has allowed mortgaging in order to keep the property together and prevent its being ruined. Mortgage is not transfer, but nevertheless when the mortgage falls in the mortgagee can sell the property, and thus it becomes alienated away from the family. In this case the Court would allow a mortgage.

The Acting Chief Justice: In two generations the land may be very valuable indeed. Have you any authority to show that the Court has ever interfered with an entail?

Mr. Schreiner: Not to the extent of allowing asale, though it has allowed mortgage. *Ex parte Von Post* (3 Sheil, p. 227). There under special circumstances a father was allowed to mortgage property registered in his daughter's name, but there was no will in that case. There must be some mode of setting right what the testator

would have set right if he were alive. The heirs cannot go to Parliament. That was done in *Nel's case* but Parliament refused to interfere. In *Ex parte Nadea* (4 Sheil, p. 215) where the property could not be sold before the death of the longest living, the Court refused to authorise the registration of transfer. But that case is not in point.

The Acting Chief Justice said: This is a case in which the late Philip Ryklief made a will by which he bound up his property for four generations at least. The object of that was that the collective children could be allowed to live on the land, but they were prohibited from selling any of the land or buildings until they had become the prope ty of the residuary legatees. We are now asked practically to set aside the will of the testator. This case shows the wisdom of not allowing entails for such a long period; but as the law stands the Court cannot say that the will is an unwise one, and thus set it aside. This property brought in an income of £142 per annum, but it is not expected that this will be maintained, but it is an income from which the executors can preserve the estate for the intended beneficiaries under the will. There is certainly not an absolute necessity for the property to be disposed of. There is an income, limited it is true, but it seems to be sufficient to enable the executors to preserve the estate for the benefit of those for whom it was intended. Anxious as I am to assist the applicants, the Court cannot add a codicil to the will and alter the express terms of the bequest. I regret exceedingly that under the circumstances the Court can not set aside the will in the way the applicants desire. There will be no order on the application.

[Applicants' Attorney, C. Herold.]

In re PHILLIPS' ESTATE. { 1897. Sept. 13th.

This was an application for leave to raise the sum of £100 upon mortgage of certain property to which the minor children of the testator were the heirs, his wife and executrix having the usufruct until her death or remarriage. The Court had upon the 12th February, 1891, granted leave to the executrix to mortgage the property for £150, of which £27 5s. 1d. had been repaid. £100 was now required for the purpo e of repairing buildings.

Mr. Jones appeared for the petitioner.

The Master reported favourably and the application was granted, the beneficiary to pay the interest.

In re ATTWELL. { 1897. Sept. 13th.

Curator—Person of weak intellect.

On application for the appointment of a curator bonis *to a person of weak intellect, a* curator ad litem *was appointed, and a rule* nisi *granted.*

This was an application for the appointment of a curator or curators for the administration and management of the property of Lilian Agnes Attwell.

The petition of the mother of the said L. A. Attwell set forth that the latter was 29 years of age, and of weak intellect and childish in her ways, unable to read or write and incapable of attending to any business matters, though by no means insane; that she was entitled under her father's will to a certain legacy, and that an account had been filed by the petitioner as executrix, with her co-executor, dealing with this legacy, but the account could not be passed without a voucher or receipt from the said L. A. Attwell, which she was for reasons above stated unable to sign.

Mr. Jones appeared for the petitioner.

The Court referred to *Re Spolander* (5 Sheil, p. 254) and appointed Mr. Joubert *curator ad litem*, granting a rule *nisi* calling upon the said L. A. Attwell to show cause why a curator should not be appointed; the rule to be served on the *curator ad litem* and returnable on the 12th October.

Postea (12th October).

The return day was extended to the 11th November.

[Petitioner's Attorney, Gus Trollip.]

BLACKBURN V. MITCHELL, MASTER OF THE SHIP "BRITISH EMPIRE."

Mr. Innes applied for leave to the defendant to appeal to the Privy Council.

The application was granted on condition that the usual securities were given.

In re THE CAPE COMMERCIAL BANK IN LIQUIDATION.

Mr. Schreiner presented the fourteenth report of the official liquidators.

The usual order was made for the report to lay on the table for fourteen days.

VAN DER BYL AND OTHERS V. SCHOLTZ.

Mr. Innes, Q.C., applied for a rule *nisi*, calling on respondent to show cause why applicant should not be allowed to sue *in forma pauperis*, to be made absolute.

Mr. Schreiner, Q.C., opposed the application.

The Acting Chief Justice said that Haupt had no right to sue as a pauper He was in receipt of £2 a week in wages, and as late as last November he had an inheritance of £128, and quite recently he had been purchasing carts and wagons. He was not a man who was entitled to sue as a pauper. Leave was granted as regards the first two applicants, but refused as regards Haupt.

HINTON V. HINTON.

Mr. Innes, Q.C., applied for a decree of divorce He said that on the 12th July, 1897, the Court made an order for restitution of conjugal rights by the 31st August. The husband was then in Bulawayo, but he returned to the Colony, and a certified copy of the order was served upon him in Cape Town on August 3. There was an affidavit from Mrs. Hinton saying that her husband had not complied with the order, and she believed he had no intention of doing so

The application was granted.

ROWE V. NEL AND ANOTHER.

Mr. Joubert applied for leave to sign judgment against the plaintiff for not proceeding with his cause.

The application was granted, with costs.

RICHARDSON V. WARREN.

This was an application by the defendant in the action for leave to sign judgment against the plaintiff for not proceeding with his cause. Summons had been issued on the 7th May and appearance entered on the 14th May. Plaintiff's attorneys now filed an affidavit stating that he had a good *prima facie* cause of action, but that they were unable to ascertain where he was at present.

Mr. Jones for the applicant.

Mr. Innes, Q.C., for the respondent.

The application was granted.

[Applicant's Attorneys, Messrs. Findlay & Tait; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

BAYNE'S TUTOR V. THOMPSON AND ANOTHER.

Mr. MacGregor applied for an order for the delivery of the minor Andrew Gow Bayne.

Mr. Joubert appeared for the respondent, and asked for a postponement, on the ground that he had not been consulted until ten o'clock that morning.

The matter was postponed until the 14th inst. *Postea* (14th September).

The application was allowed to stand over until the next motion day in order that some agreement might be arrived at if possible; if no agreement all affidavits to be filed within a week from date.

In re THE MINORS HALL.

Mr. Innes applied for the appointment of a *curator ad litem* to represent one of the minors in an action to have the validity of a certain document tested.

The application was granted, and Mr. Advocate Currey was appointed *curator ad litem* to the elder minor.

In re MINOR VAN RENSBURG.

This was the application of the executors of the late Johannes Petrus Janse van Rensburg and the mother and natural guardian of his minor child, J. H. P. Janse van Rensburg for leave to retain the amount due to him under his father's will in order to pay the sum of £1,000, for which sum a share in the farm Boksburg was bequeathed to him under the said will, and for leave to mortgage his share of the farm Boksburg for the balance of the bequest price, his mother undertaking to advance the sum without interest.

Mr. Sheil for the petitioner.

The application was granted, the bond to be passed for £689 10s. 7d., costs and expenses.

In re THE CAPE COLONISATION COMPANY IN LIQUIDATION.

Mr. Schreiner presented the liquidators report for confirmation.

The Court granted an order in terms of the report.

In re MINORS VAN HEERDEN. } 1897. } Sept. 13th.

This was an application by Francina van Heerden, Albertus Lambertus Van Heerden, the husband of the first-named petitioner, and Hendrik Johannes van Heerden, owners of shares in certain properties in the division of Cradock, for the sanction of the Court to certain transfers and exchanges proposed to be effected between them, and the owners of neighbouring

properties. Minors were interested in the properties, and the Master reported that the proposed arrangement was in their interest.

Mr. McGregor appeared for the petitioners.

The application was granted.

SUPREME COURT.

[Before the ACTING CHIEF JUSTICE and Mr. Justice MAASDORP.]

REGINA V. STEPHEN PICQUERR AND GABRIEL SEPTEMBER. { 1897. Sept. 14th.

Police Offences Act 27 of 1882, section 7, sub-section 12, does not include being in the bar of a hotel.

Mr. Justice Maasdorp said that a case had come before him as judge of the week from the Special Justice of the Peace of Laingsburg, in the district of Prince Albert, where the accused were charged with contravening section 12 of part 2 of Act 27 of 1882. There was some clerical error in this, as no doubt the accused were intended to be charged under section 7, sub-section 12. The accused were charged with trespassing in the bar of the Railway Hotel. It did not seem that the section was applicable to a case of that kind. A person entering a bar could hardly be said to be trespassing there. What the Justice of the Peace should have done was to have laid the charge under section 78 of Act 28 of 1883, where a person might be ordered out of a bar if he was disorderly; and on refusal be charged with a punishable offence. The conviction must be quashed.

SINCLAIR V. THOMPSON, RATCLIFFE AND CO.

Mr. Schreiner, Q.C., and Mr. Joubert for the plaintiff. Defendants unrepresented.

Judgment by consent had been agreed to.

Mr. Schreiner, Q.C., said that the plaintiff had been a commercial traveller for the defendants, and he claimed a true account of all money due to him under the agreement dated January 11, 1896, whereby he was entitled to commission whilst travelling and a certain salary whilst not travelling. Plaintiff claimed £12 10s. as for salary. The plea made allegations of certain misconduct. The defendants admitted that £34 5s. 10d. was due by way of commission, but alleged that it had been forfeited in terms of a certain letter. Defendants admitted that £7 10s., and not £12 10s., was due on account of salary, but refused to pay on the same ground. The allegation as to misconduct was withdrawn by letter. Then an offer of £60 in full satisfaction of plaintiff's claim was made. Mr. Schreiner moved for judgment in terms of the consent paper in favour of the plaintiff for £60 sterling, with costs of suit. There was a claim in reconvention for an account of the expenditure to which defendants were put whilst plaintiff was travelling, as to which it was agreed there should be absolution from the instance with costs.

The Court gave judgment in terms of the consent paper.

Ex parte HOWES.

This was the petition of Agnes Maria Howes, married in community to Felix James Howes for leave to receive the whole of an inheritance coming to her from her father's estate, without the assistance of her husband. She alleged that her husband was out of his mind, and had been in an asylum since June, 1889. He was at present at Valkenberg, and regarded as incurable. Her father died in 1893, leaving her an inheritance of £372, which she was unable to obtain in consequence of the mental condition of her husband. She was in poor circumstances, and maintained herself and five children by her own exertions.

Mr. McGregor appeared for the petitioner.

The matter was ordered to stand over yesterday for some information as to whether the husband had been declared a lunatic by order of Court, and whether a curator had been appointed to his person.

The Court now suggested that an ordinary detention order for a month should be obtained from a magistrate, and have that submitted to a judge, with affidavits showing the necessity of appointing a curator. There would be no order at present.

SUPREME COURT.

[Before the Acting Chief Justice, the Hon. Mr. Justice BUCHANAN.]

In re TARRY'S ESTATE. } 1897. } Sept. 21st.

This was an application by the executor testamentary of Edward Wallace Tarry and tutor testamentary of his minor children for the consent of the Court to a certain compromise.

The petitioner stated that the testator, Edward Wallace Tarry, died in England, in November, 1889, whilst on a temporary visit to that country, and that his will was proved there. An action was thereafter instituted by some of his heirs in the Chancery Division of the High Court against the petitioner and others of the heirs in respect of the provisions of the will and a codicil. The solicitors of the various parties had arrived at a compromise, but as one of the daughters, Alice Maria Tarry, was still a minor, and as the executor had obtained his appointment from this Court, it was necessary that he should obtain the consent of the Court. There was still a few thousand pounds' worth of assets in the Transvaal and the Cape Colony which had not yet been converted into money. He annexed affidavits, showing the nature of the proposed compromise, and declared that he considered it to be in the best interests of the minor that it should be assented to. The Master had had the matter referred to him, but reported that he could make no recommendation, as the question in dispute involved a point of law.

Mr. Schreiner, Q.C., appeared for the petitioner.

The Acting Chief Justice said the action was one which involved a large sum of money and involved several complicated questions of domicile, of law, and of the construction of the codicil. Under all the circumstances a compromise was very reasonable, and all the parties had come to an agreement. It was really a family settlement of a disputed matter There being one minor, and the estate being under the custody of the Court and the petitioner being appointed by the Court, it would be necessary to get the consent of the Court both as executor in the estate and as tutor testamentary to the minor. The Court would grant an order authorising the petitioner, or tutor testamentary, to enter into the proposed compromise in the action instituted in the High Court of England. That, his lordship thought, would meet the whole case. The costs to come out of the estate.

In re THE MINORS HALL.

This matter had been before the Court on the 13th September, when the Court appointed a *curator ad litem* to the elder of the two minor daughters of Mrs. Hall, to represent her in an action about to be instituted respecting the validity of Mrs. Hall's will.

Mr. Innes, Q.C., now applied for the appointment of a *curator ad litem* to the younger child. He said that it was understood at the first application that the executor dative should institute the action, but seeing that the will was informal on the face of it, and that the Master refused to grant letters of administration under it, the executor was averse to doing so, and thought the action should be commenced by one of the minors. The interests of the minors conflicted, and therefore the younger one should in any case be separately represented.

The Court appointed Mr. Schreiner, Q.C., as *curator ad litem* to the younger minor.

In re ESTATE OF JOHN GEORGE NICHOLAS VAN GASS.

Mr. Innes, Q.C., applied on behalf of the trustees in the insolvent estate of J. G. N. van Gass for an interdict to restrain the Registrar of Deeds from passing transfer of certain landed property registered in the names of S. Botha, P. W. Botha, and P. J. van Gass, pending the decision of the Court in an action to be instituted by the trustees for the recovery of the said property as part of the assets in the said insolvent estate. The applicants' attorneys had written to the Registrar of Deeds lodging a *caveat* against the transfer, but were informed by him that without an order of Court he could not refuse to pass transfer if the papers were in order.

The Court granted a temporary interdict with leave reserved to the respondents to move to set it aside. Action to be instituted forthwith.

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT.

[Before the Hon. the Acting Chief Justice (Mr. Justice BUCHANAN) and the Hon. Mr. Justice MAASDORP.]

REGINA V. MATROOS AND OTHERS. } 1897. Oct. 12th.

Cumulative sentences in cases remitted under Act 43 of 1885 struck out as to the portion above twelve months.

The Acting Chief Justice said: These cases came before me as judge of the week from the Acting Resident Magistrate of Port Nolloth. Preliminary examinations were taken against the prisoners, who were charged with theft on various counts. These cases were remitted to the Magistrate by the Attorney-General as a whole, and not on each count under Act 43 of 1885.

The Magistrate, however, split up the cases and sentenced the prisoners to twelve months, imprisonment with hard labour on each count.

Under Act 43 of 1885, under which the cases were remitted, the Magistrate's jurisdiction is limited to twelve months imprisonment and as each case was remitted as a whole, so much of each sentence as exceeds twelve months must be struck out.

ADMISSIONS.

The following admissions were made:

Martin Vincent Gleeson, attorney at law and notary public.

Frederick Rudin, attorney at law and notary public.

Abraham Jacobus Ross, attorney at law and notary public.

Arthur William Robinson, conveyancer.

Henry George Drake, conveyancer.

Johannes Christoffel de Klerk, translator.

PROVISIONAL ROLL.

VAN ZYL V. VAN NIEKERK.

Mr. Maskew applied for provisional judgment for £134 on an acknowledgment of debt, with interest at the rate of 5 per cent.

Provisional sentence was granted as prayed.

SMITH V. RAS.

Mr. Maskew applied for provisional judgment on a mortgage bond for £100, and that the property be declared executable.

The application was granted.

BUISSINNE V. VICTOR.

Mr. Buchanan applied for provisional judgment on a mortgage bond for £250, with interest at the rate of 6 per cent., and that the property be declared executable.

The application was granted.

THE MASTER V. KIMLO.

Mr. Sheil applied for an order calling on the respondent to file his accounts in the estate of which he was executor.

The usual order was made.

NATAL BANK V. VICTOR WOOLFF.

Mr. McGregor for the plaintiff; Mr. Innes, Q.C. (with him Mr. Schreiner, Q.C.), for the defendant.

Mr. Innes applied for a postponement of this matter until November 1, the defendant being now in England.

The matter had already been dragging on for four years, and was founded on a judgment of the High Court of the S.A. Republic. Summons was served after defendant had left the Colony He had sent out an affidavit, which had, however, been sworn before a person who was not a commissioner of this Court, and it had been sent back at once to have the defect remedied.

Mr. McGregor opposed the application.

After argument.

Their Lordships granted the application, the case to be heard on its merits on the date mentioned, the costs to stand over for future decision.

LIND V. KLEYN.

Mr. Close applied for the final adjudication of the defendant's estate. Provisional order had been granted in the Oudtshoorn Circuit Court returnable here.

The order was granted.

CANE V. AURET.

Mr. Buchanan applied for the final adjudication of the defendant's estate.

The order was granted.

HAND AND CO. V. FRIEDMANN.

Mr. Jones moved for the discharge of the provisional order of sequestration in this matter.

The application was granted.

HUBBARD V. BAGGELEY.

Mr. Graham applied for the final sequestration of the defendant's estate.

The defendant appeared to object to the application, and said the money for which judgment was obtained was lent to him by Hubbard to carry on his business. A fortnight afterwards he wanted it back and took all defendant's implements which were used to carry on his business, and caused them to be sold.

Mr. Graham read the summons, which alleged that the defendant was indebted to the applicant to the extent of £418.

The Court ordered the final sequestration of defendant's estate.

TOWN COUNCIL OF CAPE TOWN V. FALCONER.

Mr. Close applied for judgment under rule 329, for the sum of £48 10s. 9d, arrear of rates due by defendant, and £3 17s. 5d. expenditure by the Council for damage and negligence.

The application was granted.

UYS V. WESTERN PROVINCE EXPLORATION SYNDICATE.

Mr. Gardiner moved for judgment under Rule 329D for the sum of £137 18s. 5d., for services rendered as manager of the company.

Judgment as prayed.

ELLIOTT V. BOELK.

Mr. Gardiner moved for judgment under rule 329D for the sum of £171 3s. 3d.

Judgment as prayed.

VAN DER BYL AND CO. V. SCHMIDT.

Mr. Currey moved for judgment under rule 329D for the sum of £67 7s. 2d., goods sold and delivered.

Judgment as prayed.

VAN DER BYL AND CO. V. SWINDELL.

Mr. Close moved for judgment under rule 329 for the sum of £7 19s. 5d., for goods sold and delivered.

Judgment as prayed.

FORTUIN'S TRUSTEE V. BRANNAN.

Rule 329D—Undue preference.

Mr. Graham moved for judgment under rule 329D for £156, which was claimed from defendant as an undue preference.

Judgment as prayed.

FORTUIN'S TRUSTEE V. BASTARD FORTUIN.

Mr. Graham moved for judgment under rule 329D for £283 10s., claimed as an undue preference.

Judgment as prayed.

REHABILITATION.

Mr. McGregor applied for the rehabilitation of the estate of Lourens Marthinus Luyt.

The application was granted.

GENERAL MOTIONS.

EDMOND MARTELL AND CO. V. J. AND F. MARTELL.

This was an application calling on the respondents to show cause why they should not be ordered to pay applicants' taxed costs in and about a certain application.

Mr. Innes, Q.C. (with him Mr. Molteno), for the plaintiffs; Mr. Schreiner, Q.C. (with him Mr. Searle), Q.C., for the respondents.

Mr. Innes said an action had been instituted by Rolfes, Nebel & Co., as agents for E. Martell & Co. E. Martell & Co. had been importing into the Colony brandy manufactured by them, and selling it as the brandy of E. Martell & Co. Then the respondents caused an advertisement to appear, warning the public that the brandy of E. Martell & Co was not the original Martell brandy. Application had been made to restrain E. Martell & Co. from selling the brandy, and affidavits made, but none had been filed, and the application was now made for the costs.

The Acting Chief Justice said the Court had nothing whatever before it. It was most unusual for applications to be made without the affidavits being filed.

Mr. Innes admitted that there was nothing before the Court, and it was only that morning that he learned from the Registrar that the affidavits had not been filed. He asked the Court to allow the matter to stand over until the first day of term to allow the affidavits to be filed.

Mr. Schreiner said the matter could not be settled without the Court going into the merits.

The Acting Chief Justice said the application would stand over, and parties could decide on what course they would follow.

EDMOND MARTELL AND CO. V. J. AND F. MARTELL.

Mr. Innes applied for a commission to be appointed to take evidence in France and England in the action pending between the two firms. The respondents had been notified that the application would be made, but the affidavits had not been served upon them, because they had been barred.

Mr. Schreiner was allowed to appear for the defendants and suggested that the commision should be a joint one.

Mr. Innes consented to the removal of the bar on defendants paying costs.

The Acting Chief Justice said the Registrar would be instructed to issue the commission when the pleadings are closed, Mr. A. S. Brown, of Paris, to take evidence in France, and Mr. Mackarness to take evidence in England. The costs to be costs in cause. The bar was removed, defendants to pay costs.

[Plaintiff's Attorneys Messrs. Scanlen & Syfret; Defendant's Attorneys. Messrs. Van Zyl & Buissinné.]

WORDON V. WORDON.

Mr. Searle, Q C., applied for an order authorising the Registrar of Deeds to pass transfer to applicant of certain landed property settled by him on his wife the respondent, who had forfeited all right to the said property.

The applicant had settled the property in trust for his wife by ante-nuptial contract in 1882. In 1887, the trustee refused to continue to act, and the property was then conveyed to her and registered in her own name in the Deeds Registry of the Colony. In August, 1897, the applicant had obtained an order of the High Court of the S.A. Republic dissolving the marriage and declaring that the respondent had forfeited all rights under the said ante-nuptial contract.

The Court ordered respondent to sign a power of attorney to transfer the property within one month, and authorised the Sheriff in case of her default to transfer the property to applicant, subject to the consent of the mortgagees and the filing of an affidavit setting forth that there are no children of the marriage.

WINTERBACH V. WORCESTER MUNICIPALITY. { 1897. Oct. 12th.

Municipality — Proceedings — Minutes —Resolutions not seconded.

The Council of a Municipality constituted under the General Municipal Act is not obliged to enter upon its minutes a resolution which is not seconded.

This was an application for an order upon the respondent Municipality to amend the minutes of their proceedings of the 7th September, 1897, by including and inserting therein a certain amendment and three resolutions moved by the applicant.

The applicant alleged that he had moved the amendment and resolutions referred to but that they had not been seconded, and that the Mayor had refused to allow hem to be minuted; applicant's request to have them minuted was however recorded. At the subsequent meeting the applicant objected to the confirmation of the minutes for the reason stated, but they were nevertheless confirmed.

The Mayor of the Municipality filed an affidavit in which he stated that at the meeting of the 7th September, there was not a full attendance of Councillors, one of them being absent, and that the applicant did not at any time thereafter when that Councillor was present bring forward his rejected resolutions again.

He said also that it had been the rule, which was never departed from in their proceedings, that whenever any proposition was submitted and not seconded it should forthwith drop and not be recorded on the minutes; nor yet the fact that it was submitted but not seconded.

Mr. McGregor for the applicant referred to Act 45 of 1882, section 94. *Chadwick Healey on Company Law and Practice* (p. 281); *Regina* v. *Mayor of Evesham* (8 A. and E., p. 266). It is not necessary that a motion should be seconded before discussion. This is a rule of the House of Commons but not of the House of Lords (*May's Parliamentary Practice*). I admit that no regulations have been framed under section 109.

Mr. Innes, Q.C., for the respondent.

The application was refused with costs.

The Acting Chief Justice (without calling on Mr. Innes) said: The application in this case is for an order of mandamus to compel the Municipal Council of Worcester to enter on their minutes every resolution which was proposed, whether such resolution could by their practice or regulations be submitted for discussion or vote by the Council or not. It is said the matter is a small matter. but it is a tremendous exercise of discretion that the Court is called upon to use—to issue a mandamus in a matter of that kind. Under the General Municipal Act the Council is required to cause entries of the proceedings of the Council

and the names of the Councillors attending such meetings to be duly made from time to time, and by the 109th section the Council are authorised to make regulations regulating the proceedings of the Council. In the absence of such regulations—there appear to be no regulations in the case—the practice of the Council would govern what should be done in the case, and the Council has sufficient inherent authority to institute such a practice so long as such practice is not illegal or contrary to the express term of the Ordinance. The practice of the Council, according to the Mayor's affidavit, has been that when a resolution is moved, unless such resolution is seconded, the matter drops, and such resolutions not so seconded are not minuted. I do not see anything in the 94th section which makes that practice illegal and contrary to the Statute, and unless it is illegal and contrary to the Statute, the Court will not exercise the extraordinary powers of *mandamus* asked for in the case. The application must therefore be refused, with costs.

[Applicant's Attorney, V. A. van der Byl; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

KAFFRARIAN COLONIAL BANK, IN LIQUIDATION.

Mr. Buchanan applied for the confirmation of the liquidators' first and final report.

The application was granted.

HARRIS V. HARRIS.

Mr. Graham applied for leave to sue for restitution of conjugal rights by edictal citation. The affidavits showed that leave had previously been given, but an attempt had been made at reconciliation, and the wife proceeded to Johannesburg to join her husband. He, however, treated her in an indifferent manner, allowed her no money, and at one time informed her that she could do as she liked, and subsequently deserted her. While at Johannesburg they did not live together as man and wife. The parties were married at Cape Town, the respondent being at that time an engineer on the steamship Great Northern. Being deserted, the petitioner had to borrow money to come back again, and the object of the present application was to commence the case again *de novo*.

The leave applied for was granted, and the citation made returnable on November 18.

WELT V. WELT.

Mr. Graham applied for leave to attach certain property to found jurisdiction and to sue by edictal citation. He read affidavits which showed that the parties were married at Tulbagh in 1887, and had one child. At that time the respondent was a general dealer at Tulbagh. After 1895 he sold his business and became a grain merchant at Hermon Station. Recently he expressed a wish to visit his father at Warsaw, in Russia. The petitioner accompanied her husband to his steamer and saw him depart. She subsequently received a telegram saying that if she came to Cape Town she would hear important news about her husband. She then learnt from a Mr. Nathan en that her husband had gone away with a view to join Mrs. Nathansen, and that her husband was living with her in Europe. Adultery was alleged, and it was further stated that the respondent had contributed to the expense of Mrs. Nathansen's passage to Europe. The respondent, it appeared, had left several liabilities, and had sold all the property. The respondent had made away with the whole of the joint estate to the value of about £500.

Leave as prayed for was given, the citation to be returnable on February 1.

CAPE COMMERCIAL BANK, IN LIQUIDATION.

Mr. Schreiner, Q.C., applied that the liquidators' fourteenth report be confirmed.

The application was granted, leave being granted to sell the few remaining assets at an early date.

In re ESTATE OF E. F. THAUNISSEN.

Mr. Buchanan applied for an order authorising the partition of certain landed property, and for leave to mortgage the said land.

The application was granted.

THE MINOR COMMAILLE.

Mr. Currey applied for leave to the father of the minor to sell certain landed property.

An order was granted in terms of the Master's report.

In re ESTATE OF FAKEER MOHAMED IBRAHIM POWLEY.

Mr. Close applied for leave to the executrix to raise the sum of £400 on mortgage of the property in this estate, in order to complete necessary drainage and pay debts.

The application was granted.

WEYMARK V. WEYMARK.

Mr. Buchanan applied for a decree of divorce, on the ground that the defendant had not obeyed the order of the Court to restore to the plaintiff her conjugal rights.

The application was granted, with costs.

Ex parte RICHARDS AND SHEA— THE SURVEYOR-GENERAL INTERVENING. { 1897. Oct. 12th.

Derelict Lands Act 28 of 1881.

This was the extended return day to a rule *nisi* granted on the 20th August under the Act 28 of 1881.

The petitioners alleged that they were the registered owners in equal undefined shares of certain land situate at Princess Vley in the Cape Divisio·, in extent twenty-three morgen, 416 square roods and 114 square feet, as per deed of transfer dated 12nd October, 1895.

That in July, 1815 the above property, together with certain two other lots or erfpachten (one granted to Jacob Hendriksen on 1st January, 1810, in extent six morgen and thirty square roods, and the other granted to Jacob Fredrik Greibe on the 1st May, 1810, in extent 4 2-3 morgen) were transferred to one Benjamin Langley as per deed of transfer.

That in October, 1825, the first-named property was transferred to Jan of Bouzies by the sequestrator in the insolvent estate of Benjamin Langley, omitting the properties mentioned in paragraph 2, and that this appears to have occurred owing to the peculiar and unusual wording of the deed of transfer in Benjamin Langley's favour.

That the property mentioned in paragraph 2 has always been sold and purchased along with the property now registered in the petitioners' name continually from 1825 to the present date, and has always been occupied by the various purchasers since that date; in fact the homestead occupied by the various purchasers is situated on one of the erfpachten in question, and the petitioners having lately decided to subdivide the land, when the diagrams were prepared to give effect to the partition it was for the first time discovered that the petitioners did not hold title to the two erfpachten in question, nor have they ever been transferred from Langley to anyone.

That owing to the lapse of 72 years it is impossible for the petitioners to obtain transfer in their names of the said two erfpachten in the usual way and manner, and moreover, no one save the petitioners has any right to the land in question.

The petitioners prayed that the Court might be pleased to grant an order authorising the Registrar of Deeds to pass transfer to them of the two erfpachten, now registered in the name of Benjamin Langley, in equal undefined shares.

Upon this petition a rule *nisi* was granted on the 25th August made returnable on the 12th September. On the return day the Surveyor-General applied for leave to intervene, leave was granted, and the return day extended.

The Surveyor-General now alleged that the two pieces of land in respect of which transfer was applied for were not held under ordinary quitrent tenure, but were granted on the dates mentioned above on 15 years quitrent lease, subject respectively to an annual quitrent of four and six skillings currency of the Settlement per morgen, as will appear from copies of the titles annexed, and upon the expiration of that period reverted to the Crown.

The Surveyor-General, on behalf of the Colonial Government, objected to the rule *nisi* being made absolute and claimed the land as Crown land, and submitted that the same could only be dealt with under the Crown Lands Disposal Acts now in force.

He further alleged that no quitrent had been paid for the last 64 years, the last payment being made in the year 1833

In answer to the Surveyor-General's affidavit the applicant produced the affidavits of two old residents, who alleged that the two erfpachten had always been considered as forming part of the adjoining land, now registered in the names of the applicants.

Mr. Jones was heard in support of the rule.

Mr. Sheil, Acting Attorney General, for the Government.

After argument,

The matter was allowed to stand over for further information as to the registration of the property and the practice of the Government in dealing with limited quitrent grants of similar nature; the rule to be discharged if not brought on again before the last day of next term.

[Applicants' Attorney, Gus. Trollip; Intervener's Attorneys, Messrs. J. & H. Reid & Nephew.]

In re ESTATE OF P. ENGELBERTUS DU PREEZ.

Mr. Jones applied for an order authorising the Master to take the necessary steps for the election of a trustee in the estate to fill the vacancy caused by the death of the trustee originally appointed.

An order was given authorising the Master to call a meeting of the creditors for the purpose of electing a trustee.

In re ESTATE OF LEONORA MARIA JOUBERT.

Mr. Jones applied for an order authorising the Registrar of Deeds to pass transfer of certain land purchased at private sale by one of the executors from the estate

The matter had been referred to the Acting Master as minors were interested, and he reported that the sale was a *bona fide* one, and the price a fair price.

The order was granted.

VAN DER WESTHUYZEN V. VAN DER WESTHUYZEN.

Mr. McGregor applied for an order authorising applicant to take his eldest daughter to a me first-class institution to have her education completed.

Mr. Searle, Q.C., for respondents, opposed the application.

Mr. McGregor said that the parties had been divorced, and that the wife had been given the custody of the daughter, now seventeen years of age. Her father believed the daughter's education was being neglected, and he asked that she should be sent to Wellington Seminary.

Mr. Searle read affidavits which said that the daughter's educat on was in keeping with her station, and that the application had simply been made to give annoyance to the daughter's mother.

After argument, the application was refused.

The Acting Chief Justice said that the father and mother of the daughter in question had been divorced, in an action brought by the wife, owing to the misconduct on the part of the applicant. The Court gave the mother the custody of the three daughters, and the mother did not seem to have neglected her duty. She had kept the daughter at school, and she said now that she considered she had sufficient education for her position in life that of a farmer's daughter. There had been nothing to show that there was any necessity for sending the girl further to school. It appeared that already she had received a better education than many farmers' daughters in South Africa. The application would be refused, with costs.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

In re ESTATE OF ELLEN SCHOONRAAD.

Mr. Gardiner applied for an order authorising the executors to raise a sum of £600 on mortgage to pay certain debts.

The application was granted.

In re THE MINORS GORDON.

Mr. Graham applied for an order authorising the Paarl branch of the African Banking Corporation to transfer to the Malmesbury Board of Executors certain moneys standing to the minors' credit.

The application was granted.

Ex parte ANDRIES GREER.

Mr. Close applied for an order authorising the Registrar of Deeds to rectify a certain deed of transfer passed on the 27th July, 1896, by substituting petitioner's name for that of Andries Graves.

The application was granted.

NASH V. W. JONES AND F. T. JONES.

This was an application for committal of the respondents for contempt of Court by not obeying an order of the Court.

Mr. Innes, Q.C., for the applicant; Mr. Searle, Q.C., for the respondents.

The affidavits showed that Henry Nash and the respondents had been appointed executors testamentary in the estate of the late Mr. William Jones, Port Elizabeth, and the application was because Nash's co-executors, Mr. W. Jones, jun., and F. T. Jones, had failed to carry out the orders of the Court; the applicant also applied for the removal of the two from the executorship. An order had been made by the Court that accounts should be filed, and that £750 should be paid by them for the Joppa Tannery, and a distribution made. These his co-executors had failed to do.

In an answering affidavit F. T. Jones said that he had carried out the orders of the Court. He and his brother had bought the Joppa Tannery for £750, but he had not yet received transfer. Other property had not yet been realised.

Mr. Searle suggested that the distribution should be made and the heirs paid out within a given time. That, he thought, would be better than bringing in a foreign company.

The application was refused with costs

The Acting Chief Justice said: The application has been made for the commitment of the two executors, two brothers, and for their removal from their office of executors testamentary on the estate of their late father. I can not lose sight of the fact that the executors in the case have not done their duty. Their father died seven years ago, and they have not yet wound up the estate. The principal item is the purchase price of the Joppa Tannery, which it is alleged the respondents bought from their father, and that the amount ought to have been paid in six years ago, The applicant is one of the executors testamentary, and for the past three or four years he has been bringing the respondents before the Court to compel them to perform their duty. On two occasions a distinct judgment was given, the last being that accounts were to be filed within three months, but that judgment, or part of it, has not yet been

complied with. It is in the interests solely of the heirs that we are inclined to give the respondents a further chance, but we cannot give them any length of time. The respondents will be ordered to comply with paragraph 2 of the judgment, namely, that they forthwith pay into the estate £750, the purchase price of the Joppa Tannery, with interest thereon from the date of the purchase to the date of paying in the money, and further, that they file an account in connection therewith. They admit that they have filed an account, but the Master says that it is entirely unsatisfactory. The respondents will have to the 31st October, and they must pay the costs of the action. Failing compliance, the application may be renewed on the first day of term, and that without further notice to respondents. That, I think, will secure the winding up of the estate.

The respondents will not have their costs out of the estate, but the applicant will be allowed to charge his costs on the estate.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorney, Gus Trollip.]

SUPREME COURT.

[Before the Hon. the Acting Chief Justice) (Mr. Justice BUCHANAN) and the Hon. Mr. Justice MAASDORP.]

Re ESTATE OF CHRISTIAN JOHANNES ROODT. { 1897. Oct. 18th.

Mr. Molteno applied for an amendment of the order granted on the 26th August, 1897. He explained that an error had been made in the original affidavits and in the order describing a portion of the farm Winterhoek, it being described as lot A instead of lot B.

The application was granted.

Ex parte MARTIN J. BEIN.

Mr. McGregor applied for the cancellation of a certain mortgage bond passed by petitioner while yet a minor.

The petitioner alleged that he had never received any consideration for the bond, which had been passed in 1860, in favour of one Keyter; that it had been passed without any order of Court, and that he had never been called upon to pay interest. Keyter had become insolvent since the passing of the bond. No notice of the application had been given to the bondholder.

No order was made on the application, the Acting Chief Justice saying that notice ought to be given to the bondholder.

In re ESTATE OF J. H. VAN DER MERWE.

Mr. McGregor applied for an order authorising the transfer of certain landed property purchased from the said estate by one of the co-tutors of the minor children of the testatrix, who were heirs in the estate. The property had not been specifically bequeathed, and the Master recommended that the application should be granted.

The order was granted.

BEHR AND OTHERS V. VAN DER WESTHUIZEN'S ESTATE AND OTHERS.

Mr. Jones made an application for an award dividing certain property in the division of Oudtshoorn among the parties to be made a rule of Court.

Mr. Buchanan, for three of the respondents, consented.

The application was granted.

Ex parte DONI ZOZO.

Mr. Gardiner applied for a rule *nisi*, under the Derelict Lands Act, to be made absolute.

The application was granted.

Re ESTATE OF ADOLPHUS SCOTT.

Mr. Buchanan, on behalf of Sarah Scott as the executrix of the estate of the late Adolphus Scott, applied for a rule *nisi*, granted under the Derelict Lands Act, to be made absolute.

The application was granted.

Re LILIAN AGNES ATTWELL.

Mr. Jones applied for an extension of the return day of the rule *nisi*.

The return day was extended to November 11.

Ex parte JEANETTE STORK.

Mr. Schreiner, Q.C., applied for an extension of the return day, in order that the applicant's husband might have an opportunity of appearing.

The return day was extended to January 12, the rule to be sent to the husband.

COLONIAL GOVERNMENT V. RAPHAEL. { 1897. Nov. 2nd.

Interdict—Obstruction of right of way.

This was an application to make absolute a rule *nisi* granted on the 28th September last, calling upon the respondent to show cause to-

day why an interdict should not be granted restraining him from obstructing the passage called Spin-lane.

Mr. Sheil appeared in support of the rule.

Mr. Innes, Q.C., for the respondent said that the case was an important one and an action was necessary. At any rate sufficient information was not now before the Court. He asked for a postponement.

The case was postponed until the first day of term, respondent's affidavits to be filed within a week.

Postea (November 2nd).

The application was heard.

The affidavit of the architect to the Public Works Department, upon which the rule *nisi* was granted alleged that the Colonial Government owned several properties in Grave-street, Cape Town, by virtue of which it is entitled to the use of a lane running into Plein-street called Spin-lane.

That the respondent is the owner of certain buildings on either side of Spin-lane.

That during the early part of the year 1895 the respondent obstructed Spin-lane to such an extent by placing in it packing-cases, straw, and other impediments, that the deponent was obliged to threaten him with an application for an interdict. Correspondence ensued between the Government solicitors and the respondent's solicitors, the result of which was that the Government agreed to allow the respondent to open his cases in the lane, provided no other use was made of the lane and no nuisance was caused by the opening of the cases, but right being reserved to withdraw the consent at any time.

That for a time the lane remained clear, but for some time past the respondent has, notwithstanding frequent protests, proceeded to deposit numbers of packing cases, straw, and other articles of a highly inflammable nature in the lane, which is now so blocked as to be almost impassable.

The respondent in his replying affidavit admitted that he used Spin-lane for the purposes of his business. He alleged that the Government did not use the lane over which they claimed a right of way, that he was unaware of the title under which the Government claimed the right of way, and he submitted that before he was debarred from using the lane the Government should produce some proof more than a mere allegation as to their right to the use of Spin-lane.

In reply to the above, the Government produced its deed of transfer from one Cornelius Bartholomew, dated 15th September, 1880, showing that the Government had a right to the passage leading towards Plein-street, and also the respondent's diagram showing the common passage marked on it.

Mr. Sheil, Acting Attorney-General, for the applicant.

Mr. Innes, Q.C., for the respondent, said that more information should be placed before the Court. The Government has only a footway. The respondent has bought all the surrounding property and there does not appear to be a remaining extent, so that he ought to have the right to the yard. *Porter* v. *Philip* (B. 1876, p. 192). The soil belongs to him if it belongs to anyone. The respondent does not object to the use by the Government of a limited right of way to the extent of three feet six inches or thereabouts

Mr. Sheil said he could not consent to a declaration that the respondent was entitle to the whole of the lane except three feet six inches.

The Court granted an interdict restraining the respondent from obstructing the passage; Mr. Raphael to be allowed to open packing cases in the passage on condition that the empty packages be removed as soon as they have been opened; the respondent to pay costs, with leave to bring an action for the discharge of the interdict.

[Applicant's Attorneys, Messrs. J. & H. Reid & Nephew; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

Re ESTATE OF HELEN SOPHIA MILES.

Mr. McLachlan applied for leave to raise a sum of £100 on mortgage.

The application was granted.

REGINA V. JAMESON.

Theft—Evidence.

This was an appeal from a conviction of the appellant by the Assistant Resident Magistrate of Cape Town on a charge of stealing one case of whisky, the property of Messrs. White, Ryan & Co., on the 9th September last.

The following evidence was led for the prosecution: Richard Hayes (sworn) states: I am employed at White, Ryan & Co.'s branch store, Bree-street. At 10 30 a.m. yesterday (9th September) I saw Mr. White mark a case of whisky in the store. He gave me certain instructions. Prisoner came to the store about 2.30 p.m. with the wagon and an order for certain goods which did not include the case of whisky. The goods ordered were about to be placed on the wagon. I asked prisoner if he

could take a case of whisky. He said yes. He did not ask what he was to do with it. I told him he was to get the money the same day from the party to whom he sold something. I said he must get me a bigger price for this case of whisky than he had got for a previous case that had been sold; that price was £1. He said he would not get more than he got on that occasion. He took the case and drove away with it. About eight minutes later a detective came down with the wagon with the whisky on it.

Cross-examined: I put the case of whisky on the wagon myself.

By the Court: My master told me that in the event of the prisoner asking for a case of whisky I was to let him have it when he came to the store. I asked him if he could take the case, he said yes he could take it. I was to get 14s. out of the £1. I was acting under my master's instructions when I asked him to take the case.

Arthur Hill, sworn, states: I am a detective officer. Yesterday afternoon I watched the stores of White, Ryan & Co., in Bree-street. I saw prisoner about 3.30. He drove to the store in a wagon. He spoke to last witness. Last witness brought out the case of whisky and placed it on the wagon, and prisoner got on the wagon and drove away. I followed him. He stopped at a public-house called the Atlantic. He got off the wagon, took the case of whisky off, and took it into the bar. I followed him in. He went behind the bar, and came out again without the case of whisky. He had been in a room behind the bar. He was three or four minutes in the bar. The proprietor of the Atlantic Hotel, who was behind the bar, beckoned to prisoner to come to him in a room behind the bar. Prisoner went in. I heard some money being paid to accused. He came out with his hand in his right-hand trousers pocket, and left the house. I followed him out, told him I was a police officer, and asked him why he left the case of whisky there. He said, "I had an order from the foreman at the stores, Mr. Hayes, and have a bill to show that I left it there." I asked him to show me this bill. He searched his pockets and said, "I have not got it." I asked him to return to the public-house and show me where he had put the case of whisky. He came back. I went behind the bar, followed by the proprietor and prisoner into a small room at the back of the premises, and then saw the case of whisky produced. I took the case of whisky and drove to the store in Bree-street, and then to the station. At the station the prisoner acknowledged having received £1 for the whisky he had sold to the proprietor. Prisoner handed me 20s. in silver.

Upon this evidence the Assistant Resident Magistrate found the prisoner guilty, and sentenced him to three days' imprisonment. From this conviction and sentence the present appeal was brought.

Mr. Schreiner, Q.C., was heard in support of the appeal.

Mr. Sheil, Acting Attorney-General, for the Crown.

Mr. Schreiner: There is no evidence of criminality. Prisoner acted under instructions of his superior. *Volenti non fit injuria.* There was no *contrectatio.* If Hayes is considered to be an accomplice, there is no corroboration. The evidence of a trap is only considered sufficient when he acts under the authority of the Public Prosecutor. *Regina* v. *Pound* (J. 2, p. 2).

Mr. Sheil: Prisoner must have known the value of the whisky, which was £2 16s., and he sold it for £1. The theft was committed when the case was taken off the wagon and placed in the hotel. There is a clear inference that the prisoner was to get six shillings. As to the evidence of a trap, *Regina* v. *Williams* (1 C. and K. p. 195).

Mr. Schreiner in reply.

The conviction was quashed.

The Acting Chief Justice said: Jameson was accused of stealing a case of whisky. The case certainly came into his possession under very suspicious circumstances, and he disposed of it in a very suspicious way. He made no explanation whatever before the Magistrate of his conduct, although he was not bound to do so. Looking at the circumstances I am not much surprised that the Magistrate found Jameson guilty, but at the same time in criticising the evidence it can be seen that several important links are wanting. The whisky was given to Jameson by the foreman, a man in authority, with instructions to sell it. Jameson sold it, and what he did with the money was also very suspicious. Still more evidence is wanted to convict him of theft. In this case there are grounds for very strong suspicions, but there are several important links wanting. Under the circumstances the conviction will have to be quashed.

Mr. Justice Maasdorp concurred.

[Appellant's Attorney, A. P. Kenealy.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSION. { 1897. Nov. 1st.

Mr. Close applied for the admission of George Christian Vosloo as an interpreter in Dutch and English.

The application was granted; the oath to be administered at Fort Beaufort.

PROVISIONAL ROLL.

VAN DER BYL AND CO. V. SCHMIDT.

Mr. Currey asked for a writ of civil imprisonment on an unsatisfied judgment of this Court.

The application was granted.

DENTON AND THOMAS V. BEGLEY.

Mr. Graham applied for a decree of civil imprisonment against the defendant.

The Chief Justice: There is an order for compulsory sequestration against the defendant.

Mr. Graham: That is since the application was handed to me.

No order was made.

BROOKS V. BROOKS.

Mr. Jones asked for an order for civil imprisonment against the defendant. Judgment had been given against him for the costs of an action for divorce brought in the Supreme Court amounting to £52 8s. 11d. There had been a return of *nulla bona*.

The order prayed for was granted.

NATAL BANK V. VICTOR WOOLF. { 1897. Nov. 1st.

Provisional sentence granted for the unpaid balance of a judgment of the High Court of the South African Republic and interest thereon—Rate of interest.

Mr. McGregor applied for provisional sentence for £152 4s. 6d., with interest at 6 per cent. from the 1st July, 1897, being the balance of a judgment of the High Court of the South African Republic, and interest on that balance up to the 1st July.

The defendant filed an affidavit stating that as guarantor for the Britannia Gold Mining Company he had become indebted to the plaintiff in the sum of £1,000 or thereabouts, for which sum a judgment was obtained against him on the 17th November, 1893, with costs.

That he had afterwards offered to pay £50 a month until the judgment was satisfied, had regularly paid the instalments until indebtedness was reduced to about £250.

That about June, 1896, after a conversation with plaintiff's manager he received an account showing a sum of £211 13s. 3d. due, which he paid by cheque in full satisfaction and discharge of plaintiff's claim.

That he heard nothing more about the matter until in Febuary, 1897, when an official of the High Court inquired whether he was prepared to pay the amount, and again in June, 1897, when he was requested to point out property to satisfy the judgment. He on both occasions stated that he had settled with plaintiff.

He also stated that he had a claim against the plaintiff for an amount between £4,500 and £5,000, which he intended to prosecute on his return to South Africa in December next.

James Watson, inspector of the plaintiff bank at Johannesburg, deposed that in June and July, 1896, he was acting manager of the Johannesburg branch. He denied that an account of £2.0 was sent to defendant, and that the amount of £211 11s. 3d. paid by him was paid in full satisfaction of the plaintiff's claim, but said that the defendant was well aware he was still owing interest on the amount of the judgment.

He said he was not aware of the defendant having any claim against the plaintiff bank.

The amount awarded to plaintiff by the High Court judgment was £998 6s. 0d., with interest *a tempore morae*. A writ was issued from which it appeared that interest was claimed at eight per cent., which was the rate then allowed by the High Court.

He annexed an account signed as correct by the defendant on the 5th of June, 1894, showing that the balance then due by the latter was £1,067 3s. 9d. In the said account an amount of £57 12s. 6., was shown as interest due by defendant to date; also a further account showing the balance due on the 1st July, 1896, to be £152 4s. 6d., £94 12s. for the interest which had accrued from the 5th June, 1894, to the 1st July, 1896, and £57 12s. 6d., balance of capital.

Mr. Innes, Q.C., and Mr. Schreiner, Q.C., for the defendant.

Mr. McGregor pointed out that interest upon interest was included in the summons, but he could put no authority before the Court for that portion of the claim.

Mr. Innes: This is not a liquid claim. The summons does not state the amount for which judgment was obtained, nor the rate of interest allowed by the judgment. It is said that the rate allowed in the High Court is eight per cent., but that would have to be proved extrinsically. This Court can take judicial cognisance of the judgment but not of the rate of interest unless that were mentioned in the judgment. Secondly, there is nothing now due to the plaintiff the capital having been paid off. The payment of £211 was in full settlement. The claim now made is too vague and indefinite; it includes solicitor's charges, which do not form part of the judgment.

Mr. McGregor: The account is signed "Correct," and we start from that; the interest to date then was £57 12s. 6d. I have no authority to show that we are entitled to interest upon interest and no evidence of custom.

Provisional sentence was given for the amount claimed, less £1 17s. for solicitor's charges, and so much of the claim as was made up of interest on £57 12s. 6d.

The Chief Justice said that with reference to the form of the summons there was no doubt that it fully represented to the defendant the plaintiff's claims. There had been considerable argument as to the rate of interest, but inasmuch as only 6 per cent. was claimed there was not much weight to be attached to that argument. As to the merits of the case, the only point really urged on behalf of the defendant was a remark made by the manager of the bank. Mr. Innes had contended that that amounted to a settlement, but his lordship could not agree with that. There was nothing in the correspondence showing any suggestion that there should be a reduction of the amount, and it appeared to him to have been quite an unguarded statement on the part of the manager of the bank. There was nothing in the correspondence to satisfy him that the manager of the bank intended to relinquish the claims of the bank, and that being so it seemed that there was an amount due by Mr. Victor Woolf, who should not take advantage of the unguarded statement made by the manager of the bank. It was not a final judgment, and it was quite competent for Mr. Woolf to reopen the case. It was further possible, if he went into the principal case, that he might satisfy the Court that the amount was not owing. At present all the evidence of the case was against him. His lordship would therefore give provisional sentence leaving it to the defendant to enter into the principal case and show that the amount was not owing.

Mr. Innes asked for a stay of execution in order that a cable be sent to Mr. Woolf, London, and that time be allowed for him to send out money instead of having property in the Colony attached.

Mr. McGregor consented, but asked for the costs of the application for postponement heard on the 12th October, which were then ordered to stand over.

The Court granted a stay of execution for six weeks and costs of the former application.

[Plaintiff's Attorney, Gus. Trollip; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

CAIRNCROSS V. KORKIE.

Mr. Currey asked for provisional sentence on a mortgage bond for £23, with interest reckoned from 1st July, 1896, with costs.

Provisional sentence was granted.

FORTUIN'S TRUSTEE V. REALOON.

Rule 329D—Undue preference.

Mr. Graham applied for judgment under Rule 329 for £70, money paid by the insolvent to the defendant; it was claimed as an undue preferring of the defendant over the insolvent's other creditors.

The application was granted.

GENERAL MOTIONS.

ZOSI V. NANISI. { 1897. Nov. 1st.

This was an application to have a rule *nisi* made absolute. The applicant had passed a general power of attorney in February last in favour of the respondent, and this power had been put into the Resident Magistrate's Court of Cape Town as evidence in an action brought by the respondent against the applicant, and filed of record. On the 22nd October applicant verbally revoked the power, but the clerk of the Court refused to deliver it to him on the ground that it had been put into court by the respondent's agent, and the Acting Resident Magistrate refused to allow him to cancel it or destroy it. The respondent had applied for the power, and applicant believed she would obtain it and make an improper use of it. The rule obtained called on respondent to show cause

why the power should not be delivered to applicant, and was ordered to act as an interim interdict, restraining the Magistrate's clerk from delivering it to respondent.

Mr. Buchanan for the applicant.

The application was granted.

[Applicant's Attorney, A. P. Kenealy.]

DIBBEN V. THE CAPE DIVISIONAL COUNCIL.

Mr. Schreiner, Q.C., applied to have a day fixed for the trial of the above cause by jury. The action, it was stated, was pending for alleged breach of contract.

The application was granted, and November 24 fixed.

PIRIE V. PIRIE.

Mr. Close applied to have a rule *nisi* for divorce made absolute.

The application was granted.

In re ESTATE OF E. G. M. BARTHOLOMEW.

Mr. Gardiner applied for an order authorising the Registrar of Deeds to pass transfer of certain property purchased from the estate by one of the executors.

The order was granted.

Ex parte HENRY JONES.

Mr. Close asked for the rule *nisi* to be made absolute. The rule had been issued under the Derelict Lands Act.

The application was granted.

In re ESTATE OF SIR CHARLES MILLS.

Mr. Searle, Q.C., applied that the rule *nisi* be made absolute. Under the Derelict Lands Act the rule had been ordered to be served on Messrs. Corbin & Corbin, Plymouth, Indiana, and had been sent to them by registered letter. No reply had been received, but the letter had not been returned. Publication had also been made in the "New York Herald."

The Court considered that although the service had not been effected in the proper manner, it was reasonable to suppose that the rule had reached Corbin & Corbin, and granted the application

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Ex parte THE PRINCIPAL OFFICER OF CUSTOMS.

Writ of assistance and search—Act 10 of 1872, section 58.

Mr. Sheil, Acting Attorney-General, applied for a writ of assistance and of search, under the Customs Act, 10 of 1872, section 58. He mentioned that three writs had been issued in 1872, when the Chief Justice was Attorney-General, and the new one was necessary owing to the extension of the Colony. He understood that the new writ was for Mafeking.

The Chief Justice said he did not understand why it was that the Legislature did not give the necessary power to the officers in question. The Legislature should, he thought, say that the Officer of Customs should have the right of search. At present the Court was asked to grant the writ without any information before it.

The order asked for was granted.

REGINA V. COLLZEA. { 1897. Nov. 1st.

Lashes—Act 43 of 1885.

Mr. Justice Solomon stated that in the cases which came before him as judge of the week was one from the Resident Magistrate of Namaqualand, in which a prisoner named John Collzea was charged with housebreaking with intent to steal and with theft. After a preliminary inquiry the charge was remitted to the Magistrate to be tried under Act 43 of 1885. The man was sentenced to imprisonment for twelve months and to receive twenty lashes. The last part of the sentence could not stand. The provisions of Act 43 of 1885 were quite explicit, and only in the case of a previous conviction within three years could the punishment of lashes be inflicted. There was no proof that the man had been so convicted, and therefore that part of the sentence with regard to the lashes must be struck out.

CAUSE LIST.

TRUTER V. TRUTER. { 1897. Nov. 1st.

This was an action for divorce instituted by Mrs. Truter on the ground of the adultery of her husband. The defendant had been served by edictal citation in Australia.

Mr. Buchanan appeared for the plaintiff.

Edmund Gorges, clerk in the Colonial Office, produced the marriage certificate of the parties, James Lionel Truter and Johanna Elisabeth Fick.

Mrs. Truter deposed that she was married in Cape Town to the defendant on 13th May, 1871. They lived in Cape Town in 1872 when her husband went to Kimberley, first as magistrate's clerk, and latterly as magistrate. There were six children alive of the marriage, two of whom were majors. They lived at Kimberley together until 1888, when her husband

went to England. Soon after his return she heard stories about his misbehaviour with a young woman named Louie Brown. Her husband first denied what was said about it, but afterwards the information was confirmed. They were then in Cape Town, and her husband said he would not live with her, but would go to the Queen's Hotel. Instead of doing that, he went to a boarding-house in Roeland-street, where the woman Brown was living. In 1890 he went to Kimberley. His wife soon afterwards sent a wire to him stating that she was going to visit him at Kimberley. He wired back that if she came to Kimberley he would leave the place. She went North all the same, and when she reached Kimberley he was at the station, and appeared to be very much annoyed. He asked her to go straight back to Cape Town, but she declined. He did not take her to where he was living, and she went and stayed with friends. The next time she saw her husband was in the office of Mr. Haarhoff, they having met there, as she wanted a deed of separation drawn up. At first her husband refused to sign the deed. Witness told Mr. Haarhoff in the presence of her husband about his unfaithfulness, and he merely smiled. When she threatened to take him into court he agreed to sign the deed of separation. Her husband had not adhered to the terms of that deed, and it was only with difficulty that she got him to pay the money that the deed provided for. He agreed to pay her £40 a month. In 1891 he came to Cape Town and asked witness to assist him to pay sundry debts he had contracted. Witness refused, and said he should apply for help to the woman he was living with. At that time he admitted that the woman Brown had had a child, of which he was the father, and witness advised him to have the child sent to a home. Her husband said if the facts became known he would lose his position, and to prevent that witness said nothing. She had not seen her husband since, and she knew he had gone to Australia. Letters she had sent to him in Sydney had not been returned, and she concluded that he had received them. So far as she knew the woman Brown was unmarried.

Norah Peterson, Maynard-terrace, said she formerly lived with Mrs. McClintock, Roeland-street. She knew Mr. and Mrs. Truter and also Miss Brown. Mr. Truter came and stayed at the house. He had a room downstairs and Miss Brown a room upstairs. The two used to go out on the stoep a great deal. They were often out late. One night witness saw a light in Miss Brown's room, and it being late she looked in. In the room Mr. Truter was sitting by the table, and Miss Brown was sitting on the bed half undressed. On another occasion witness took a parcel to the station for Miss Brown when she was going North. Witness saw a carriage marked "engaged," with the names "Mr. and Mrs. Truter" on the door. Mrs. Truter was not there; only Miss Brown. Later, witness saw Miss Brown in a boarding-house in Grave street. Witness observed that Miss Brown was then in the family way.

Sarah Bassea or Hevitt, Rose-street, Cape Town, deposed that she knew Mr. and Mrs. Truter and also Miss Brown. She knew Miss Brown as Mrs. James. Witness was engaged by Miss Brown to go to Kimberley as a servant. She remained with Miss Brown as a servant for about three months. Mr. Truter was a frequent visitor on Miss Brown. There were no visitors to Miss Brown but Mr. Truter.

Leah Bassea spoke to Mr. Truter, engaging her daughter as a servant to go to Kimberley.

The Chief Justice: You have better evidence than this, Mr. Buchanan, I suppose?

Mr. Buchanan: I have not.

The Chief Justice: But you have proved absolutely nothing. There is nothing inconsistent in a gentleman engaging a servant for a lady, and afterwards calling upon her.

Norah Peterson (recalled) stated that only Mr. Truter and Miss Brown were in the engaged compartment that evening she saw them start for Kimberley. There was sleeping accommodation provided in the carriage.

A decree of divorce was granted, the plaintiff to have the custody of the children, £10 per month as maintenance, and costs.

[Plaintiff's Attorney, D. Tennant.]

CAMPION V. CAMPION. { 1897. Nov. 1st.

This was an action for divorce instituted by Mrs. Campion on the ground of her husband's adultery.

Mr. Buchanan appeared for the plaintiff; defendant appeared in person.

The Chief Justice (to defendant): Do you appear to defend this action?

Defendant: Yes, my lord.

The Chief Justice: Do you deny the adultery?

Defendant: I admit the adultery, and I want to give the cause why I left my home.

Mary Ann Campion said she was married on the 12th October, 1886. There were four children dead and three living of the marriage. They were married in Cape Town, and lived at first in Buitengracht-street. They lived happily together until February of this year, when her husband induced her to go to Caledon for the sake of one of the boys, who was ill. When she

returned she learned that her husband had been living with a Mrs. Quin. He at first denied the truth of this, but on the Friday following he left her, and did not return until the next Monday, when he gave her £5 to pay the rent. On the Friday morning he took away £101 which witness had in her possession. He said he was going to put it in the bank. When he returned on the Monday he told her that he had been at Stellenbosch with Mrs Quin, and had been living in a hotel there together. Mrs. Quin was a friend of witness's. After that he left, and did not come back for two months. In April he returned, and she forgave him. They lived together for three weeks, when he again left her and went back to Mrs. Quin. During those three weeks he wrote to Mrs. Quin, and Mrs. Quin returned the letter. Her husband denied having written the letter. In May he told her she could apply for a divorce, and that he would not oppose the application. Her husband had since been living with Mrs. Quin. Her husband was a compositor, and earned £2 17s. 6d. a week.

Defendant said he earned only £2 15s. per week.

The Chief Justice: But what is your defence? You defend the action, and yet you say you committed adultery.

Defendant: I admit the adultery.

Mrs. Smith spoke to Campion engaging a room in her house. He and a woman lived together as man and wife. Until they left, witness had no suspicion that the woman was not Mrs. Campion. The woman was Mrs. Quin.

The Chief Justice: Where are you living just now?

Defendant: I am living with Mrs. Quin. It is all a family affair, and I wanted my wife to leave where she is staying, which is next door to her mother. The declaration asked for maintenance, but Mr. Buchanan stated that the Resident Magistrate had granted an order under Act 7 of 1895.

Decree of divorce was granted, plaintiff to have the custody of the minor children, and to remain in possession of the furniture in her possession until a further order of the Court was made, with costs.

[Plaintiff's Attorney, D. Tennant.]

OPPEL V. OPPEL.

Restitution of conjugal rights and divorce—Custody of a child born since commencement of action.

This was an action for the restitution of conjugal rights, and failing compliance, for decree of divorce. There was no prayer for custody of children.

Mr. Close stated that the parties were married at Victoria West in May, 1896. They were married in community of property, and there was one child of the marriage born since the action had been instituted. The husband deserted his wife in May this year, and the application was made for restitution of conjugal rights, and, in default of compliance, for decree of divorce, the plaintiff to forfeit any benefits of the marriage.

The evidence had been taken on commission, including that of the minister who had married the parties.

Mrs. Oppel stated that her husband had left her, going, she believed, to Bulawayo. He had written her to secure a divorce, and asking her not to think of him any more.

The Court ordered the restitution of conjugal rights before December 31; failing which, the defendant to show cause before January 12, 1898, why decree of divorce should not be granted, and why plaintiff should not have the custody of the child born since the commencement of the action.

[Plaintiff's Attorney, Gus. Trollip.]

JANSONS V. JANSONS. { 1897. Nov. 1st.

This was an action for divorce brought by Mrs. Jansons on the ground of her husband's adultery.

Mr. Jones appeared for the plaintiff.

Edmund Gorges, from the Colonial Office, proved the marriage of the parties.

Maud Margaret Jansons said she was married in Cape Town on August 22, 1867. She was married before the Magistrate. Witness did not remember the name of the Magistrate who married them. Witness lived with her husband for thirty years. He first left her in July last year, and went to Johannesburg with a woman. In October she followed, and was just three days too late in coming across him and the woman at Bloemfontein. She afterwards forgave him. He again left her on September 18 in this year. Witness employed a detective named Hill to make inquiries. She and Hill went out to Wynberg on September 30, and went to a house belonging to Mr. Hart. There they found her husband, but they did not see the woman. Witness knew the woman Maria Christian, having seen her at Pretoria, where she was living in a half-empty room. The photograph put in was that of Maria Christian. Her husband had money in the bank, and witness had got an interdict preventing him from drawing £466. He also possessed two erven. She had heard he had other property, but she could not prove it.

Carl Neft, cabdriver, Newlands, said he knew Jansons, the defendant. He knew both Jan-

sons and his wife. Witness drove Jansons in September to Kildare-road, and there he met a woman. Witness drove Jansons and the woman to Wynberg Flats. (Shown photograph.) Witness recognised the portrait as that of the woman Jansons met that day.

Seton Hart, Wynberg, said that Jansons leased a house from him in September. He remembered Mrs. Jansons coming. (Shown photograph.) He recognised the photo as that of the woman who lived with Jansons as his wife. It was understood that the woman was Mrs. Jansons.

William Hill, private detective, spoke to visiting Wynberg and going to the house belonging to Hart. There they saw Jansons, who admitted that he was living with another woman.

Decree of divorce was granted, and an order given for the division of the property, with costs.

Mr. Currey, of the General Estate and Orphan Chamber, was appointed receiver.

[Plaintiff's Attorney, D. Tennant.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

GENERAL MOTIONS.

GAVIN v. THE MUNICIPALITY OF OUDTSHOORN. } 1897. Nov. 2nd.

Trespass—Construction of aqueduct—Interdict.

This was an application on notice to the respondent Municipality, calling on them to show cause, why they should not be interdicted from using a certain aqueduct constructed by them and from trespassing upon the applicant's property, pending an action to be brought in the next Circuit Court to be held at Oudtshoorn. The respondents had recently constructed an aqueduct about 300 feet long over applicant's property for the purpose of leading water to the town of Oudtshoorn, in place of an old one hitherto existing, which took a more devious route. The applicant alleged that the aqueduct was badly constructed, had already burst on several occasions, and was dangerous to his property, in that the flood of water when it burst would sweep away his cultivated land below. The respondents denied the right to an interdict, on the ground that no damage had been done and that they were not trespassers, inasmuch as one Greeff, the former owner of the ground, had given his consent to the construction of the aqueduct, and that the applicant had knowledge of this consent. Greeff had left the district, and no affidavit from him had been filed.

Mr. Searle, Q.C., appeared for the applicant.

Mr. Schreiner, Q.C., for the respondents.

Mr. Searle: The applicant has no knowledge of consent given by Greeff. There is no necessity for the use of the aqueduct now and until action is brought The old furrow is very suitable; water has been taken by it for thirty years: the aqueduct is in a dangerous condition and there are cultivated lands just below. The construction is faulty.

Mr. Schreiner: This is not a case for an interdict. *Damnum factum* must be shown and not *damnum infectum* unless the damage will be irreparable *Cape Town Town Council* v. *Woodstock Municipality* (1887, not reported).

The Chief Justice: Was there any trespass there.

Mr. Schreiner: I think not, as far as Woodstock was concerned. It is true we are on applicant's land but there is strong evidence that Greeff consented, and the applicant admits that he saw the aqueduct before he bought the property. The applicant should wait until damage is done; he can easily recover damages in that event The right should have been registered, but as soon as knowledge on the part of the owner is shown the right must be recognised. *Richards* v. *Nash* (J. 1, p. 312).

Mr. Searle: We are not bound to show that the damage will be irreparable. The respondents have power to expropriate, but they do not expropriate.

After argument,

The Chief Justice said: At this stage it is not desirable that the Court should express any opinion on the merits, but at the same time I think that an opportunity ought to be allowed to the applicant to bring an action. It is not fair to the respondents to make them show their hands at present, but I think that a month ought to be allowed to decide whether the applicant will bring the action or not. In the meantime it is only right that the respondents should appoint a qualified engineer to examine the aqueduct, in order to ascertain whether some alterations in the work should not be effected in order to see if

it was suitable for the purpose for which it was intended. The Court is of opinion that a temporary interdict should be granted to restrain the use of the aqueduct for a period of four weeks from date, the applicant to be at liberty to bring his action for the purpose of obtaining a perpetual interdict. The costs of the application will stand over. I think the Court had better not say that the costs should abide the result of the action, for the reason that it is to be hoped that no action will be brought, but that the parties will come to terms.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

Ex parte EXECUTORS OF LATE H. H. FRANKEN.

Mr. Buchanan applied for the cancellation of a certain mortgage bond. The bond had been lost, and the applicants alleged that it had been paid and all liability extinguished. No interest had been paid for years. The application was rendered necessary, because no declaration could be made stating absolutely that the bond had not been ceded or pledged to anyone, as required by the rules of the Deeds Registry, under Act 19 of 1891, section 5.

A rule *nisi* was granted, returnable on the 11th November, to be published in the "Cape Times" or "Cape Argus."

Postea (November 11th).

The rule was made absolute.

Ex parte EXECUTORS OF WM. JOYNER.

Mr. Buchanan applied for leave to raise a sum of £300 on mortgage of certain landed property in the estate in which minors were interested. The matter had been referred to the Chief Magistrate of East Griqualand, where the property was situated, and he had reported in favour of the application.

The application was granted.

BAILEY V. ANTHER.

Mr. Currey applied for leave to attach certain landed property to found jurisdiction, and to sue by edictal citation in an action upon a mortgage bond. The whereabouts of the defendant were unknown. There was some difficulty with regard to giving notice of calling up the bond, which was only payable after six months' notice, and counsel asked for some intimation from the Court as to what would be considered sufficient notice, or else that the citation might be ordered to stand as a notice.

The application was granted as prayed, the citation to be published in the "Star," returnable on the last day of the May term, and to stand for notice.

In re ESTATE OF THE LATE HENDRIK JOHANNES HOFMEYR. *Ex parte* J. H. HOFMEYR. } 1897. Nov. 2nd.

Prescriptive right to land belonging to estate of deceased claimed by executor personally—Rule *nisi*.

This was the petition of J. H. Hofmeyr, which set out that the estate Weltevreden was sold in building lots in 1855, and that in the division some strips of land were left for streets if wanted; that petitioner purchased a block of land marked D and one J. C. Hofmeyr purchased the opposite block marked C, and that there is a vacant strip of land between said blocks originally intended but never used as a street.

That since the purchase in 1855 petitioner as owner of block D and J. C. Hofmeyr as owner of block C have been in undisturbed possession of the strip in question, and since 1860 or thereabout divided the same, and had undisturbed possession up to the present, and as such acquired legal rights by prescription.

That the executors of deceased are S. V. Hofmeyr and petitioner, and they have signed power to transfer, but the Registrar of Deeds raised a difficulty as to transfer of the portion to the petitioner because he was himself one of the executors.

The petitioner therefore prayed for directions in the matter.

The petition came before Mr. Justice Maasdorp in Chambers, and he granted a rule *nisi* calling upon all persons interested in the strip of land in question to show cause why it should not be registered in the name of J. H. Hofmeyr, the rule to be served personally on such of the heirs of Hendrik Johannes Hofmeyr upon whom personal service can be effected, and published once in the "Gazette." Returnable on the 1st November.

Mr. De Waal applied that the rule be made absolute.

The application was granted.

Ex parte LONGDEN. { 1897. Nov. 2nd.

Attorney—Admission as advocate—Reinstatement as attorney.

An enrolment as an advocate of the Supreme Court virtually suspends or cancels a previous enrolment as an

attorney. Where the applicant had been admitted as an attorney and notary but had not practised as such, and was subsequently admitted as an advocate, the Court upon his application cancelled the enrolment as an advocate and reinstated him as an attorney.

This was an application for an order declaring that applicant is not disqualified from practising as an attorney and notary public by reason of his having been enrolled as an advocate, or in the alternative, for an order removing his name from the Roll of Advocates.

Mr. Innes, Q.C., appeared for the petitioner; Mr. Sheil for the Attorney-General; Mr. Searle, Q.C., for the Law Society.

The petitioner had been admitted as an attorney and notary of the Supreme Court in 1883, and in 1890 had been admitted as an advocate without his name having been taken off the roll of attorneys. He had lately applied for admission as an attorney of the High Court of Matabeleland. The proclamation of the High Commissioner of 8th April, 1892, provided for the admission of attorneys who were duly admitted and enrolled and under no disability to practise in the Cape Colony. The High Court ordered the application to stand over for evidence that petitioner was under no disability to practise as an attorney in the Cape Colony.

Mr. Innes said it was clear from the Charter of Justice that the functions of an attorney cannot be performed by an advocate, and *vice versa*, but it was not provided that the enrolment on one list prevents the enrolment on the other. The petitioner had never practised as an advocate.

The Chief Justice: He should have been removed from the roll of attorneys. The enrolment of an advocate virtually suspends or cancels the enrolment as attorney. As he ought to have been removed from the roll of attorneys originally, ought we not to consider that as having been done, and ought we not now to reinstate him?

Mr. Searle said the Law Society had no objection to the petitioner being reinstated as an attorney.

The Chief Justice said: In my opinion the practical effect of the petitioner's enrolment as an advocate was to cancel his enrolment as an attorney. Now he appears to intend to practise as an attorney at Bulawayo. It appears to be a *bona-fide* application, and subject to the amendment of the petition, the Court will cancel his enrolment as an advocate and reinstate him as an attorney.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

Ex parte THE EXECUTRIX OF THE LATE G. P. PERKS.

Mr. Jones applied for an order authorising the sale of the landed property in the estate of the late G. P. Perks. The children had been appointed heirs under the will; the wife, who was also executrix, to have the usufruct until she died or remarried. It was desired to pass transfer of two lots in King William's Town which had been sold and to sell the rest of the landed property. All the heirs were of full age except one, and they consented to the sale. The Master approved.

The application was granted.

THE MASTER V. LOUW.

Mr Sheil asked for an order upon the defendant to file an account in the estate of which he was trustee.

The usual order was granted.

THE VILLAGE MANAGEMENT BOARD OF BERLIN V. KETH. } 1897. Nov. 2nd.

This was an appeal from a decision of the Assistant Resident Magistrate of King William's Town in an action in which the respondent sued the appellant for £40 9s., as the latter's contribution towards fencing a certain farm belonging to the respondent. The boundary of the farm adjoined the boundary of the village commonage. The fencing was provided for by Act 30 of 1883 and Act 15 of 1891, under which disputes as to the cost of fencing, position of fence, and material to be used had to be settled by arbitration. The respondent had erected the fence without making an agreement with the appellant, and sued him for half the cost. The matter had never been referred to arbitration. The Magistrate gave judgment for respondent.

The Magistrate's reasons were as follows:

1. That the plaintiff sent the required notice to fence as required by law.

2. That he was led to believe that the Village Management Board were prepared to fence.

3. That no objection was made to plaintiff's estimate to fence, nor to the boundaries or proportion of expense to be borne by each, or nature of fence, and that there never was any dispute between the parties on these points, and that therefore there was no necessity to arbitrate and nothing to arbitrate about.

4. That in face of the letter from defendants, declining to pay the amount, and stating that

they were prepared to defend any action that he might take in the matter, there was no other alternative for plaintiff but to sue the defendant for half the cost of the fence.

Mr. Schreiner, Q.C., for the appellant.

Mr. Innes, Q.C., for the respondent.

Mr. Schreiner: The only authority which gives the Magistrate jurisdiction is Act 30 of 1883, and that provides that the matter must be referred to arbitration before he has to decide. For the purposes of this statute, the Village Management Board is not an occupier because it has not the ownership of the land. By Act 15 of 1891, it is made an occupier for the purposes of the Fencing Acts; therefore when called upon by an adjoining proprietor to fence, it is the person who has either to agree or go to arbitration.

Mr. Innes: Act 30 of 1883 lays down the principle that adjoining occupiers must join in fencing. The disputes referred to are those regarding the cost, position, and material of fences. but on these points there was no dispute. It is admitted that there was no formal agreement. There was really a waiver of the duty to go to arbitration. *Myburgh & Co.* v. *Protecteur Fire Assurance Co.* (B. 1878, p. 152).

Mr. Schreiner in reply.

The Court altered the judgment to one of absolution from the instance with costs, and costs of appeal.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

STEER AND CO. V. ROWLAND. { 1897. Nov. 3rd.

Broker—Commission—Lease—Sub-lease —Price—Rental.

The lessee for a term of a licensed public-house employed a broker to sell his goodwill, stock, and right to the lease at a commission of 2½ per cent. on the price. The broker sold the goodwill and stock, and found a sub-lessee at a rent in excess of that which was payable by the lessee.

Held *that the broker was entitled to 2½ per cent. commission on the price of the goodwill and stock, but not on the rent to accrue during the whole of the term.*

The lease not having been sold at all, held that the custom of brokers, in letting property for the owner, to charge 5 per cent. on one year's rental affords a fair criterion as to the reasonable remuneration payable to the plaintiff for securing a sub-lessee of the promises.

This was an action for commission on the sale of the defendant's business and stock.

The declaration stated that the defendant on the 7th June instructed the plaintiff to effect the sale of his business, viz., the Victoria Wine and Spirit Company, including stock, fixtures, goodwill, and lease, and that it was agreed that brokerage should be charged at 2½ per cent., and that on the 28th June the plaintiff sold as aforesaid to one Rolls.

That the defendant occupied the premises under a lease from Anders Ohlsson for the term of ten years, at a monthly rental of £10; that eight years of the period were unexpired, and that one of the terms of the agreement was that the premises should be taken over by Rolls as sub-tenant at £30 per month for the eight years.

That the consideration for the sale was £450 for the goodwill, £510 for the stock and fixtures, and £2,880 the rental for the eight years, altogether £3,846, on which he was entitled to 2½ per cent. That defendant denied plaintiff's right to commission on rental, and had tendered commission only on £966. Plaintiff claimed £96 3s.

The plea admitted the facts stated in the declaration, except that any agreement was made as to paying commission on the rental. It denied plaintiff's right to claim 2½ per cent. upon £2,880, but again tendered £24 3s., being 2½ per cent. on £966, and further tendered £24 by way of commission or remuneration in respect of the rent, and costs to date. Issue was joined on these pleadings.

Mr. Searle, Q.C., and Mr. Close for the plaintiff.

Mr. Schreiner, Q.C., and Mr. Jones for the defendant.

William L. Kidney, bookkeeper with Steer & Co., stated that on 7th June he called on Mr. Rowland, who gave him a letter regarding the disposal of his business. Witness said the terms of the firm were 5 per cent., and Mr. Rowland said he could not agree to those terms. Witness suggested 2½ per cent. on the entire transaction, and asked, should Mr. Steer agree to that rate, if the defendant would accept those terms. The defendant agreed. He said the terms would be 2½ per cent. on the entire transaction, and witness knew that he understood the proposal, as he repeated the words, "on the entire transaction." The business was advertised in Johannesburg and Cape Town, and was afterwards sold to Mr. Rolls.

Cross-examined by Mr. Searle: Witness was going to put the matter into the hands of other agents, and witness said it would not be fair for him to do that.

Re-examined: Witness said he was assisting to liquidate Mr. Rowland's business, and he told him it would not be fair for him to go to another broker.

Frederick M. Steer stated that he instructed the previous witness to close with Mr. Rowland. The disposal of the lease was the most important part of the transaction; that was, getting the increased rental. The rental before was £10, and witness got £3 ½. Witness took a very great deal of trouble over the business. The rate was 2½ per cent. on the entire transaction.

The Chief Justice: If you disposed of the business, say for three years, you charge commission on the rental for the three years?

Witness: I would charge brokerage on the full term unless there was an arrangement.

George Rowland, the plaintiff, corroborated the evidence of Mr. Kidney, with the exception of the statement that it was agreed to pay brokerage on the entire transaction. He got a claim from Steer & Co., and he at once went to Mr. Brittain, as he protested against the charge made. There was no reference made to the brokerage being charged on the entire transaction. He didn't think these words were once used.

James Henry Leffler, a broker of twenty years' standing, stated that his practice had been in similar cases to charge 5 per cent. on the first year's rental of the premises disposed of by him.

George Brittain, a broker of seventeen years, corroborated the previous witness as to the custom. His system was the same as Mr. Leffler's.

Mr. Searle: It is admitted that 2½ per cent. was to be paid upon the transaction, the lease is included in the business. The gist of the whole transaction was the increased rent, and even if the words "entire transaction" were not used the 2½ per cent. should be paid on the lease there was practically a sale of the lease; if plaintiff is not entitled to claim on the sale of the stock and goodwill. Defendant's whole transaction, he is only entitled to claim on the position is unreasonable and inconsistent; there is no explanation of the amount of £24 offered. *Story on Agency*. Commission must be paid upon the business done.

Mr. Schreiner was not called upon.

Judgment was given for the plaintiff for the amount tendered, with costs up to the date of plea; the plaintiff to pay the subsequent costs.

De Villiers, C. J.: There is no question as to the commission payable to the plaintiffs on the sale of the goodwill and stock. The dispute is whether the defendant is liable to pay 2½ per cent. on £2,880, which represents the total rent which will be payable to him by the sub-lessee during the next eight years. It is admitted that 2½ per cent. is payable to the plaintiff as broker, and although this is not clearly stated, it may be taken that it is by way of commission on the price. The question is, what is the price? Clearly the rent for eight years cannot be regarded as the price. If the right to the lease had been sold there would have been a price on which commission would be payable, but a sub-lessee was secured at a rental in excess of that which was payable by the defendant. It may be said that if there had been a sale the price would probably have been the present value of the difference for eight years between the rent payable by the lessee and that payable to him by the sub-lessee, but on the other hand the sub-lessee might never have taken an assignment of the lease if it necessitated the immediate payment of so large a sum In the absence of a sale there really was no price on which the commission of 2½ per cent. could be calculated, and accordingly the parties were really not *ad idem* as to the remuneration which should be payable to the plaintiff for securing a sub-lessee. The defendant admits that they are entitled to some renumeration, and has tendered the sum of £24, being 5 per cent. for two years on the excess of rent payable to him, but this mode of calculation rests on no basis of reason or custom. In my opinion, a fair criterion of the remuneration, payable to the plaintiff is afforded by the custom of brokers on letting property on behalf of the owner. The recognised charge appears to be 5 per cent. on one year's rental. Upon that basis the

plaintiff would be entitled to only £18. The judgment of the Court will be for the amounts tendered, with costs to the date of the plea, but subsequent costs must be paid by the plaintiffs.

[Plaintiffs' Attorney, A. Steer; Defendant's Attorney, D. Tennant.]

BLOEM v. ZIETSMAN. } 1897. Nov. 3rd.

Slander — Privilege — Truth — Public interest — Married woman.

Where in an action for defamation in a Resident Magistrate's Court the summons called upon the defendant a married woman, duly assisted by her husband, to answer the plaintiff and no exception was taken to the summons in the Court below.

Held, *that the exception could not be taken on appeal.*

Where the defendant in speaking to a friend used the following words "I am surprised that A. did not tell me that my child M. is in the family way, because she is in the family way by Z. (the plaintiff)."

Held, *that the words were defamatory, and not privileged. Whether the communication, if true, would have been to the public interest.*— Not decided. Sparkes *v.* Hart *(Menzies 3. p, 3) commented on.*

This was an appeal from a decision of the Assistant Resident Magistrate of Kokstad, in an action for damages for slander in which the appellant was the defendant, and the respondent was the plaintiff. The defendant was one Lena Bloem, a Griqua, the summons was against her, duly assisted by her husband: the plaintiff was a farmer.—The slander complained of was the use of certain words in speaking in Dutch to a friend of hers, one Annie Vry, of which the following was the translation "I am surprised that Mr. Murray did not tell me that my child Maria is the family way, because she is in the family way by Bassie Zietsman" (the plaintiff.)

The plea denied the use of the words, but if the contrary be proved she specially pleaded that they were spoken *bona fide* on reasonable grounds and without malice, and that they are substantially true and were spoken on a privileged occasion. The Assistant Magistrate in giving judgment for plaintiff for £1 with costs said:—I find that the words complained of were used by defendant, and that they were defamatory. With regard to the special pleas put in, viz: (*a*) that the words were spoken *bona fide* on reasonable grounds and without malice, the presumption being that this defamatory accusation was made maliciously unless the contrary be shown, it remains to be seen whether defendant was justified upon what had gone before in making such a statement. Maria had told defendant that Bassie (plaintiff) had taught her something she did not know before and in accordance with her duty as a mother she had her daughter examined by a medical man, to whom however she did not confide her suspicions and who in turn does not appear to have suspected pregnancy in Maria, whom he treated for consumption. Having therefore deliberately as it were put the matter to the decision of a medical man she was not justified in making the statement she did on the 11th April. The next branch of the specia' plea to be dealt with is (*b*) that the words are substantially true.

This is a matter of credibility of witnesses and consideration as to whether the evidence is such as would support an action for the support of the child supposing it were born. The evidence of Maria is confronted by that of plaintiff and Burne, the latter of whom distinctly swears that he had connection with Maria during the time he was at Zietsman's. Maria's evidence taken altogether was not given in such a manner that I consider it should outweigh that of both plaintiff and Burne. That plaintiff was on somewhat friendly terms with Maria I think quite probable, but I do not consider the evidence of Maria sufficient to prove that he caused her pregnancy.

With regard to the final clause (*c*) that the words were spoken on a privileged occasion, I fail to see that there are any grounds for this contention; there was no duty devolving upon defendant to make the statement to Annie Vry, to whom it had no special application nor would have been of any service to her.

Taking all the circumstances into consideration, a somewhat flighty girl, a young fellow of twenty-one, and a dissipated tutor, I do not think this is a case for exemplary damages, which will be assessed at £1 with costs.

Further reasons for judgment were sent up with the record in which the Assistant Magistrate said:—"I consider the witnesses for the plaintiff more worthy of credence right through their evidence. On a perusal of the evidence it will be seen that that given by defendant and her husband is anything but truthful, and the girl Maria has not stated the truth with regard

to her examination on the second occasion by Mr. Murray. Moreover she did not impress me as feeling in any way her peculiar position, nor as the kind of girl who had fallen a victim to her affection for the one man she loved.

Mr. Schreiner: The defendant was a married woman and was sued as such: she was assisted by her husband, but she ought not to have been brought into Court at all. *Selby* v. *Friemond* (5 Juta, p. 266), Act 2) of 1856, section 51. The authorities quoted in *Snook* v. *Bosman* (E.D. 2, p. 201) do not support a summons in this case. The point was not raised in the Court below.

The Chief Justice: The power to appeal is signed by the husband. The warrant to sue is also signed by him. There was no exception taken. Even if a minor had been assisted in this way the action would have been upheld. It seems to be a homologation of the husband's power to his wife.

Mr. Schreiner: The husband would have had to do as much as that in order to raise the exception.

The Chief Justice: We are of opinion that it is too late to raise the exception. The husband delegated his power to his wife; probably at that time he could have taken the exception but he cannot take it now.

Mr. Schreiner: A further point is that this was a privileged communication made by the mother of the girl to an intimate friend, the statement was afterwards repeated through the efforts of the plaintiff. I cannot urge the defence of truth.

The Chief Justice: Do you say the truth is no defence?

Mr. Schreiner: I doubt whether I can take that defence since *Sparkes* v. *Hart* (3 M., p. 3).

The Chief Justice: That is an old case; in later cases the Court has taken a very wide view of what is for the public benefit.

Mr. Schreiner: As to the connection with plaintiff the Magistrate required corroboration of the girl's oath. but there he was wrong; he applied the paternity doctrine of evidence where paternity was not in question. Apparently, by inference he believed the connection had taken place.

The Chief Justice: The utmost that can be implied is that the Magistrate was doubtful. But you must fail unless you can prove that the connection did take place.

Mr. Schreiner: As to privilege *Celliers* v. *Pienaar* (1 Sheil p. 201.)

The Chief Justice: It has always been held that there must be some duty incumbent on the person making a statement to allow it to be privileged.

Mr. Schreiner: That is the English law but it does not appear to come from any source of Roman Dutch law. In *Celliers* v. *Pienaar*, privilege was allowed as a defence although the Court found that the statement was not true.

The Chief Justice: *Fick* v. *Watermeyer* (R. 1874 p. 86), is more in your favour.

Mr. Schreiner referred to *Roberts* v *Duthie* (S.C. 11, p. 279), and *Graham* v. *Kerr* (9 J. p. 185). upon the point of public interest.

The Chief Justice: There the truth had been proved. I am inclined to think that in this case, if truth had been proved, the communication would be for the public benefit.

Mr. Schreiner: *Botha* v. *Brink* (1878, pp. 118) *Michaelis* v *Braun* (J. 4, p. 205) *Sparks* v *Hart* (3 M., p. 3.)

The decision of the Magistrate was confirmed, with costs.

The Chief Justice said: The action was for damages for defamation, the words on which it was founded being words employed by the defendant, in speaking to a friend, to the effect that the defendant's daughter was pregnant by the plaintiff Zietsman. Undoubtedly the words used were defamatory, and the defendant could only succeed either by proving the truth of the words spoken, or in showing that the words, if not true, were not spoken maliciously and were spoken on a privileged occasion. As to the truth of the words, Mr. Schreiner relies upon the terms of the reasons supplied by the Magistrate to the Court and he contends that judging from the Magistrate's reasons he was doubtful. But in my opinion when a plea of truth is set up it lies upon the defendant to prove that plea. It is not clear that the Magistrate found that the plea was proved. On the contrary the Magistrate states positively that in a matter of credibility, he prefers to give credence to the witnesses of the plaintiff rather than to those of the defendant. He seems to believe the statement of Burne as to his connection with Maria although she denies it. I am of opinion that the truth has not been proved. Then the next point is, assuming that the truth has not been proved, was the action a privileged one? I do not think there is any proof of express malice. The fact of the words being defamatory is *prima facie* proof that there was malice. There is not a single case in which the Court has gone so far as to hold that words used to a person who has no interest whatever are privileged. If in this case the words had been used by Annie Vry I think it would have been a privileged communication, because there would be a duty upon Annie Vry to tell the mother, and a corresponding interest in the mother to know the condition in which her child was. But in this case

there was no reason why the communication should have been made to her. If the argument used by Mr. Schreiner is a good one, that it was to the interest of the defendant's friend to know the charges which were alleged against the plaintiff, then it was clearly the defendant's duty to publish the matter to the whole world. I am not sure that at the present day the decision in Sparkes v. Hart would be supported. I think the decisions at the present day tend to widen the question of public interest. Under all the circumstances I am of opinion that the decision of the Assistant Magistrate should be confirmed with costs.

Mr. Justice Maasdorp: I concur. I only wish to say that on the Magistrate's finding of fact it is not necessary to express an opinion as to whether I would have held that the communication if true would have been in the public interest. I am rather inclined the other way.

Mr. Justice Solomon concurred.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Van Zyl & Buissinne.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

ADMISSION. } 1897. Nov. 4th.

Mr. Close applied for the admission of Moritz John Hoffa as an attorney-at-law and notary public.

The application was granted, and Mr. Hoffa took the prescribed oaths.

PROVISIONAL ROLL.

KING AND CO. AND ANOTHER V. EDWARD JOHN BEGLEY.

Mr. Buchanan applied for the final adjudication of the defendant's estate as insolvent.

The application was granted.

W. H. DEAN V. WEBNER AND CO.

Mr. Molteno applied for judgment under rule 329 for the sum of £43 13s. 6d., for goods sold and delivered, with interest and costs of suit.

The application was granted.

GENERAL MOTIONS.

HARRIS V. HARRIS.

Mr. Graham applied for leave to effect substituted service. An order for edictal citation had been granted on October 12, and citation had been sent to the Transvaal for personal service there. The defendant had since come to the Colony, and had now disappeared.

The application was granted, personal service to be effected, or failing that one publication in the "Star," Johannesburg.

THE PETITION OF J. W. SHARK.

Mr. Buchanan applied for leave to sue the Cape Town Tramway Companies (Limited) *in forma pauperis*.

The application was referred to counsel.

UYS V. WESTERN PROVINCE EXPLORATION SYNDICATE, LIMITED.

Mr. Buchanan applied for an order directing the said syndicate to be wound up, and for the appointment of an official liquidator. The syndicate was indebted to plaintiff on an unsatisfied judgment for arrears of salary as manager.

The Court issued a rule calling on the syndicate to show cause next Thursday why the application should not be granted, counsel to satisfy the Court that the rule had been served upon some one capable of representing the syndicate, and further, the Court granted an order restraining the syndicate from parting with any of its assets. If no personal service possible, publication to be made in "Het Dagblad."

Postea (November 11th).

The rule was made absolute.

Mr. Van Eyk was appointed official liquidator with the powers enumerated in section 149 of Act 25 of 1892, security to the satisfaction of the Master to be given to the extent of £250. Messrs. Van Zyl and Buissinné appointed attorneys to the liquidator.

VAN DER POEL V. COETZEE.

Mr. Buchanan applied for leave to attach certain moneys to found jurisdiction, and for leave to sue by edictal citation. Petitioner had lent defendant the sum of £60 5s. 3d. on a note of hand, payable in January, 1896. Defendant was then living in Namaqualand, but had since crossed the Orange River into German territory, and was beyond the jurisdiction of the Court. Coetsee had been married in community of goods, and his wife had since received an inheritance from her parents' estate, and it was

this that was sought to be attached. The money had been placed in the custody of S. van Niekerk for the benefit of defendant's wife.

The application was granted, leave being given to attach £85, and to sue by edictal citation, personal service if possible, failing that service on Van Niekerk.

WRIGHT, CROSSLEY AND CO v. THE ROYAL BAKING POWDER CO., OF NEW YORK. } 1897. Nov. 4th.

Registered trade-mark—Proceedings to expunge — Practice — Attachment *ad fundandam jurisdictionem.*

Where a foreign company had registered its trade-mark in the Colony and an application was made for leave to attach their interest in the trade-mark in order to found jurisdiction, in an action to have the trade-mark expunged.

Held, *that the proceedings need not be by action, and that it was unnecessary to attach any property or interest inasmuch as the company had brought itself within the jurisdiction by the act of registration.*

This was an *ex parte* application for leave to attach the interest of the defendant company in the mark "Royal," which is registered in the Deeds Registry as their trade-mark, to found jurisdiction, and for leave to sue by edictal citation.

Mr. Innes, Q.C. (with him Mr. Schreiner, Q.C.), for the applicants.

The application was brought by Wright, Crossley & Co., Liverpool, who carried on business as millers and manufacturers, and had done so for the past fifty years. They manufactured baking powder, which they labelled "Royal Baking Powder," and had done so for forty-five years. For some time they had exported this baking powder largely to South Africa. About March, 1897, the petitioners made application to have their trade-mark registered in the Deeds Registry, but this was objected to by the Royal Baking Powder Company, New York, on the ground that they had registered the word "Royal."

Mr. Innes contended that the word "Royal," being an adjective of quality, could not be registered as a trade-mark. The "Royal" of the New York company must be expunged from the register before the Liverpool firm's trade-mark could be registered. They had no right to register the word "Royal" as a trade-mark. Definition of trade-mark in Acts 22 of 1877 and 12 of 1895. Petitioners did not object to the New York company using the word "Royal," but they objected to the company using it exclusively. The New York company objected to the petitioners using the word. "Royal" is a word denoting the character or quality of the goods. *Sebastian* 3rd ed. p. 366 *In re Royal Baking Powder Co.* (W. M. 1890.) Also *Sebastian*, pp. 22, 67.

The Court held that it was not necessary to proceed by action or to attach anything, as the respondents had brought themselves within the jurisdiction by registering their mark. It therefore granted a rule calling upon the respondents to show cause why the trade-mark in question should not be removed from the Register of Trade Marks on the ground that the word "Royal" was not a registratable trade-mark within the Trade Marks Act of the Colony. The Court were of opinion that there should be service of the rule on the attorneys who acted for the respondents, and that it be sent in a registered letter to the respondents' address in New York; the rule also to be served upon the Registrar of Deeds; the rule to be returnable on February 1, 1898; further, that respondents show cause why they should not pay costs.

OOSTHUYZEN v. PIENAAR. { 1897. Nov. 4th.

Magistrates Court — Jurisdiction—Residing.

In an action brought in the Magistrates Court for C. *for the price of goods sold it appeared that the sale had taken place within the district of* C. *and that for six weeks before action brought, the defendant had been living within the district although he occasionally left it for the purpose of making purchases elsewhere for a Johannesburg firm.*

Held, *that the evidence was sufficient to justify the Magistrate in holding that the defendant resided within the district and that the Court had jurisdiction.*

This was an appeal from a decision of the Resident Magistrate of Colesberg in an action in which the respondent was the plaintiff and the appellant was defendant.

The summons claimed £22 10s. as the balance of an account for sheep sold and delived to the

defendant during July, 1897. The defendant took exception to the summons on the ground that he was a resident of Johannesburg in the S.A. Republic, and therefore the Court had no jurisdiction.

The evidence called in support of the exception was to the effect that defendant had lived at Johannesburg since Febuary last and was a partner of the firm of C. T. Bayley and Co., of that town, and that he had been about a month in Colesberg, at intervals, buying stock. While there he had bought the stock from Pienaar and had been served there with the summons. He said he had been away from Johannesburg a little more than a month, during which time he had been twice in Johannesburg and also in Bloemfontein, Brandfort, four times in Bethulie and twice in Steynsburg.

On the pliantiff's side it was alleged that defendant had stated that he was stationed at Colesberg to receive stock for the firm.

The Magistrate over-ruled the exception and gave judgment for plaintiff with costs: in his reasons he stated that there was nothing before the Court to come to any other conclusion than that the defendant was domiciled in Colesberg as a buyer of stock, that he was a purchaser upon his own account—for he had paid out moneys received, took receipts in his own name —and, as sender, transferred all stock purchased by him in his individual capacity.

Mr. Schreiner, Q.C., for the appellant, referred to *Scott* v. *Clarke & Co.* (S.C. 13, p. 15). There is no evidence that defendant resides in Colesberg. He has only come to Colesberg at intervals. His residence was in Johannesberg. The credit was given to a Johannesburg firm of which he was partner and representative. *Beedle & Co.* v. *Bowley* (S.C. 12, p. 401).

The Chief Justice: In both the cases cited the defendant was clearly resident in one place and came into another from day to day to transact business. But here there is evidence of residence at least for one month.

Mr. Schreiner: The evidence here is that defendant resides at Johannesburg though he has been absent for a month visiting various places.

Mr. Molteno for the respondent: The Magistrate found that defendant was domiciled in Colesberg. He had been in Johannesburg only three months and a half, and had been transacting all his business in Colesberg. He is stopped from raising the question of want of jurisdiction.

Mr. Schreiner: There can be no waiver in a question of Jurisdiction. *Divisional Council of Riversdale* v. *Pienaar* (J. 3, p. 252).

The appeal was dismissed with costs.

De Villiers, C. J.: The only objection now raised to the Magistrate's judgment is that he was wrong in holding that the defendant resided within the district of Colesberg. The 1st Rule of the Magistrates Court gives these courts jurisdiction "over or in respect of any person residing or inhabiting" within the districts assigned to them respectively. The evidence shews that the contract sued upon was entered into within the district of Colesberg and that for six weeks before action brought he had been living there, although he occasionally went elsewhere to buy sheep for a Johannesburg firm. He had previously resided at Johannesburg, where he is said still to be partner in some business, but it does not appear that he had been living longer at Johannesburg than he afterwards lived at Colesberg. The Court sees no reason for disturbing the judgment of the Magistrate upon what is really a question of fact and the appeal must be dismissed with costs.

Mr. Justice Maasdorp concurred.

Mr. Justice Solomon said: I thought at first the evidence went to show that the defendant had his permanent home in Johannesburg, and had merely come to Colesberg for a temporary purpose. If that had been so, I would have felt some doubt as to what the decision should be. But when one looks at the facts of the case, one cannot come to the conclusion that he did reside at Johannesburg. It is clear that he had only been there for about three months before he went to Colesberg. It is true he was a member of a firm carrying on business at Johannesburg, but it was a curious thing that almost immediately he joined the firm he left Johannesburg and went to Colesberg, and had been in Colesberg about six weeks. The evidence goes to show that his residence was in Colesberg rather than in Johannesburg, and that Colesberg was his residence at the time of the action.

[Appellant's Attorneys, Messrs. Walker & Jacobsohn; Respondent's Attorneys, Messrs. Sauer & Standen.]

HEYDENRYCH v. WOOLVEN. { 1897. Nov. 4th.

Set-off — *Compensatio* — Principal and agent—Undisclosed principal—Sale —Price.

A person purchasing from the agent of an undisclosed principal without notice of the agency is entitled to set off against the price claimed by the principal a debt owing by the purchaser to the agent.

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town in an action in which the appellant was the plaintiff and the respondent was the defendant.

The plaintiff claimed £30 as the price of an organ sold by him to defendant in October, 1894.

The defendant pleaded the general issue. 2ndly Denied plaintiff's right to sue and that he ever purchased the harmonium from plaintiff, 3rdly If the above pleas were deemed insufficient he said that he bought the organ from one Beedle, who did not at any time disclose Heydenrych as his principal. That Beedle owed him £21 11s. 4d. and that he had tendered to Beedle the sum of £8 8s. 8d. being the difference between £30 and £21 11s. 4d., and if the Court should find that Heydenrych was lawfully entitled to the sum due, but not otherwise, he filed a counter-claim for £21 11s. 4d., and pleaded a tender of £8 8s. 8d. before issue of summons upon the said Beedle, or the said principal, re-polishing the organ as agreed.

Judgment was given for plaintiff, and for plaintiff in reconvention for the sum of £21 11s. 4d.

No order as to costs.

The following were the reasons given by the Assistant Resident Magistrate:

I found that the organ was Heydenrych's property, and that he had employed Beedle as his agent to sell, and that the organ was at the time of the sale in Beedle's possession. I found however, that Beedle did not disclose his principal but led Woolven to believe that he (Beedle) was the actual owner of the organ.

It appeared to me that under these circumstances Woolven had the right to set off against Heydenrich any counterclaim that he might have acquired against Beedle.

I found that Woolven had established his counterclaim as pleaded, little or no evidence having been led to rebut it.

The counterclaim was for £21 11s. 4d., for services rendered, etc., and I found this to be within the jurisdiction of this Court inasmuch as, Heydenrych having been found to been entitled to sue, and a tender of the difference as between his claim and defendant's counterclaim against Beedle having been pleaded, defendant virtually admits the claim in convention and the sum of £8 8s. 8d., is really the only matter in dispute. The defendant during the hearing withdrew the condition as to polishing again, &c., from his tender.

I did not consider that plaintiff, in view of the action of his agent Beedle, and of his long delay in making any claim on Woolven, was entitled to costs.

Mr. McGregor appeared for the appellant.

Mr. Graham for the respondent.

Mr. McGregor: The principle of set-off is clear, but there is a complication here of Beedle & Co. and Beedle. Beedle was floated into Beedle & Co. after the organ was built; it is not clear whether it was before the organ was sold. Beedle & Co. owed money to Woolven and he bought the organ in order to set-off with them. Beedle also owed some money to him. So much inquiry being necessary to show whether Beedle or Beedle & Co. owed the money militates against the view that this is a clearly liquidated counter-claim. *Compensatio* can come only from the person entitled to set-off, it cannot be shifted about from one person to another. The account in this case is very like that in *Brett* v. *Soliman* (4 Juta, p. 6); *Hollandse Consultaties* (1, 274).

[Maasdorp, J.: Was not Beedle the original creditor?]

This is not clear. The judgment as to the £21 11s. 4d. is beyond the jurisdiction and void.

Mr. Graham: The Magistrate found that the transaction was between Beedle and Heydenrych —not Beedle & Co. The money was due to Woolven from Beedle. Where a person sells for an undisclosed principal the purchaser can set-off any amount due from the agent. *Fish* v. *Kempton* (7 C.B., p. 687). The purchaser may have bought for the express purpose of setting off the debt. This is what he did here. *Broom's Common Law* (Lib. Ed., p. 587); *Paley on Principal and Agent* (p. 141); *Dixon* v. *Henley* (4 Ch. Div., p. 133); *Biggs* v. *Evans* (Q.B.D. 1894, p. 88). The organ was put into order by some other person but Beedle undertook to put it in order.

[De Villiers, C.J., referred to *Voet* (16, 2, 10.)]

Mr. McGregor in reply.

The appeal was dismissed with costs.

De Villiers, C.J.: The plaintiff sued the defendant for the sum of £30 being the price of an organ alleged to have been sold by the former to the latter. The defence was that the organ was in fact bought from one Beedle who at the time owed the defendant the sum of £21, and that the defendant was entitled to set off this debt against the claim for £30. To the plaintiff's statement that Beedle was his agent in the sale of the organ, the defendant's answer was that he was not aware at the time of his purchase that the plaintiff was the real seller. The evidence supports the Magistrate's finding that the defendant believed he was buying from Beedle, and the question, therefore, arises whether a person purchasing from the agent of an undisclosed principal without knowledge of the agency is entitled to set off against the price a

debt owing by such agent. There is no direct authority upon this point, but upon every principle regulating the dealings of third persons with the agents of undisclosed principles the set off ought to be allowed. It may well be that if the debt had been owing by the plaintiff and not by the agent, the defendant, upon being sued by the plaintiff, as the undisclosed principal, for the price of the organ, might have set off the debt against the price, but it by no means follows that he is not entitled to set off the debt, which is in fact due by the agent against the price of the organ sold by the agent in his own name. Even in the case of a cession of a debt the debtor may, according to Pothier (Oblig section 596), oppose to the demand of the cessionary not only what is due from such cessionary, but also what is due from the original creditor, provided the debt was contracted by such original creditor before the debtor had notice of the cession. In the cases upon which the opinions of eminent jurists are reported in the Dutch Consultations (Vol. 1 c. 274 and Vol. 3 c. 8), the purchasers knew that they were dealing with agents and it was held that third parties dealing with the agents could not set off, as against the principals, debts owing by their respective agents. The passage in *Voet* (Comm. 16, 2, 11) citing these opinions, clearly shows that, according to his view also, set off is not allowed where an agent has sold not in his own but in his principal's name (*non in suo sed proponentis nomine*) and has on the other hand himself become a debtor of the party to whom he had thus sold. The inference is obvious that the set off must be allowed where the existence of the agency had not been disclosed. I am of opinion that the Magistrate correctly allowed the compensation in the present case and that the appeal must be dismissed with costs.

[Appellant's Attorney, V. A. van der Byl; Respondent's Attorney, A. P. Kenealy.]

ATTWELL & CO. v. PURCELL, YALLOP AND EVERETT. { 1897. Nov. 4th.

Magistrates jurisdiction. — Liquidated damages—Counter claim—Conditional payment—*Condictio indebiti.*

The purchaser of timber having had a dispute with the seller as to the quantity delivered, sent him a cheque in full settlement of his account. The seller cashed the cheque and kept the money but sued the purchaser in the Magistrate's Courts for the balance of the account, viz, £50. The defendant excepted to the jurisdiction and filed a counterclaim for an amount exceeding the original claim, being an amount paid by him in excess of the quantity actually delivered to him.

Held, *on appeal, that the Magistrate had properly allowed the exception. Money paid on condition that it should be accepted in full satisfaction of the creditor's demand may be recovered back on proof that it was in excess of the debt due.*

This was an appeal from a decision of the Acting Resident Magistrate of Cape Town in an action in which the appellants were plaintiffs and the respondents were defendants. The plaintiffs claimed £50, being the balance of an account for timber sold to defendants. The defendants excepted to the jurisdiction on the ground that the sum sued for was the balance of a total amount exceeding the jurisdiction, and that the quantity of timber alleged to have been delivered was disputed.

The defendants further pleaded the general issue, and specially that on the 30th April they tendered a cheque for £224 18s. 5d., that plaintiffs accepted and cashed the cheque, and then informed defendants that they treated the same as a payment on account, whereas it was, in fact, in full settlement of the account; they pleaded further a counter-claim for £53 9s. 9d., being over-payment in respect of the cheque in question, and further, that goods were not according to sample.

The Magistrate found that the counter-claim was a *bona fide* one, and exceeded his jurisdiction, and therefore dismissed the case with costs, giving the following reasons: I was of opinion that the cheque was handed by defendants to plaintiffs conditionally upon the latter accepting it in full settlement of all claims, and that under the circumstances it was competent by the former to sue for a refund of any amount in dispute, plaintiffs having cashed the cheque and used the proceeds. I hold that the counter-claim was a *bona fide* one, and that the amount in question exceeded the jurisdiction of this Court.

Mr. Innes, Q.C., for the appellants: The counter-claim is really one for damages for short delivery of timber. Our claim is for a liquidated amount. There is no admission of the £50 being due.

The Chief Justice: Can you recover the price as long as there is a dispute as to whether you delivered the articles?

Mr. Innes: There is no decided case in point. The evidence does not show how much is claimed for short delivery, and how much for quality. *Brett* v. *Soliman* (4 J., p. 86). The Magistrate should have decided the claim. The defendant could have raised the defence that the money was not due. *Smith* v. *Ramsbottom* (1878, p. 98); *Colonial Government* v. *Stevens and Hollingsworth* (J., 10 p. 140).

Mr. Justice Solomon: Then the Magistrate would have had to decide upon the same thing, that is, the counter-claim.

Mr. Innes: The counter-claim cannot be decided without evidence; the question is there raised as to what percentage of wastage there should be. The question what is a liquidated amount is very vague. *Kruger* v. *Van Veuren's Executrix* (J. 5, p. 162.)

Mr. Schreiner, Q.C., for the respondents: The counter-claim is really one for the recovery of money paid. There was a dispute as to £102 and it was an unlawful act to take the cheque which was given on condition and to carry it to account. The two things are so indissolubly woven together, that if one is liquid the other is also, if one illiquid so is the other. The Magistrate should try both or neither.

The appeal was dismissed with costs.

De Villiers, C.J.: This case is in some respects a peculiar one and differs from all the other cases in which the jurisdiction of Magistrates' Courts has been determined. The latest of these cases, *Dale* v. *Winships* (9 Juta, p. 509) exemplifies the effect of a counterclaim upon the jurisdiction of the Magistrate in regard to the original claim. In the present case the counterclaim is in excess of the jurisdiction and the appellants' contention is that inasmuch as the counterclaim is for unliquidated damages the Magistrate should not have refused to try the action. But the counterclaim was really to recover back from the plaintiff a sum of money, which is alleged to have been paid in excess of what is really due. A cheque was sent to the plaintiff for £224 in full settlement of the defendant's debt for timber supplied to him. The plaintiff cashed the cheque, but kept the money and treated it as payment in part only of his claim. Clearly then the defendant, who had made only a conditional payment, was entitled to recover back the excess which he had paid. If the plaintiff chose to keep the money as paid there may be a question whether he can recover the balance, but there can be no question as to his liability to be sued for any amount overpaid to him. A conditional payment cannot be regarded as a payment of money which can only be recovered by the *Condictio indebiti* if made in ignorance of some fact. The defendant would have been wiser not to part with the cheque without an acknowledgement from the plaintiff that the money was received in full satisfaction of the claim, but the plaintiffs' detention of the money cannot alter the terms upon which alone the defendant intended to part with his money. The excess which the defendant seeks to recover consists of sums charged for timber which the defendant says was never delivered to him. Such a claim is as much liquidated as the original claim for the price of the timber. To recover the price the plaintiff would have to prove that the full quantity was delivered. I am of opinion therefore that the Magistrate's judgment sustaining the exception to his jurisdiction must be affirmed and the appeal dismissed with costs.

[Appellants' Attorney, Mr. Gus Trollip; Respondents' Attorney, Mr. C. C. Silberbauer.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

MUNICIPALITY OF ALICE v. CRALLEN. } 1897. Nov. 5th.

Municipality—Suspension of Regulations—Act 45 of 1882, Sections 111, 112.

A municipal body published in the "Gazette" certain regulations, amongst which was the following: "The removal of the night-soil shall be made only by the officer or officers that may be appointed by the Council from time to time." Thereafter they gave notice that the regulation would stand over until a certain event. One of the ratepayers gave notice to the Town Clerk, in terms of the said regulations, that he required his night-soil removed.

Held, *that he could not recover from the Municipality any damages caused by their neglect to remove the same, inasmuch as the regulations were not intended to impose a duty upon the Municipality.*

This was an appeal from a decision of the Assistant Resident Magistrate of Victoria East in an action in which the respondent was plaintiff and sued the Municipality for £10 damages.

The summons set out that the plaintiff was the owner and occupier of certain premises at Alice; that the Municipality had framed certain additional regulations under the Municipal Acts of 1885 and 1893, which had been duly approved of and published in the "Gazette"; that one of such regulations was as follows: "The removal of night-soil shall be made only by the officer or officers that may be appointed by the Council from time to time:" that the plaintiff gave notice to the Town Clerk on the 23rd July in terms of the fourth paragraph of the additional regulations that he required a certain bucket to be removed from his premises, and tendered the sum of sixpence for the removal in terms of the regulations. That the defendants, though often requested, have neglected to remove the bucket.

The defendants admitted all the allegations aforesaid, except the last, as they had not put the regulations in force, and pleaded that the plaintiff was made aware of the fact before action.

The Town Clerk, in his evidence, stated that the Council had agreed that the additional regulations should stand over till the promulgation of the Health Bill, and that the resolution was officially published in the "Alice Times." The plaintiff had also had verbal notice to the same effect.

Judgment was given for plaintiff for £5 damages with costs, the Assistant Magistrate holding that the Council had no power, in face of sections 111 and 112 of Act 45 of 1882, to suspend the regulations without the sanction of the Governor.

Against this judgment the defendants appealed.

Mr. Schreiner, Q.C., for the appellant: The Council had discretion to appoint officers or not; they gave notice to respondent that the appointment would be withheld. He could have removed the night-soil himself, and if sued for breach of the regulations would have had a valid defence. *Volenti non fit injuria.* The summons did not allege any special damage.

Mr. Innes, Q.C., for the respondent: The questions in issue are, first, have these regulations the force of law and do they impose a duty on the municipality; and secondly, had the municipality discharged the duty. Act 45 of 1882, sections 111, 112. Byelaws passed under that Act have as much force as the Act itself. They impose a duty on persons, and do not merely confer upon the municipality the right of seeing that they are fulfilled; the effect of the regulation is to make it illegal for any person himself to remove night soil.

[De Villiers, C.J.: The use of the word "only" seems to show what was meant.]

That adds force to the argument that the municipality must appoint officers.

Mr. Schreiner in reply:

The appeal was allowed with costs.

The Chief Justice said: With respect to the Municipal regulations, I certainly incline to the view that they were intended to confer certain powers upon the Municipality, and not to impose duties upon the Municipality. The powers were conferred that the work of scavenging should be properly done, and not left to individuals, even of their own houses. If that is so, there is no liability on the defendant Council. If they choose to surrender these powers and give notice to the ratepayers, the ratepayers have no power to compel them to exercise them. It was quite impossible for any of the householders afterwards to sue the Municipality for the non-exercise of powers. But assuming that there was a duty upon the Municipality to remove the night-soil, Mr. Innes had to admit that if this duty was not exercised, and if the Municipality itself did not remove the night-soil, but allow householders, like the respondent in the present case, to do so, the latter would not have been liable to a prosecution. The Municipality could have prosecuted for a contravention of its regulations and if the man Crallen had been prosecuted for a contravention of the regulations, he would have had a good answer, namely, that the Municipality refused to do the work, and he was therefore compelled to perform the work. In my opinion that was the proper course. When the Municipality refused to do the work Crallen should have done it himself, and then, if there was that duty upon the Municipality, he would have had an action against the Municipality for any costs he would incur in removing the night soil himself. But what did he do? He continued to use the closet, and allowed his family to continue the nuisance. Having created the nuisance, and caused damage to his property, he now claims damages from the Municipality. Not being liable to prosecution, it was his duty to remove the nuisance. Under the circumstances the decision of the Magistrate can not be sustained, and the appeal must be allowed with costs.

Appellants' Attorneys, Messrs. Scanlen & Syfret; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

NICHOLSON V. MYBURGH. { 1897. Nov. 5th.

Lessor and lessee—Wilful holding over —Malicious trespass—Ejectment—Damages.

A lessee who wilfully or contumaciously holds over after expiration of the lease until ordered by a decree of ejectment to deliver occupation is liable to exemplary damages as for malicious trespass.

A lessor having become liable to a second lessee in damages for not being able to give possession of the premises in consequence of the first lessee wilfully holding over until ejectment, held, *that the lessor was entitled to recover such damages from the first lessee besides an amount equal to the rent for the period of such wrongful occupation.*

This was an appeal from a decision of the Resident Magistrate, Cape Town, in an action in which the respondent had obtained judgment for £5 10s. rent and £10 damages.

The respondent, the plaintiff in the Court below, was owner of certain premises situated at Green Point, and the present appellant occupied those premises as a monthly tenant. In the month of April she received notice to leave the premises on April 30, and failing to do so an action for ejectment was instituted against her on May 27. The decree of ejectment was granted, but execution was suspended until June 1. The action was brought by the respondent against the appellant for rent and for damages, £5 1 s. for rent and £11 15s. for damages. She occupied the house subject to a month's notice, but she retained possession of the house until the end of June. It appeared that the house, some time prior to April, had been let to a Mr Duncan, and by reason of the appellant not vacating the premises, complications arose because Duncan could not get admission to the house, and another man, Gandry, who, in turn, had taken a lease of Duncan's house, was in the same position. The prospective tenant not getting possession of the house, had to hire a room in which to store his furniture, had to board his servant out, and he himself had to live in a hotel. The damages he deducted from the rent of the house.

Judgment was given for the plaintiff as above.

Owing to the death of the Resident Magistrate of Cape Town before the appeal was heard no reasons for the judgment could be sent up to the Supreme Court.

Mr. Graham for the appellant: The form of summons is not correct. An action for rent cannot be brought as well as an action for damages. It should have been for one or the other. If sued for rent the defendant is no longer a trespasser. The damages are too remote. Gandry sustained no loss.

[De Villiers, C.J.: The principle is that only such damages should be given as might reasonably have been contemplated.]

That is laid down in *Hadley v. Bascendale* (9 Ex., 354); and has always been followed here. There is nothing to show notice to defendant that the lessor would suffer damage; nothing to show that he paid Duncan or that he admits any liability for his claim.

Mr. Searle, Q.C., for the respondent: The word 'rent' should not have been used in the summons; the claim is really for use and occupation and plaintiff is entitled to damages besides. Is the amount allowed too much; the whole sum might have been given either as damages for trespass or for breach of contract.

[De Villiers, C.J.: If sued for use and occupation is she not a tenant? how then can she be sued as a trespasser?]

In England there is an action for *mesne profits*. The matter is dealt with by Statute of Geo. II. It must have been in the contemplation of the parties that another tenant was coming in and that defendant would be liable for expenses incurred in arranging for him.

Mr. Graham in reply: *Voet* (19, 2, 3) and *Hollandse Consultatie* there cited.

The appeal was dismissed with costs.

De Villiers C.J.: The plaintiff has obtained judgment in the Court below for £5 10s. as rent and £10 as damages. If the summons had asked for the total amount as damages for the defendant's refusal to deliver up the premises at the end of the month for which she had received notice, it would have been quite in order. I do not however, consider the summons to be wholly bad by reason of its being made up of a claim for rent for the month of illegal occupation and for damages. The term "rent" is not strictly applicable seeing that the letting had ended. The real question is whether the amount awarded by the Magistrate is excessive. The sum of £5 10s. is admitted to be a fair amount for a month's use and occupation. As to the damages it appears that after the plaintiff had given the defendant notice to quit he let the house to one Duncan, but was unable to give

him possession owing to the defendant's refusal to leave. Duncan had to hire another house for part of the time and had to find board and lodging for himself and servant at an hotel for part of the time. He claims £10 as damages from the plaintiff and has deducted this amount from the rent subsequently payable by him for the premises. The claim appears to be a fair one, but if the plaintiff is to pay this amount to Duncan he clearly ought to be entitled to receive it from the defendant. The Court has not been favoured with many authorities as to the nature of a lessor's remedy against a lessee for refusing to deliver possession on the expiration of the lease. I find that under the Civil Law rule a lessee, who retained possession after action brought and until final judgment, was regarded as a malicious trespasser who might not only be ejected but condemned to pay to the successful party the value of the property (Cod., 4, 65, 33). *Voet* refers to this rule as having been adopted by the Dutch law to this extent that after litis-contestation the lessee is bound, besides delivering up the land, to pay to the owner one half of the value of the land and that, if he holds over until after judgment, he is bound to pay the whole value and damages sustained by the owner. *Voet* (19, 2, 32). The Placaats cited by Voet fully support his statement of the Dutch law. I am not aware that any South African Court has ever enforced the penalty for wrongfully holding over. But I have always understood that a person who wilfully or contumaciously holds over after the expiration of his tenancy is regarded in our law as a malicious trespasser from whom exemplary damages may be recovered. In the present case the defendant had no excuse for remaining in occupation in the premises after due notice to quit had been given. This Court would not, therefore, scrutinize too closely the exact measure of damages applied by the Court below if, on a consideration of all the circumstances, the amount awarded appears to be reasonable. It certainly appears to be eminently reasonable that the plaintiff should be allowed to recover from the defendant for the month's illegal occupation an amount equal to one month's rent, in addition to the damages of £10 for which the plaintiff has become liable to Duncan. The appeal must therefore be dismissed with costs.

[Appellant's Attorney, D. Tennant; Respondent's Attorney, Gus Trollip.]

DE VILLIERS V. STIGLINGH'S EXECUTOR. { 1897. Nov. 5th.

Will — Construction — "Children"— "Grand children" — Collaterals— Presumption – *Fidei-commission.*

A testator by his will appointed the "children" (kinderen) of his sister C. *as fidei-commissary heirs on the death of* W. *the fiduciary heir, and confined the interest of such fiduciary heir, to her lifetime and only for so long as she remained unmarried. After providing for seven sets of fidei-commissary heirs, the will directed that the capital inheritance shall be divided into seven equal parts and that to each "branch" a seventh part shall be paid.*

Held, *that although in the case of collaterals the presumption is against including grandchildren under the term "children," such presumption cannot prevail against other indications of the testator's intention to provide for the grandchildren as well as the children in the first degree of his sister* C.

This was a special case for the interpretation of a will.

The terms of the special case were as follows:

1. The plaintiff is Susanna Elizabeth de Villiers (born De Goede), widow of the late Isaac Adriaan Johannes de Villiers. The defendant is Johannes Henoch Neethling Roos, secretary of the Board of Executors, Cape Town, and as such executor testamentary of the estate of the late Andries Stiglingh who is sued in his said capacities.

2. The will of the said late Andries Stiglingh is in Dutch, and the following is a true translation of the clause material to this suit, the word "kinderen" being translated "children": "And now proceeding to the election of heirs, the testator declared to call upon, nominate, and appoint as his sole and universal heir, Miss Christina Sophia Willemse, and such to all the property movable and immovable, to be relinquished by him on demise, acts, and credits, inheritances, and expectances, nothing excepted, with this express condition and stipulation, however, that the whole inheritance which shall fall to her share shall be entailed

and burdened and remain under the bond of *fidei commissum*, as the same is by these presents entailed and burdened, with the following express condition and stipulation: that during her life, if she remains single after the death of the testator, but not otherwise, she shall enjoy and dispose of at pleasure only the interest or usufruct of the capital inheritance herein mentioned, and that after her (the said Christina Sophia Willemse's) death or marriage as aforesaid, the said capital inheritance shall then at once as free and personal property pass to and devolve upon the following persons, to wit: (1) Catharina Magdalena le Roux, now residing with testator; (2) the children of the testator's late brother, Michael Abram Stiglingh; (3) the children of the testator's late brother, Jacobus Hendrik Stiglingh; (4) the children of the testator's late brother, Hendricus Stiglingh; (5) the children of the testator's late sister Johanna Stiglingh, born of her marriage with Jacob Mostert (6) the children of the testator's late half-sister, Constantia Petronella Wilsnach, born of her marriage with Jan de Ville; (7) the children of the testator's late sister, Catherina Stiglingh, born of her marriage with Hermanus de Goede; and such *per stirpes* that is, that the capital inheritance shall be divided into seven equal parts, and to each branch a seventh part of the same shall be paid, by these presents substituting them all now for then as my heirs.

3. The plaintiff is a daughter of the late John Michael Stiglingh de Goede and Catharina Jacoba Susanna Greef who were married in or about the year 1837; the said J. M. S. de Goede was the son of Hermanus de Goede and Catherina Helena Stiglingh, married in or about the year 1813; the said Hermanus de Goede and Catherina Helena Stiglingh being the persons named in the seventh sub-section of the said clause in the said will.

4. The only child of the said Catherina Helena Stiglingh and Hermanus de Goede, who survived his mother, was the said John Michael Stiglingh de Goede, and he left issue him surviving, namely, the plaintiff and one son, Lourens Johannes de Goede, who died before the said Catherina Sophia Willemse, leaving one child now alive.

5. The plaintiff's father, the said John Michael de Goede, died after the said Andries Stiglingh, the testator, but before the said Christina Sophia Willemse. The said Willemse has recently died intestate and without issue.

6. The defendant has framed a liquidation account of the estate under the will of the late Andries Stiglingh, wherein nothing is awarded to the plaintiff, but to the heirs of the said Willemse is awarded the sum of £160 4s., of which sum she claims she is entitled to the half, namely, the sum of £80 2s.

7. The plaintiff contends: (*a*) That she is entitled to have it declared that she is one of the persons entitled to share in the distribution of the estate under the will of the late Andries Stiglingh; (*b*) that she is entitled to payment of the sum of £8) 2s., being a half-share of one-seventh of the estate.

8. The defendant contends that the "kinderen" or children of the testator's late sister, Catharina Stiglingh, born of her marriage with Hermanus de Goede, are, according to the true intent and meaning of the said will, only children in the first degree, inasmuch as such "kinderen" or children are not descendants from, but collateral relations of, the testator, and that, as no such "kinderen" or children survived the aforesaid Christina Sophia Willemse, the plaintiff is wholly excluded from sharing in the distribution of the estate bequeathed as aforesaid by the testator, which they contend has been rightly dealt with by the account to which the plaintiff objects.

Mr. Molteno for the plaintiff; Mr. Schreiner, Q.C., for the defendant.

Mr. Molteno: In *Pretorius* v. *Pretorius* (2 Juta, p. 296) it was held that the question was one of fact as to the testator's intention when he made use of the word "children." *In re Beck* (1 M., p. 332). The testator did not desire Sophia Willemse to have children; he cannot have intended her heirs *ab intestato* to succeed. He looked to the branches rather than to the individuals. The presumption that the term "children" is used in a restricted sense is rebutted by his words.

Mr. Schreiner: The Court has pointed out that where there are clear indications which have been ruled to have a certain meaning fresh words not used by the testator will not be imported. "orn of her marriage with Hermans de Goede" are most salient words. As to the meaning of "children," *McGregor's Translation of Voet* (3, 6, 1. 2, 2,) and the authorities mentioned there. Also *Spengler* v. *Higgs* (R. 1. p. 221) which was not quoted in *Pretorius* v. *Pretorius*. Voete J. restricted the term to children of the first degree. It is not consistent with *Pretorius* v. *Pretorius* but can be distinguished from it inasmuch as the marriage was an English one and if there was any disparity between the English and Roman Dutch law the former should prevail. In *Michau* v. *Michau* (11 S.C., p. 365) it was held that children included grandchildren. *Van der Keessell* (Th., 364). The presumption as to

"children" does not apply in the collateral line; there it is a contrary presumption and requires a strong declaration to rebut it; here, in order to give a contrary construction one must strike out the words "born of her marriage with Hermanus de Goede."

De Villiers, C.J.: The words "substituting them all now for then as my heirs" is a strong argument that the vesting should take place on the death of the testator and not at the death of the fiduciary heir. In that case John Michael Stiglingh de Goede's estate should be before the Court. We don't know whether the plaintiff is his heir. The words of the will are strong to vest the estate in Willemse. *De Geest's Executor* v. *De Geest's Executor* (4 Juta, p. 95); *Castleman* v. *Stride's Executors* (4 Juta, p. 28): *In re Zipp* (1878. p. 132); *Van Dyk* v. *Van Dyk's Executor* (7 Juta, p. 194). The property must remain with the fiduciary on the death of the fidei commissary before the fiduciary unless there are clear indications to the contrary. This is not inconsistent with *Strydom* v. *Strydom's Trustee* (11 S C., p. 425).

De Villiers, C. J.: The question is whether the testator, in appointing the "children" (kinderen) of his late sister Catharina, as fidei-commissary heirs, intended to include her "grandchildren." I agree with Mr. Schreiner that, in regard to collaterals, the presumption, in case of doubt, is against the construction which would include grandchildren among "children." But the presumption may be rebutted by indications of an intention to benefit both generations. The matter is fully discussed by *Voet* (36, 1, 22) and by Mr. McGregor in the interesting notes to his translation A careful perusal of the will now in question has satisfied me that the testator intended to use the word "children" in the widest sense of which it is legally capable. The testator is careful to limit the fiduciary heir's interest to her lifetime and only for so long as she remained unmarried, but if his sister's grandchildren are not to be regarded as "child en," the share intended for the latter might have to remain with the fiduciary heir as her full property. Then again we find that after providing for seven sets of fidei-commissary heirs the testator directs that the capital inheritance shall be divided into seven equal parts and that to each "branch" a seventh part shall be paid. The use of the word "branch" is suggestive as shewing that the testator intended to provide for the families of his sisters and brothers in all their ramifications. It is therefore no forced construction of the word "children" as employed by the testator, to hold that it was intended to include Catherina's grandchildren. Judgment must be given in terms of the plaintiff's contention and the costs must come out of the funds in the hands of the executor.

[Plaintiff's Attorneys, Messrs. Sauer & Standen; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

THOMPSON V. BARKLY EAST RINDERPEST COMMITTEE. { 1897. Nov. 5th.

Resident Magistrate's Court—Amendment — Summons — Exception — Misdescription.

One of the defendants in an action in a Magistrate's Court having been described in the summons as "Civil Commissioner" instead of "Resident Magistrate" the defendants excepted to the summons by reason of such misdescription. The Court sustained the exception and refused to allow an amendment applied for by the plaintiff.

Held, *that the amendment ought to have been allowed in the absence of any proof that the plaintiff would have been prejudiced thereby.*

A person who commits a delict or tort or procures its commission is personally liable to the injured party even although he acted in a representative capacity.

An action having been brought against the members of a rinderpest committee for the illegal destruction of the plaintiff's dog, the defendants excepted to the summons on the ground that they could not be sued "personally and individually."

Held, on appeal, *that the exception ought not to have been allowed.*

This was an appeal from a decision of the Assistant Resident Magistrate of Barkly East in an action in which the present appellant, the plaintiff in the Court below, sued the respondents for £10 damages.

The summons cited Douglas Archibald Campbell (Civil Commissioner for the division of Barkly East), Carl Johannes van Pletsen, Benjamin Norton, Johannes Daniel Naude, Coenraad Johannes Neethling Visser, and George Gough Wallace, in their capacity as members for the time being, and as such composing the

local Rinderpest Committee for the district of Barkly East, thereto duly appointed as by law directed and required, and the last five defendants individually, the one paying the other to be absolved, to answer the plaintiff, who claimed £10, being damages alleged to have been sustained by the action of one Gert Kleynhans, a rinderpest guard, in the employment of the defendants, in killing, on the 28th June, 1897, a fox-terrier bitch, the property of the plaintiff.

The defendants' attorney, before the hearing of the case, put in powers signed by D. A. Campbell as Civil Commissioner of Barkly East and as Resident Magistrate, and in his capacity as chairman of the local Rinderpest Committee of Barkly East for the time being; also powers given by Messrs. Naude and Visser.

The plaintiff's attorney excepted to the authority of the chairman of the committee, inasmuch as he was not legally entitled individually to appear and defend on behalf of the defendants, the local Rinderpest Committee. This exception was overruled.

The defendants' attorney filed the following exceptions:

1. That Douglas Archibald Campbell, Civil Commissioner, has been summoned as member of the local Rinderpest Committee, when in fact as Civil Commissioner he is not a member thereof at all.

2. That Douglas Archibald Campbell is not sued in any representative capacity as required by law, he being simply described as Civil Commissioner.

3. That Douglas Archibald Campbell, in his capacity as Resident Magistrate, Barkly East, and as such chairman of the local Rinderpest Committee, and a member of the same, should have been joined in this action with the other defendants.

4. Excepts to that portion of the summons in which the defendants are sued personally and individually.

Mr. Campbell, Civil Commissioner, was then called, and he produced the "Government Gazette" of the 8th June, 1897, containing Government Notice 478 of 1897, which provides for the constitution of the local Rinderpest Committee for Barkly East, and that the Resident Magistrate shall be chairman and convener. He also produced Proclamation 189 of 2nd July, 1897.

The plaintiff's attorney then applied to have the words "Resident Magistrate" inserted in the summons in stead of "Civil Commissioner."

This application was refused, on the ground that to have allowed the amendment would have condoned the laxity in which the summons was framed.

The Magistrate relying, as he stated in his reasons, on *Hudson* v. *Cozens* (1 Menz, 126) and *Hoone* v. *Balstone* (November, 1870), sustained the first three exceptions and allowed the fourth to stand over for ruling until evidence had been heard and the merits of the case gone into.

The Court then called upon the plaintiff's attorney to proceed with his case against all the defendants except the Civil Commissioner. This the plaintiff's attorney declined to do, inasmuch as Mr. Campbell's name had been removed from the record by virtue of the exception. The Magistrate then sustained all the exceptions, and ordered the plaintiff to pay the costs.

From this judgment the plaintiff now appealed.

Mr. Buchanan was heard in support of the appeal.

Mr. Sheil (Acting Attorney-General) for the respondents.

Mr. Buchanan: The Committee were appointed under Act 2 of 1897, section 6. There is no regulation giving them power to destroy dogs. Act 12 of 1897, section 4, enacts that no committee or member or officer of any committee shall be personally liable for any act *bonâ fide* done in the performance of functions, &c., nor shall the Government be liable, but this act was done wrongfully and unlawfully; if they acted within the scope of their functions the Government would be liable up to a certain point; if not the committee are liable as joint tortfeasors and should be sued in the ordinary way.

Mr. Sheil: The Magistrate would have been better advised if he had allowed the amendment. The fourth exception is a good one because the plaintiff should have alleged that the act was done *malâ fide*. That exception is really a plea and what was meant was that the defendants were protected by Act 12 of 1897. An act may be illegal but may at the same time be *bonâ fide*. However the case goes no order should be made as to costs, as the plaintiff's attorney should have adopted the Magistrate's suggestion and gone on with the case against all the defendants except Mr. Campbell, all the defendants being tortfeasors and individually liable.

Mr. Buchanan: The defence of *bona fides* can only apply when the Committee are acting under regulations properly proclaimed.

After argument,

The judgment of the Magistrate was reversed, and the case was remitted to the Magistrate to decide upon the merits; the costs to abide the result.

De Villiers, C.J.: The Court below ought to have allowed the amendment in the absence of any proof that the plaintiffs would have been prejudiced thereby. The amendment proposed by the plaintiffs was simply to correct a misdescription of the first defendant, in the summons, by substituting "Resident Magistrate" for "Civil Commissioner." The illegal act alleged to have been performed by him and his co-defendants was that of shooting the plaintiff's dog, and it was in his capacity as "Resident Magistrate" that he became a member of the Rinderpest Committee. The Court below therefore erred in sustaining the three first exceptions. The 4th exception was that the defendants could not be sued "personally and individually" for an illegal act authorised by them in their public capacity as members of the Rinderpest Committee. The illegal act charged is in the nature of a delict or tort and not breach of contract, and I have always understood that a person who commits a tort or procures it to be done is personally liable, even if he acted in a representative capacity. Even if it were a defence that the defendant's acted *bonâ fide* in performance of a public duty such a defence should have been raised by a plea and not by way of exception to a summons which charges the commission of an act which is *primâ fide* wrongful and unlawful. I am of opinion therefore that the 4th exception ought not to have been sustained. The appeal must be allowed and the case remitted for trial on its merit, the costs abiding the result.

[Appellant's Attorneys, Messrs. Scanlen & Syfret; Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice MAASDORP and the Hon. Mr. Justice SOLOMON.]

BEKKER v. VAN HEERDEN. { 1897. Nov. 9th.

Contract of apprenticeship—Breach of contract Damages—Minor—*Bona-fide* counter-claim—Jurisdiction—liquidated demand—set off.

In an action in a Magistrate's Court for an amount within the jurisdiction the defendant filed a counter-claim for a liquidated demand exceeding £20 and excepted to the jurisdiction. The counter-claim being on the face of it unreasonable and founded upon an illegal transaction, held that it had not been made bona fide *and that the Magistrate rightly dismissed the exception.*

An apprentice who had been duly apprenticed by his father to the defendant, on condition, among others, that he should be instructed in the Christian religion and the English language and should not be assigned to any other employer without the father's consent, held entitled, on becoming of age, to obtain damages from the defendant for breach of contract.

The defendant having, after the death of the father and without the consent of the mother who survived, transferred the plaintiff to the Government as Rinderpest guard, which duly involved his absence from the defendant's home and the utter neglect of his education, received part of the salary payable to the plaintiff as such guard and by his counter claim demanded the balance which the plaintiff had received.

Held, *that the counterclaim was on the face of it unreasonable and founded on an illegal transaction.*

This was an appeal from a decision of the Resident Magistrate of Albert in an action in which the respondent sued the appellant for £20 damages, for breach of contract.

The summons alleged that on the 14th December, 1891, the defendant entered into an agreement of apprenticeship with the plaintiff's father, according to the terms of which the defendant undertook to instruct or cause the plaintiff to be instructed in the Christian religion and the English language to the best of his ability, but that he had failed to do so. Further, that he undertook not to assign and transfer the plaintiff while in his service to any other person, but that he b oke this stipulation by transferring the plaintiff to the Colonial Government, by whom he was used as

a rinderpest guard for five months, during which time he suffered great hardship and privation, and that the remuneration given by the Government to the plaintiff was drawn by the defendant for his private purposes. The defendant put in a counter-claim, showing £77 10s. due to him, as being the pay earned by the plaintiff as rinderpest guard for five months and six days; £11 5s., being the value of a horse and saddle belonging to him and sold by plaintiff; and £4 4s., being money advanced by him on plaintiff's behalf. From these amounts were deducted £46, rinderpest pay received by him from plaintiff, and £13 allowance to plaintiff for food whilst on rinderpest duty. The counter-claim, after these deductions, stood at £33 19s., and the defendant objected to the jurisdiction of the Court. The Magistrate proceeded to take the evidence of the defendant and his witnesses on the counter-claim, and also that of the plaintiff. He then found that the claim for £77 1 s. was not a *bona-fide* one, "seeing that it was an illegal contract, and inconsistent with the terms of the indenture"; he found that the other items were claimed *bona fide*, but as they did not together oust the jurisdiction the defendant might claim them in reconvention. He then went into the merits of the case, and gave judgment for plaintiff for £10, and dismissed the claim in reconvention with costs.

The Magistrate, in his reasons, stated that the £4 4s. was never intended to be claimed by the defendant, but was expended in his own interests, and that the £11 5s. had been compensated by the payment of the £46 received by defendant, £16 of which had been paid since the liability of £11 5s. accrued. He held that the £46 had been paid under an illegal contract, which was to the benefit of defendant and not of the plaintiff.

He held further that the plaintiff had not received the education which his position entitled him to, and that the defendant had departed from his contract and abused his trust.

Mr. Searle, Q.C., for the appellant.

Mr. Innes, Q.C., for the respondent.

Mr. Searle: There is no breach of contract, the transfer and assignment referred to in the contract are not such as sending him on rinderpest guard. The plaintiff was in appellant's service and in touch with him all the time. The rinderpest employment was only a temporary service; the plaintiff was in a manner sublet. As to jurisdiction, the Magistrate could not go into the counter-claim; therefore he could not go into the merits. The claim is decidedly liquidated. *Theron* v. *Tiffin* (6 Sheil, p. 305).

[De Villers, C.J.: Is not the counter-claim fictitious in the face of it? Did appellant ever make the claim before?]

On the respondent's own evidence he had claimed it before.

[De Villiers, C.J.: A claim may be so monstrous as to justify the Magistrate in dismissing it at once.]

Brady v. *Michiel* (3 Juta, p. 178). The Magistrate should not have gone into the merits of the counter-claim at all, but he called a great deal of evidence upon it. The respondent has proved no damage owing to want of instruction or suffering privations.

Mr. Innes, in reply to the Court, undertook that the respondent would not proceed further against the appellant for the moneys received by him.

Mr. Searle: The respondent has suffered no damage through being put on rinderpest guard; on the contrary, he has benefited to the extent of £30 or £40.

De Villiers, C.J.: An exception to the Magistrate's jurisdiction was taken on the ground that the defendant had a liquidated counterclaim against the plaintiff in excess of such jurisdiction. The action was for damages for breach of the covenants of a contract of apprenticeship, which during the plaintiff's minority his father had entered into on his behalf with the defendant. The covenants were that the defendant would teach and instruct the plaintiff in the trade of a general servant, as also in the Christian religion and the English language to the best of his ability, and should provide suitable meat, drink, clothing, washing, and all other things necessary; and also that he should not assign or transfer the apprentice to any other person whatsoever, without the consent of the father in writing. By his counterclaim the defendant claimed the balance of salary, which the plaintiff had received from the Government as a rinderpest guard, the defendant having, during the currency of the apprenticeship, transferred the plaintiff's services to the Government. The plaintiff received part of the salary and the main object of the counterclaim was to recover the amount back from him. The Court below found that the counter-claim was not made *bona-fide* but with the view to oust the jurisdiction. The ground on which this finding was based was that the transfer of the minor's services to the Government was on the face of it unreasonable and illegal. I willingly confess that I have no fault to find with this part of the judgment. The father wished his son to

be instructed as a general farm servant and to be taught the Christian religion and the English language. The master to the obvious detriment of the boy's education sends him away from home to do police duty, contrary to the express terms of the contract, and then claims that the salary paid to the boy shall be refunded to him. Even if there had been no covenant against transfer of the plaintiff's services I should have been prepared to hold that the sub-letting of his services, as if he were part of the defendant's goods and chattels, for quasi-police duty, was unreasonable and illegal, and that consequently a counter-claim founded upon such a transaction was on the face of it not a *bona fide* claim. The Magistrate further held that there had been a breach of contract on the defendant's part for which he awarded the sum of £10 as damages. Upon this point also the judgment must be affirmed. Spasmodic attempts had been made to teach the child something of the Christian religion and of the English language but when it was found that he was not a very ready or willing scholar no further attempts were made. Then as to the transfer of his services, which constitutes one of the breaches of contract complained of, it is admitted that the mother's consent was never obtained. At that time the father was dead but the mother was alive and, without her consent, the plaintiff should not have been assigned to rinderpest duty. It is said that he was willing. Perhaps he was; he would probably prefer the excitement of such work to the drudgery of a farm. But it was not the work which his father intended for him or which he himself afterwards found to have been for his benefit. The damages awarded appear to me to be supported by the evidence and the appeal must be dismissed with costs.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Walker & Jacobsohn.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

LEICESTER CONSOLIDATED MINES v. COLONIAL GOVERNMENT. { 1897. Nov. 10th.

Stamp acts—Taxation—Construction—Scrip certificate—Share certificate—Payment under protest.

No stamp duty is payable under Tariff 16 of Act 20 of 1884, in respect of certificates issued by any company and stating that the person therein named is the registered owner of specific shares in such company.

This was a special case, stated for the decision of the Court in the following terms:

1. The Leicester Consolidated Diamondmines is a joint stock company, having a capital of £5'0, C0 in 5 0,1'0 shares of £1 each. The company was duly registered on the 30th June, 1896, with limited liability under Act 25 of 1892, and has its head or registered office in Kimberley.

2. The defendant is the Treasurer of the Colony, and as such is the proper person to be sued.

3. The plaintiff company, during the year 1896, and after its registration, issued to each allottee of shares in the company whose name had been entered on its register of members, required to be kept by Act 25 of 1892 at its registered office, with the particulars required by section 76 of that Act, certificates under its common seal specifying the share or shares in the capital stock of the company of which such allottee was the registered proprietor. The said certificates were in terms of the company's articles of association, signed by its proper officials. A form of the said certificates marked A is annexed for reference.

4. Tariff 16 of Act 20 of 1884 provides that stamps to the amount of 3d. for every £10 of subscribed capital, or fraction thereof, shall be affixed to "every scrip certificate, scrip or share (new scrip certificates without change of proprietorship excepted), (*a*) entitling any person to become the proprietor of any share in any company or proposed company, (*b*) issued or delivered in the Colony, and entitling any person to become the proprietor of any share in any Colonial or foreign company, or proposed company."

5. The Civil Commissioner of Kimberley, under the aforesaid tariff, claimed from the plaintiff company that the certificates referred to in paragraph 3 must, prior to their issue, as aforesaid, have affixed to them stamps to the amount of 3d. for every £10 of subscribed capital, or fraction thereof, on the face of the said certificates.

6. The plaintiff company involuntarily and under protest, and after notice to the said Civil Commissioner that the amount hereinafter mentioned would be re-claimed, affixed to the said certificates the stamps required by the said Civil Commissioner. The amount paid by the plaintiff company for such stamps is £394 0s. 6d., as will be more clearly seen on reference to the account annexed and marked B, which shows the dates on which the several payments making the total of £394 0s. 6d, were made.

7. The plaintiff company contends that the said certificate is not a document requiring to be stamped, and that it is entitled to recover from the defendant the sum of £394 0s. 6d., with interest at 5 per cent. on the amounts making up that sum, as shown in account B, from the dates specified in that account on which the several amounts were paid.

8. The defendant contends that the said certificate is a document which had to be stamped under the aforesaid tariff referred to with the stamps which are affixed to them, but admits that if this contention is not upheld the plaintiff company is entitled to recover from him the amount of £394 0s. 6d., with interest thereon as aforesaid.

Wherefore the parties pray for the judgment of this Honourable Court upon their respective contentions and on the question of costs.

ANNEXURE A.

Certificates of shares in the Leicester Consolidated Diamond Mines Limited.

Incorporated under the Companies Act, 1892, of the Cape of Good Hope.

Capital: £500,000 in 500,000 shares of £1 each.

This is to certify that of is the registered proprietor of fully paid shares of one pound sterling each, numbered from to inclusive, in the capital stock of the Leicester Consolidated Diamond Mines, Limited, subject to the articles of association and the rules and regulations of the said company.

Given under the common seal of the Company at Kimberley, South Africa, this day of 189 .

Secretary.

Directors.

I of do hereby cede, assign and transfer all my right, title and interest in and to the within shares of the Leicester Consolidated Diamond Mines, Limited, numbered to inclusive, unto of his executors, administrators and assigns, subject to the several conditions on which I held the same at the time of execution hereof.

Dated at the day of

Witness:

Transferor.

Registered this day of

Secretary.

Mr. Solomon, Q.C. (with him Mr. Schreiner, Q.C.), for the plaintiff company: The only provisions of the Stamp Acts bearing on the question are section 5 and tariff 16 of Act 20 of 1884. The latter is taken from the English Stamp Act of 1870, re-enacted in 1891, and is in the same language except that in the English Act the words are "scrip certificate, scrip or other document." There do not appear to be any judicial decisions on the point, but certain well-known text-books dealing with the Joint Stock Companies lay down that no stamps need be affixed to share certificates such as this. *Palmer's Company Law* (5th ed., p. 400); a scrip certificate does require stamps.

The Chief Justice: Why is the word "share" substituted in our Act?

Mr. Solomon: The only effect is that it is not so sweeping as the English Act; but the important part is the adjectival clause "entitling any person to become the proprietor" A share certificate is merely a solemn affirmation of the company under its seal that the person named is the holder of certain shares. The procedure is to make application for shares: then a letter of allotment is sent, which in effect simply constitutes a contract between the company and the allottee giving the latter a *jus ad rem*; then before he is a member of the company his name must be entered on the register of members as provided by sections 73, 74. As soon as his name is on the register, he is the proprietor of the shares placed opposite his name. The certificate issued by the company does not entitle the holder to become proprietor.

Mr. Justice Solomon: Can he transfer the shares without a share certificate?

Mr. Solomon: He could transfer by a separate document.

Mr. Justice Maasdorp: Would a company be satisfied with any other document but a share certificate?

Mr. Solomon: They probably would but they are not bound to issue them; there is nothing in the Act to compel them to do so but they issue them in order to prevent fraud; great

complication would ensue if transfer was made without a share certificate. Section 88 m kes the register of members *primâ facie* evidence of any question by the Act directed or authorised to be inserted therein. In *Shropshire Union Railway and Canal Co.* v. *The Queen and Robson* (L.R. App., Ca. 7, p. 496), Lord Cairns said "a certificate of shares is merely a solemn affirmation under the seal of the company that a certain amount of stock stands in the name of the individual mentioned in the certificate." It is clear the certificates in question could not entitle the persons to whom they were issued to become proprietors because they already were so. Moreover share certificates are not negotiable instruments like scrip certificates and do not by mere delivery pass the property in the shares. *Sweet's Dictionary* defines scrip or scrip certificates as "an acknowledgment by the projectors of a company that the person named therein (or more commonly the holder) is entitled to a certain specified number of shares. It is usually given in exchange for the letter of allotment and in its turn is given up for the shares which it represents."

The Chief Justice: That is the proper legal meaning, but I think any broker here would call these certificates "scrip."

Mr. Solomon: *Jordan and Gore Browne's Handy-book on Joint Stock Companies* (p 75). *Fitzpatrick and Forbes* (3rd ed., p. 100). A share certificate can not be issued to bearer; a scrip certificate is; again, a share certificate cannot be issued with regard to shares in a proposed company—a scrip certificate can. "Scrip or share" in the clause of the tariff have no special value; they are synonymous with "scrip certificate." *Regina* v. *Glen* (4 Juta, p. 498) is at first sight against me, but the argument used by the Chief Justice is in my favour. *McGregor's Trustee* v. *Silberbauer* (9 Juta, p. 36).

Mr. Justice Solomon referred to section 69 of Act 25 of 1892.

Mr. Solomon: The Legislature may have put a wrong construction upon Act 20 of 1884; but in any case no provision of Act 25 of 1892 can be held to interpret Act 20 of 1884, or to increase the burden cast by that Act upon the subject.

Mr. Sheil (Acting Attorney-General) for the Government: The scrip certificate referred to in Act 20 of 1884 is the certificate attached to this case; that is the only document not otherwise provided for. Our law does not know anything of share certificates. The intention of the Legislature was to tax shares. Section 82 of Act 25 of 1892 recognises that a certificate under the company's seal, specifying any shares held by any member of the company shall be *primâ facie* evidence of his title to the shares. If the company refused to give the holder any shares he would then come to the Court armed with this title, and the Court would compel the company to give him shares. He has not the shares themselves, only a *jus ad rem*, and this is his title to them. Shares have always been recognised as movables (*McGregor's Trustee* v. *Silberbauer*). If the holder of this scrip were to assign it his assignee would have a good title. The only other document to which this tariff could refer is what is known in England as a scrip certificate. It is admitted that it is obsolete, and this Act having been passed as recently as 1884 could not have referred to something obsolete. The plaintiff's contention would make section 69 a nullity. In *Regina* v. *Glen* if the transaction had not been a transfer the full duty would have been held payable. Registration in the company's books does not by itself entitle a person to shares.

Mr. Solomon: The persons liable on winding-up of a company are the persons on the register. If an individual is not already on the register a share certificate cannot entitle him to shares.

The Chief Justice: In *McGregor's Trustee* v. *Silberbauer* the Court appears to have held that the transfer of the scrip passed the ownership of the shares independently of registration.

Mr. Solomon: That was a case of cession of action. In this case it is admitted that the persons to whom the certificates were issued were the original allottees.

Judgment was given for the plaintiff with costs.

De Villiers, C.J.: I confess it is with great reluctance that I have come to the conclusion that the plaintiffs' contention must be sustained. Hitherto stamps have been affixed, without any objection, to documents like the one in suit, and now, for the first time, the question is raised whether the stamp duty can be legally demanded. The plaintiffs have affixed stamps to the value of £394 to certificates stating that certain persons are proprietors of so many fully paid shares of one pound each (specifying the numbers) in the capital stock of the plaintiff company, but, as the stamps were affixed under protest, it is admitted that, if the duty could not be legally demanded by the Government, the plaintiffs may now recover the amount. Tariff No. 16 of Act 20 of 1884 provides for a stamp duty of three pence for every £ 0 of subscribed capital in respect of "every scrip certificate, scrip or share (new scrip certificates without change of proprietorship excepted) (*a*) entitling any person to become the proprietor of any share in any company or

proposed company (*b*) issued or delivered in the Colony, and entitling any person to become the proprietor of any share in any colonial or foreign company or proposed company." If the sentence had stopped with the word "excepted," the defendant's contention would have been, undoubtedly correct, for the term "share" would have been wide enough to embrace the certificates now in question. But the concluding words of the sentence were clearly intended to limit the application of the first part. Only such documents as "entitle any person to become the proprietor of any share" are specified and it would be contrary to every rule of interpretation to extend the stamp duty to documents which do not fall within the specific definition thus given. A certificate that a person is a proprietor of shares cannot be classed among certificates that a person is entitled to become such proprietor. The best test of proprietorship is the register of members which companies are bound to keep under the 76th section of the Companies Act 1892. This principle is recognised by the 10th article of association of the plaintiff company, which provides that the company shall be entitled to treat a registered holder of any share as the absolute owner thereof. The share certificate is of course indispensable to the shareholder as his proof of ownership and as a means of transferring his interest to others. It does seem an anomaly that such a certificate should escape duty whilst scrip certificates, which are almost obsolete, should alone be liable. The probability is that no duty was originally placed on share certificates because it was assumed that scrip certificates had first been issued with the stamps affixed. The scrip certificates then became practically obsolete because of the duty, whilst the Legislature was not astute enough to provide for the imposition of a duty on the only documents which were now issued in respect of shares. But whatever the explanation might be of the anomaly it can only be removed by the Legislature. As the law stands, the duty could not be lawfully imposed on the certificates now in question, and the judgment of the Court must be accordingly with costs for the plaintiffs.

[Attorneys for the Company, Messrs. Van Zyl & Buissinné; Attorneys for the Government, Messrs. J. & H. Reid & Nephew.]

Ex parte WELT. { 1897. Nov. 10th.

Mr. Graham applied for an order restraining Morits Eilenberg from parting with a certain promissory note alleged to be in his possession. The application was made, he explained, on behalf of Martha Welt, of Tulbagh, whose husband had left for Europe, and against whom an action for divorce had been instituted. She had on the 12th October last obtained leave to sue him by edictal citation, and to attach certain property at Tulbagh to found jurisdiction. The parties were married in community of goods, and it was averred that when the husband left the Colony he had property to the value of £5,000, most of which could not now be accounted for. It was believed that Eilenberg had been the channel through which the bulk of the estate had been sent to Europe. He was in possession of the note in question, which belonged to the estate, and it was believed that it was about to fall due. Application was now made to allow of steps being taken to prevent anything being despatched by that afternoon's mail.

The order was granted, to be served upon Eilenberg, with leave to him to move for the discharge thereof.

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

PROVISIONAL ROLL.

DYER AND DYER, LIMITED V. ALEXANDER. { 1897. Nov. 11th.

Mr. Buchanan applied for judgment under Rule 329 for the sum of £99 11s. 2d. for goods sold and delivered, with costs.

The application was granted.

HARCOMBE BROS. V. DE KOCK AND ANOTHER.

Mr. Gardiner applied for judgment under Rule 329 for £414 and for £8 14s. 9d., for goods and balances due on goods sold and delivered.

The application was granted.

REHABILITATIONS.

Mr. Currey applied for the rehabilitation of the estate of Daniel Elija Krynauw. He mentioned that the applicant had kept no books.

The application was refused, leave being given to apply again in six months.

Mr. McGregor applied for the rehabilitation of the estate of Gert Paulus Nel.

The application was granted.

Mr. Gardiner applied for the rehabilitation of the estate of Harris Kelman and George Bernstein, who formerly traded together at Calvinia. Their books, it was stated, had been kept in Hebrew, and kept to the best of their ability.

The Chief Justice said: If foreigners, the applicants are Russians, wish to trade in this colony they must keep books understandable by the people of this colony. I do not consider the explanation satisfactory, seeing that there are very few Hebrew scholars in the Colony. The application will be refused, with leave to apply again in six months.

Mr. Gardiner applied for the rehabilitation of the estate of David Frederick van der Merwe.

The application was granted.

GENERAL MOTIONS.

COLONIAL GOVERNMENT v. ROSSELL.

Mr. Sheil applied for leave to attach certain landed property to found jurisdiction, and for leave to sue by edictal citation.

The application was granted, the order returnable on the first day of next term. Personal service if possible, failing which service on Mr. Cranswick, receiver of defendant's rents, and a publication in a newspaper.

In re LILIAN ATTWELL.

Mr. Jones moved that the rule *nisi*, granted on the 13th September, calling on Lilian Attwell and her *curator ad litem* to show cause why a curator should not be appointed to manage her property be made absolute. The petition of the mother of Lilian Attwell stated that the latter was entitled under the will of her father to a certain legacy, for which it was necessary that she should sign receipts before the accounts of the executors could be passed by the Master; that her daughter was not insane but childish, and incapable of signing the receipts.

Mr. Joubert appeared as *curator ad litem*, and said that he was unable to oppose the application.

The Court granted an order that the said L. Attwell was incapable of managing her affairs, and appointed her mother and Mr. G. B. Attwell curators.

In re WALKER'S EXECUTORS v. EKSTEEN'S EXECUTRIX. *Ex parte* VAN EEDEN.

1897. Nov. 11th.

Practice—Substitution of fresh plaintiff on record.

Where a plaintiff had obtained a judgment, but before putting it into execution, had had his claim settled by a third person, to whom he gave a cession of his rights, the Court, with the consent of the original plaintiff, allowed the cessionary's name to be substituted for his on the record.

This was an application by F. G. van Eeden for leave to substitute his name as plaintiff in lieu of the executors of the late George Walker, in the action against the executrix of Eksteen's estate, with authority to take up and continue the proc edings for a sale in execution at the stage at which they were dropped, and to recognise Messrs. Van Zyl & Buissiuné as attorneys on the record in lieu of Mr. G. M. Walker. The affidavit of applicant's attorneys set out: That about the 13th February, 1896, the executors of G. Walker obtained judgment against the estate of J. A. Eksteen for £192, and interest upon a mortgage bond, and that the property mortgaged was declared executable; that a writ issued and the proper proceedings having been duly observed, the property was advertised for sale upon the 6th of June, 1896, but on the day previous the sale was cancelled and postponed.

That the reason for the postponement was that the defendant had applied to F. G. van Eeden, the applicant, for assistance, in order to enable her to come to an arrangement, and to effect a sale out of hand with the consent of the persons interested in the land under the will of the deceased. That before paying the claim on the estate of the plaintiff, the said Van Eeden obtained cession of the plaintiff's rights by endorsement on the mortgage bond.

That the arrangements contemplated by the defendant having fallen through, the said Van Eeden had been compelled to proceed with a sale in execution in order to realise the amount of his claim against the defendant estate, and had applied to the sheriff to re-advertise the property for auction at at early date, but the sheriff had declined to do so because Van Eeden was not on the record. That it was thought an order as was prayed for would satisfy the sheriff's requirements. That instructions had been sent to the applicant's attorneys to take fresh judgment on the old bond and cession, but

the plea of *res judicata* might possibly be raised, and that as the land had not been released from attachment, the course now suggested was cheaper and more expeditious.

Mr. Schreiner, Q.C., appeared for the applicant.

The Chief Justice said: I think it is reasonable to declare that in making the cession the plaintiff intended that the present applicant should have all his rights, including the right to carry out the judgment. No addition will be made by making the order prayed for subject to the production to the Registrar of the consent of Mr. Montgomery Walker, who represented the plaintiff originally. No order will be made as to costs as the defendant should not have to bear them.

In re VAN OUDTSHOORN'S EXECUTOR AND OTHERS V. VAN OUDTSHOORN'S EXECUTOR DATIVE. *Ex parte* VAN OUDTSHOORN'S EXECUTOR DATIVE. { 1897. Nov. 11th. „ 18th.

Interdict Removal of.

Mr. Schreiner, Q.C., applied for the removal of an interdict granted by Mr. Justice Maasdorp on 14th June last, restraining the executor dative of Mr. Van Oudtshoorn's estate from selling, or disposing of the farm of Kronendaal, Houts Bay. Mr. Gibson, executor dative of Mr. Van Oudtshoorn's estate, desired to dispose of the farm. The interdict had been granted conditionally upon an action being forthwith brought; summons was issued only on the 19th July, and nothing had been done since. The delay was prejudicial to the interests of the children of the late Mr. Van Oudtshoorn.

The Chief Justice said the Court was of opinion that the respondents should have an opportunity of appearing, and the Court further had no information that the sale of the farm was absolutely necessary. The Court would grant a rule calling on the respondents to show cause on Thursday next why the interdict should not be set aside; the rule to be served on Mr. Du Preez, and also by registered letter on the respondents. The Court further thought that some independent counsel, fully versed in the facts, should be appointed to represent the minors.

Mr. Graham was appointed counsel; the costs to stand over.

Postea (November 18th).

Mr. Schreiner, Q.C., appeared for the applicant, and moved that the rule be made absolute; Mr. Graham, as *curator ad litem*, for the minors; the respondents appeared in person.

Mr. Graham stated that he made common cause with the applicant, contending that the sale would be for the benefit of the minors.

The Chief Justice: The only thing we have to consider is whether the interdict should be withdrawn or not.

Gabriel van Oudtshoorn, one of the respondents, in answer to the Chief Justice, said the respondents did not oppose the withdrawal of the interdict; they left the matter in the hands of the Court.

Mr. Graham read an affidavit signed by the respondents which stated that a compromise had been effected with two of the heirs, who had accepted £250 as their share of the estate, provided the others agreed to the same terms. That instructions to draw a declaration had been placed in the hands of counsel, and action would be brought this term. Mr. Graham added that he considered the terms of the compromise mentioned most unfair to the minors.

The Chief Justice said he thought that the best course would be to make an order that the interdict should be discharged on the last day of the term, unless meanwhile the case is set down for trial.

VAN GASS V. TAYLOR AND TRUSTEES OF J. AND C. VAN GASS. { 1897. Nov. 12th.

Insolvency—Attachment—Messenger—Ordinance 6 of 1843, section 13—Spoliation.

Where the messenger of a Magistrate's Court after attaching property in an insolvent estate under section 13 of Ordinance 6 of 1843 and returning his order to the Master subsequently, without any authority from the Master, attached other property, in the possession of the plaintiff, which was proved to belong to the insolvent estate, and the plaintiff brought an action in the Magistrate's Court for restoration of the property and damages, but failed to recover,

Held, *that this was not an application for a writ of spoliation and that the judgment of the Magistrate should not be reversed.*

This was an appeal from a decision of the Resident Magistrate of Maclear in an action brought by Petrus Jacobus van Gass, the appellant against Hugh Taylor, messenger of the

Court at Maclear. There were now other parties on the record, the trustees in the estate of J. van Gass, father of the plaintiff, and the trustees in the estate of C. van Gass, the stepmother of the plaintiff. Both of the estates had been sequestrated. The original action was brought against Taylor for the restoration of certain sheep, goats, oxen, cows calves, and harness belonging to the plaintiff, and for damages. The plaintiff complained that on or about December 4, 1896, the defendant seized and took possession of 447 sheep and 97 goats; on December 7, 178 sheep (lambs), 13 cows, and 10 oxen, and on December 23, a set of buggy harness and a set of harness for leaders. The value of the stock and articles was placed at £978, and the action was brought for the restoration of the stock and for damages to the extent of £150. In the Magistrate's Court an amendment was allowed increasing the amount of damages to £250.

The defendant pleaded in abatement that the articles referred to were duly taken possession of by him on behalf of Mr. John William Bell and Mr. Harry Gibson, the duly appointed trustees of J. van Gass and C. van Gass, in whose custody and possession the said stock and articles now are, that they were not claimed by the defendant but by the trustees, as the plaintiff well knew. After the attachment the trustees proceeded to sell the articles, but at the request of the plaintiff's attorney it was agreed to postpone the sale pending an action to be brought by the plaintiff against the said trustees, to test his claim to the said articles. It was further pleaded that the plaintiff should bring his claims against the trustees on whose behalf the defendant acted, or that he should make the trustees party to the action. Defendant prayed that the claim be dismissed with costs, the allegations of fact and the conclusions of law being denied.

The defendant claimed in reconvention for £54 for rent, and the restoration of two wagons and spans of oxen, and a quantity of wool, mohair, and mealies, or £400, their value.

The record showed that in the Court below the plaintiff and his father (now insolvent) were the principal witnesses in support of the evidence, They alleged that the messenger attached plaintiff's stock while it was left on his father's farm for safe keeping during the absence of plaintiff. When the messenger attached the stock, Mr. Van Gass, senior, alleged that he informed him that the stock was his son's. The plaintiff stated that he began to speculate when he was between ten and eleven years of age, and when he was eighteen he was managing his own affairs, and had a considerable quantity of stock. The stock seized did not belong to his father or mother, but to him. The defendant admitted that he seized, the stock without an order from the Master of the Supreme Court. The Magistrate discharged defendant Taylor from the case and gave judgment for the other defendants as regards the major portion of the property claimed, with costs.

On the claim in reconvention, judgment for defendants for one wagon and span of oxen, five bales of wool and mohair and fifty bags of mealies or their value £250, for one wagon and span or £150 its value, and £54 19s., the rent of sheep.

The Magistrate gave the following reasons for his judgment: The plaintiff in his evidence says that the property in question was acquired by him in various ways and at various times from his childhood upwards, he being now about twenty-two years of age. When a child, some animals were, after a common custom of the country, given to him by various relatives. These cattle appear to have increased rapidly and the death-rate is, it would seem, very small. From his account of his career he appears to have been uniformly successful in all transactions, including speculations from the time he was ten or twelve years old, and at one time he was earning at Johannesburg from £5,000 to £6,000 a year. Even when at school he was prosperous in the increase of his stock and he was able to pay part of the expenses connected with his education. The plaintiff's father and his stepmother seem to have at one time been well off, but while the son was so prosperous the parents became insolvent.

It appears from the evidence of Mr. Hendrik de Beer that the plaintiff received payment from him for certain sheep which belonged to the insolvent estate of Mrs. C. P. M. van Gass but which were not surrendered as they should have been.

The two receipts marked respectively B.B and C.C. bear signs of having been written on the same piece of paper though they bear different dates.

The conclusion I have come to is that plaintiff may have often assisted his father in the management of affairs and may frequently have taken care of some of the property of his father and of his step-mother, and thus animals would probably be referred to as his by people who visited his farm: just as when a person hires a house or a horse people often allude to

the property as "his house" or "his horse." Of course, however, this persession would not constitute ownership.

From the above circumstances I have been led to the conclusion that the ownership of the property is vested in the two insolvent estates and not in the plaintiff.

Mr. Schreiner, Q.C., for the appellant: The first irregularity is that the case was gone into without considering the plea in abatement. The plaintiff does not now claim the harness. The messenger had no right to seize any of the property; it was taken from the plaintiff's farm and from his possession. He had no warrant and no authority. *In initio* he was a *spoliator. Spoliatus ante omnia restituendus.* It was taken in December, 1896, but in September, 1895, he had made his attachment and return. He was then *functus officio.* He had handed his order back to the Master. Ordinance 6 of 1843 section 13, gives any power which the messenger might have.

[De Villiers, C.J.: The Master is by law vested with the right to the insolvent's property and the messenger is his servant.]

But trustees were appointed and the Master divested.

[De Villiers, C.J: Then the messenger acted as the agent of the trustees.]

But the trustees had no power to do what he did. Substantial damages would be given against him.

[De Villiers, C.J.: As the substantial question is whose property this is, this argument would only affect the question as to who should be plaintiff and who defendant.]

But spoliation proceedings were instituted at once in the Magistrate's Court and the Magistrate should have restored possession.

[De Villiers, C.J.: The summons is not one for restoration against a spoliator, damages are claimed. It is too late now to determine in whose possession the goods should have remained pending litigation.]

On the merits the Magistrate says that the property belongs to the two estates, but the two estates are separate and he does not specially say to which estate any of the property belongs. That is because there is no evidence from which any other conclusion can be drawn than that the property belongs to the plaintiff. It is clear that he had stock and that some of it at any rate was seized; also that the stock seized was not the property of the two insolvent estates. The value of the stock proved to be plaintiff's and taken from him is £5 5; depreciation by moving and death makes another £100. As to the claim in reconvention, there is no evidence as to the ownership of the one wagon and span of oxen, or of the wool, mohair and mealies. The evidence as to the other wagon and span only shows that they were bought but does not touch on the legality of the sale.

Mr. Innes, Q.C., for the respondent: The facts as found by the trustees when they looked into the estate showed that the insolvents had had a large amount of stock which they had got rid of, so that when the estates were sequestrated there was practically nothing. The attachment was irregular, but the messenger is exonerated by the distance of the country from any officials. This is not a writ of spoliation; the Magistrate cannot grant such a writ. The question of ownership was gone into during the action.

Mr. Schreiner in reply.

The Court upheld the Magistrate's decision on the claim in convention, and allowed the appeal in reconvention.

The Chief Justice said: The plaintiff in the Court below claimed restoration of certain sheep, goats, oxen, cows, harness, and damages. There were three counts in the summons. The first for alleged wrongful and unlawful seizure of 447 sheep; the second for the alleged wrongful and unlawful seizure of 178 sheep, 13 cows, 10 goats, and 10 oxen; and the third count was for the unlawful and wrongful seizure of a set of buggy harness; the whole were valued at £978, while a further sum of £150 was claimed as damages. A point has been made of the fact that there was some irregularity in the original seizure, and if the plaintiff had succeeded in this action of proving ownership, the Court would probably have kept that in mind in assessing the damages to which the plaintiff would have been entitled in respect of such illegal seizure. If the application in the Court below had been of the nature of a writ of spoliation the proceedings would have been entirely different to what they are. The writ of spoliation would have been a merely preliminary proceeding, by virtue of which the plaintiff would have got possession of the animals and goods pending the action. But the application in the present case was not in the nature of a writ of spoliation, but an action upon the merits. But that action really raises the substantial question whether the property did in fact belong to the plaintiff. In the original action the trustees were not parties, but subsequently they were allowed to be. With reference to the amendment in the Court below, I think that no fault can be found in what was done. The Magistrate came to the conclusion that the plaintiff had not proved his ownership—the ownership of the articles claimed in convention. It is not necessary to

go through the whole of the evidence ; it is sufficient for me here to say, after hearing the evidence, that I am unable to say that the decision of the Magistrate is so entirely against the weight of the evidence as to justify the Court to interfere. It was a question of credibility, and the Court did not believe the plaintiff's evidence ; and if the Court below did not believe the evidence, I think it must have come to the conclusion that if these articles were bought by the plaintiff they were not bought with the plaintiff's money. It is perfectly clear that the plaintiff has been a party to a gross fraud which was committed upon the trustees of the insolvent estates, but to what extent he has been a party it is very difficult to say. I think it is quite possible that, as stated in the Court below, the plaintiff might in the course of his career have collected some small quantity of cattle, and it is quite possible that some of these cattle may belong to him. But, at the same time, if it is proved that he has been a party to these gross frauds one cannot feel much sympathy with him if he has lost a few head of cattle. It is a question purely of credibility, and as the Magistrate did not believe the plaintiff, I think we should not interfere with the judgment of the Magistrate upon the claim in convention. Then coming to the claim in reconvention, I must say, whatever opinion the Magistrate had of the conduct of the plaintiff, he ought at all events to have required of the defendants on their part, when they sought to assert the claim in reconvention that they should give some proof in support of the claim. Clearly there is no proof whatever in regard to the wagon and the sixteen oxen, the wool, the mohair, and the mealies. In the absence of any evidence upon these, I think the Court should allow the appeal upon the claim in reconvention. Then again, as to the value which the Magistrate has attached to the remaining wagon and sixteen oxen. He has fixed the value at £150. If it were clear that the plaintiff were still in possession of the articles, no injustice would be done in fixing the value at that high figure, but I think it is only right that the Court should fix the exact value of those articles instead of simply allowing £150. The plaintiff having succeeded in effecting a very substantial alteration in the judgment of the Court below, I think that he must pay the costs of the appeal. The judgment will therefore be that the claim in convention is affirmed; that the appeal against the claim in reconvention is allowed ; and that the value of the wagon and oxen be affixed at £104. The order of the Court below as to costs will be affirmed, and the respondent will pay the costs of the appeal.

[Appellant's Attorney, D. Tennant; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

REGINA V. BOOY ZANA. { 1 97. Nov. 12th. „ 15th.

Rinderpest—Proclamation 435 of 1897, Schedule, clause 7.

Conviction for contravention of clause 7 of the Schedule to Proclamation 435 of 1897 quashed.

This case came on review before Mr. Justice Maasdorp as judge of the week. The accused was charged with the crime of contravening Rinderpest Regulation, No. 7 of the Schedule to Proclamation, No. 435 of 1897, in that upon about the 12th and 27th days of October, 1897, and at or near Roedebloem in the district of Willowmore, the said Booy Zana did wrongfully and unlawfully fail to bury the hide of an ox infected with rinderpest. The prisoner being arraigned pleaded guilty, and after evidence had been led in support of the charge he was found guilty by the Assistant Resident Magistrate of Willowmore, and sentenced to pay a fine of £10, or to undergo six weeks' imprisonment with hard labour. The following is the regulation under which the accused was charged : All horned cattle, which are actually suffering from rinderpest, may be destroyed without compensation to the owners by order of the local Rinderpest Committee. Cattle which have come in contact with infected animals, but which are certified by a Government veterinary surgeon not to be actually suffering from the disease may be destroyed, with the approval of the Secretary for Agriculture, upon the condition of payment to the owners of such reasonable compensation as may be ultimately determined by the Government. The carcases of all animals destroyed, including the hide, shall be buried to the approval of a duly appointed officer.

The matter was referred to the Attorney-General for consideration as to whether he could support the conviction.

Postea (November 15th).

Mr. Sheil, Acting Attorney-General, appeared for the Crown, and informed the Court that he was not prepared to support the conviction, as the regulation, for the contravention of which the accused was charged, created no offence, nor did it impose upon the owner of cattle, which had died or had been destroyed owing to being

infected with rinderpest, the duty of burying the carcases, although the accused might possibly have been charged and convicted under Act 27 of 1893, section 9.

Mr. Justice Maasdorp said that as the Attorney-General could not support the conviction it would be quashed.

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

VAN DER SPUY v. COLONIAL GOVERNMENT. { 1897. Nov. 15th.

Pleading - Tender — Payment into Court—General issue – Rule of Court 332.

It is now competent for a defendant, by his plea or answer, to deny his liability altogether, notwithstanding that he may have paid a sum of money into court or made and pleaded a tender, by way of satisfaction or amends, provided that the tender be unconditional.

In an action for the illegal detention of certain cattle, the plea denied the illegality of the detention, and then proceeded to tender a sum of money in case the Court should decide that the detention was illegal,

Held, *on the plaintiff's exception to the plea, that either the denial of liability or the plea of tender, so far as it was conditional, must be struck out of the plea.*

This was an argument on exceptions taken by the plaintiff to the plea filed by the defendant. The declaration set forth that the plaintiff is a cattle-dealer, and lives at the Paarl. On or about 4th May, 1897, at Steynsburg, he delivered to the Cape Government Railway certain forty-two oxen and cows and eighteen horses, which, he pleaded, he was entitled to have duly conveyed to the Paarl. Before the oxen, cows, and horses could leave Steynsburg the defendant (the Hon. P. H. Faure, Minister of Agriculture, representing the Colonial Government) prevented the forwarding of the oxen, cows, and horses, and caused them to be removed from the truck in which they had been placed. Until 20th May he wrongfully and unlawfully detained the said animals, and prevented the plaintiff from removing them to their destination at the Paarl. About 23rd May they were removed to the Paarl, and the plaintiff, as damages, claimed £227 8s. 1d

The defendant in his plea admitted that the animals referred to were delivered to the Colonial Government for conveyance to the Paarl by the Cape Government Railway, which he said was a public railway for the conveyance of passengers and goods, including live stock. He denied the right of the plaintiff to have the oxen, cows, and horses referred to conveyed, inasmuch as they were, on 4th May, brought from a district (Albert) which was an area declared infected with rinderpest, by proclamation of the Governor on 3rd May. The Resident Magistrate at Steynsburg, acting in the public interest and in accordance with the instructions of the Government, prevented the animals being forwarded, and he denied that the Resident Magistrate acted wrongly. On the contrary, on and after 5th May, the plaintiff was informed that he was at perfect liberty to dispose of the cattle and horses as he thought best, subject only to the condition that he would not be allowed to forward them south of Steynsburg. He denied that the plaintiff had sustained damages or damages in any sum, by any act of the defendant. The defendant, lastly said that if the Court should find that the Resident Magistrate was not justified in law in preventing the plaintiff's cattle being forwarded by train, the plaintiff merely sustained nominal damages by such detention, and the defendant, in case the Court should so hold and not otherwise, tendered the sum of £20 with costs to date of tender.

Mr. Schreiner, Q.C., for the plaintiff: The plea is inconsistent and embarrassing. There really are two pleas: defendant must elect. The plaintiff cannot confine himself to bringing evidence of his damages, and why should he go to the expense of calling witnesses to prove defendant's liability when it is practically admitted by his tender? *Durham* v. *Peiser & Co.* (B. 1878, p. 8); *Jones* v. *Borradaile & Co.* (B. 1875, p. 38); *Hennings* v. *Steyn* (3 M., p. 511); *Becton* v. *Wemmer* (Kotze's Transvaal Reports, p. 101). These cases were decided on Rule 19. Nothing in Rule 330 affects the case.

[De Villiers, C.J.: Rule 330 alters the whole system of pleading; there is now only one plea. The defendant ought to have paid into Court under Rule 332.]

Odgers on Pleading, p. 1'4.

Mr. Sheil, for the defendants: The third paragraph of the plea has been misapprehended; it was not intended to justify the action of the Magistrate, it must be read with paragraph 6. The object in making the allegations was to show the motives which influenced the Magistrate; the plea is somewhat similar in its nature to that in *Logan* v. *Colonial Government* (10 Juta, p. 124). The tender was meant to be unconditional; it cannot embarrass the plaintiff.

De Villiers, C.J.: The object and undoubted effect of the New Rules were to put an end to much of the unnecessary technicality which until then had prevailed in our system of pleading. The "general issue" was abolished by the 330th Rule and the cases, therefore, which decided that a plea of tender cannot be pleaded after the general issue are not applicable to the present case. The 332nd Rule allows a defendant to pay into court a sum of money by way of satisfaction or amends, and such payment into court may be pleaded in the plea or answer. It was not intended that such a plea or answer should prevent the defendant from denying his liability altogether in case the tender should not be accepted. If, therefore, the defendant in the present case had paid a sum of money into court or had made an unconditional tender in his plea, he would have been at liberty to plead his non-liability in case his tender should not be accepted. But the fatal objection to the plea before the Court is that, after denying any legal liability for the detention of the plaintiff's cattle, it proceeds to tender a certain sum of money in case only the Court should decide that the defendant is legally liable to pay damages. The tender is conditional upon a previous finding of the Court which can only be given after the evidence has been heard. Mr. Sheil has now explained that his intention in framing the plea was not to raise the question of liability at all, but to admit the liability and raise the question of the amount of damages only. Unfortunately his intention has not been clearly expressed, and the Court, while sustaining the exceptions to the plea with costs, will allow the defendant to amend his plea so as to carry out his real intention.

Mr. Justice Buchanan: I concur, and mainly on the ground that the plea does not set up the defence intended to be set up at the trial.

Mr. Justice Maasdorp concurred.

[Plaintiff's Attorney, V. A. van der Byl; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew.]

LOESCHER v. KUMST. { 1897. Nov. 15th.

Practice - Writ of execution—Immovable property.

Order declaring immovable property executable refused upon a judgment for debt which had not been put in execution upon the movables, although there had not been sufficient to satisfy a judgment obtained two months earlier.

Mr. Graham applied for judgment under Rule 329 for the sum of £18 15s. 9d, money advanced to the defendant, and for leave to attach certain money in the hands of Messrs. Van den Heever and Jacobsohn. Since the previous application to the Court on the 26th August (see p. 328) provisional sentence on a promissory note for £45 had been granted (12th September.) Under this judgment only about £2 had been recovered. The plaintiff was the holder of a covering bond mortgaging certain landed property, and he further applied for an order making this landed property executable. He admitted that it was not the usual course, but plaintiff wished to save time and expense. *Boothby* v. *Stone* (G. 7. p. 16)

Judgment was given under Rule 329 and leave given to attach the property in the hands of Van den Heever and Jacobsohn.

De Villiers, C J.: As to the other portion of the claim, to have the property declared executable, there is no necessity for it. If the movables are not sufficient you can apply in the ordinary way.

LEWIN v. SWART. { 1897. Nov. 15th.

Interdict restraining sale of property by debtor pending an action for debt.

This was an application for an interdict.

The petitioner, Lewin, alleged that he was residing at Oudtshoorn, and had hired certain erven and sub let them to one Swart, a farmer, for one year, as per lease annexed to the petition.

That in terms of the lease the rent payable by Swart was £225, payable in two equal instalments on the 1st November, and 1st April.

That on the 1st November last, the first payment became due, but had not been paid by Swart on demand.

That Swart was disposing of his assets and removing them from the premises, with the object of defeating and avoiding the payment of the rent due.

That on the 11th November Swart sold to the Municipality of Oudtshoorn 5,000 oatsheaves for the sum of £35, which sum had not been yet paid to him.

That petitioner had made an affidavit in terms of Act 20 of 1856, section 26 in order to have the assets of Swart attached pending an action for rent, but the Magistrate had refused to issue a writ on the ground that it was beyond his jurisdiction.

That petitioner was afraid that Swart would dispose of all his assets, and that the rent would remain unpaid. Wherefore he prayed for an order restraining the said Swart from disposing of or removing any assets from the property leased and restraining the Municipality f om parting with the said sum of £35, pending an action to be instituted for the recovery of the rent and that the order be telegraphed to the Deputy Sheriff of Oudtshoorn.

Mr. Molteno appeared for the petitioner.

The interdict was granted as prayed, pending an action to be forthwith brought, with leave to Swart to apply to have it set aside. Copy of the rule to be served on the Municipal Clerk and the owner of the land. Leave given to telegraph order to the Municipal Clerk and to Swart.

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS) the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

BOTHA'S EXECUTOR v. DU PLOOY. { 1897. Nov. 16th.

Lease—Cession of—Purchase of land leased—Rent—Collateral security.

The right of a lessee to retain occupation of the land after sale and transfer thereof by the lessor to another person is conditional upon his willingness to pay the rent to such purchaser, but if the purchaser bought with knowledge of a prior cession for value of the lease by the lessor, his rights will not be enforced in competition with the cessionary so long as the cession remains in force.

Land leased having been sold in execution, and transferred to the purchaser without reference in the conditions of the sale to the lease, but with notice from the cessionary to the purchaser that the lessor had ceded the lease as a collateral security for a debt owing to the cessionary,

Held, *that, although upon repayment of the debt the cessionary re-ceded the lease to the lessor, the latter was not entitled in competition with the purchaser to claim the rent accruing due after payment of the debt had put an end to the cession as collateral security.*

This was an action in which the plaintiff, W. A. Landmann, as executor of the late Johannes Hendrik Botha, claimed judgment for £100 rent from J. F. C. du Plooy, the first defendant, with costs, and costs against the second defendant if he should advance claim to the said rent.

The declaration stated that Botha had on the 12th January, 1895, leased his farm, Hartebeeste Hoek, and portion of Louw's Kraal, in the division of Fort Beaufort, to Du Plooy for five years from 1st January, 1895, and had on the same day, as security for a debt of £200 owing by him to one Johannes Frederick Dreyer, ceded all his right, title, and interest in the lease to the latter; one of the conditions of the cession was that when J. F. Dreyer should have received the necessary amount of rent to cover the claim of £200 and interest, or if Botha should at any time pay the whole of that sum or any unpaid balance, then the lease should be re-ceded to Botha.

That one Goldschmidt obtained provisional sentence against Botha on a promissory note for £180 on the 12th July, 1895, and an order for the attachment of the property leased, in execution of which judgment the property was publicly sold on the 5th November, 1895.

That at the auction, and pursuant to a protest lodged by J. F. Dreyer as cessionary of the lease, the auctioneer put up the property, subject to the lease, and the defendant H. S. Dreyer pur-

chased it, and is now the registered owner thereof. That on the 1st May, 1896, J. F. Dreyer obtained provisional sentence against Botha for the balance of the debt of £200 above referred to, and the Court specially ordered that upon payment of the amount of the judgment and costs he should re-cede the lease to Botha.

That on the 30th May, 1896, upon receipt of the said amount, he re-ceded the lease to Botha, and Botha afterwards gave notice to Du Plooy of the fact, and informed him that rent must in future be paid to him; therefore on the 1st January, 1897, he demanded the rent then due—viz., £100—but Du Plooy refused to pay him the same, alleging that he had paid H. S. Dreyer.

The defendants' plea practically admitted the facts contained in the declaration, except that the property was sold subject to the lease, and referred to the conditions of sale, which contained no mention of the lease or the cession; stated that H. S. Dreyer had received transfer in accordance with the conditions, and denied that he purchased subject to any rights of Botha or of J. F. Dreyer under the lease or cession; that one Engelbrecht had purchased Louw's Kraal, which included part of the property leased, and that after the sale Du Plooy had entered into a fresh lease with H. S. Dreyer respecting Hartebeeste alone, and had paid rent to him.

The replication admitted that no condition of sale was concluded in writing referring to the lease, but set forth that a protest in writing had been lodged with the Civil Commissioner against the sale save and except subject to the lease, and that the lease was publicly read at the sale. The sale to Engelbrecht was admitted, but the fresh lease entered into between the defendant was said to be immaterial.

The defendants rejoined generally.

Mr. Schreiner, Q.C., and Mr. Close for the plaintiff.

Mr. Searle, Q.C., and Mr. Jones for the defendants.

The documents referred to in the pleadings and other correspondence was put in by consent.

The protest lodged on behalf of J. F. Dreyer was in the following terms: "Sir,—We are instructed by Mr. J. F. Dreyer to give you notice that the lease at present in your hands has been duly ceded by the lessor to him as per cession endorsed thereon as collateral security for a debt in respect of which there is still £150 due to him, and that he hereby protests against the sale of the said leased property, save and except subject to his claim in respect of such lease."

Peter Balderstone Chalmers, Resident Magistrate and Civil Commissioner, Fort Beaufort, stated that on the 5th November, 1895, he acted as Commissioner of the Supreme Court in the sale of the three farms, Hartebeeste Hoek, Louw's Kraal, and Dubbledraai. Mr. Estment was the auctioneer under witness's instructions. The lease and several protests were handed to him by Mr. McIntosh on behalf of Du Plooy, J. F. Dreyer, and two others. He handed them to Mr. Estment to read. Estment tried to read the protest, which had been written by Mr. McIntosh, but the writing was so illegible that Estment could not read the document. Then McIntosh, at witness's request, read the protest and the lease. The documents were read publicly, and in English and Dutch. McIntosh asked witness to stop the sale, but as there was no order of Court or instruction from the Sheriff to stop the sale, witness could not do this. The sale was therefore proceeded with. McIntosh was actin · for J. F. Dreyer, Du Plooy, and two others. The properties were knocked down. J. F. Dreyer was the buyer of Dubbledraai, and he was also surety for the purchaser of the farm Hartebeeste Hoek. Du Plooy bought Hartebeeste Hoek, and Engelbrecht bought Dubbeldraai. Before witness actually put the property up he telegraphed to the High Sheriff; immediately the protest came to his knowledge he sent the telegram. Having sold the property, he immediately sent the letter which had been read. Witness knew the farm of Hartebeeste Hoek, and he knew the country there well. Without attempting to give a valuation of the farm he should say that the effect of the protest would be to reduce the price realised. This closed the plaintiff's case.

William Estment, auctioneer, Fort Beaufort, stated that, acting under instructions of Mr. Chalmers, the C.C. and R.M., he, on 5th November, 1895, sold the three farms—Hartebeeste Hoek, Louw's Kraal, and Dubbeldraai. Witness read the conditions of sale. McIntosh put in a protest, on behalf of Du Plooy, against the sale, saying that he had a five years' lease of Hartebeeste Hoek, and that four years had yet to run. Witness, in consequence of the protest, asked Mr. Chalmers what he was to do, and the reply was that the sale must proceed. The first farm put up was Hartebeeste Hoek, and the other farms followed.

Mr. Searle said the defendants had been detained on their way to Cape Town, and if their evidence was considered necessary, he asked that it might be called at a later date.

After discussion, during which it was intimated by the Court that it had the power of calling witnesses to enlighten it upon any

question of fact, and that the defendants would not be prejudiced by the argument being heard at once, it being mainly a point of law,

Mr. Searle closed the case for the defendants.

Mr. Schreiner referred to *Goldsmidt* v. *Botha* (5 Sheil, p. 256) and *Dreyer* v. *Botha* (6 Sheil, p. 130). At the time of the sale Dreyer was the cessionary of the lease and Botha had no right to it. It is clear law that the lessee's right is a contractual one. *Van der Byl & Co.* v. *Findlay and Kuhn* (9 Juta, p. 178); *Wetzlar* v. *General Insurance Co.* (3 Juta, p. 86). It is true that in the absence of a cession the lessor has no right to the rent when the property is sold. He could however contract to sell the property, reserving the lease; if then the transfer was passed the lessee would still have to pay the rent to the seller. A cessionary can sue for the rent. *Smith* v. *Howse* (2 M., p. 171). J. F. Dreyer could have sued and now Botha has the recession by order of Court.

[Buchanan, J.: The recession was ordered because the lease was held on collateral security for the debt sued on.]

Sande Dec. Fris. (1. 17, 1) as to the necessity of attachment by judicial order of a claim against a debtor in order to pay the creditor of the creditor. A lease is not a servitude, but it is something which the owner may give away to anyone. This is not inconsistent with the *dictum* that the lessee has a *jus in re*. *Green* v. *Griffiths* (4 uta, p. 350). It makes no difference whether Dreyer re-ceded to Botha or ceded to anyone else; Botha's right is not his right as owner of the property; he is a cessionary. *Voet* (18, 6, 9); *Digest* (19, 1, 13, 11); *Schorer's Note to Grotius* (898); *Voet* (19, 2, 19); *Van Zyl's Judicial Practice* (p. 159 *et seq.*) Botha's right to the recession was a *chose in action* which was not attachable without a special order of Court. *Voezius* (19. 1, 17).

The Chief Justice said the Court would intimate on the following day whether it would be necessary to hear Mr. Searle and whether the defendants should be heard.

Postea (November 17th).

Without calling on Mr. Searle, judgment was given for the defendants with costs.

The Chief Justice said: The facts of this case are really not in dispute. In 1895 the plaintiff, as the owner of certain land, let it to the defendant, Du Plooy, for the term of five years at a rental of £100 a year. On the same day the plaintiff executed a cession of his interest in the lease to one J. F. Dreyer as collateral security for a debt. Afterwards the land was sold by public auction in execution of a judgment obtained by one Goldschmidt against the plaintiff. The conditions of sale read at the auction made no mention of the lease, but letters from the attorneys of the lessee and of the cessionary of the lease were read protesting against the sale except subject to the lease; the protest of the cessionary stating that the lease had been ceded to him as collateral security for a debt of £150 still owing to him by the lessor. The second defendant purchased the property, and an unconditional transfer was made to him by the High Sheriff. On a subsequent day the cessionary obtained judgment for his debt against the lessor (now plaintiff) with a direction from the Court that upon payment of the amount of the judgment and costs, the lease should be re-ceded to the lessor, and this direction was duly carried out. The second defendant was no party to the action in which such judgment was obtained. The lessor gave notice to the lessee that, after such recession, the rent must be paid to him, and the object of the present action is to recover such rent from the first defendant as such lessee. The second defendant was made a party to the action to enable him to protect his rights, and the question now to be determined is whether the plaintiff or the second defendant is entitled to receive the rents accruing on the lease, after satisfaction of the debt as a collateral security for which the lease had been ceded to the cessionary. The general rule of the Roman law was that the purchaser of land is not bound by a lease made by the former owner, unless the purchase had been made on condition that he should be so bound. The general rule was modified by the customary law of Holland to this extent, that the purchaser must allow the lessee to remain in occupation till the end of his term, provided that such lessee be willing to pay him the rent accruing during the remainder of the term (*Voet* 19, 2, 19). The right of the lessee, therefore, to occupation was not unqualified, but was conditional upon his willingness to pay the rent to the particular successor. In this colony also the purchaser, even after obtaining transfer of the land, is bound by a lease made *bonâ fide* and not amounting to a virtual alienation of the land, but he is *primâ facie* entitled to receive the rent from the lessee. This right belongs to him as the owner of the land, and will be enforced by the Court unless it be proved that he purchased the land with knowledge that a third party had already acquired a personal right, as against the lessor, to receive the rent from the lessee. Thus, in *Van der Byl & Co.* v *Findlay & Kuhn* (9 Juta, 178), the lessees of certain premises, with full notice that the lease had been ceded to the plaintiffs as security for a debt, and that the debt had

not been paid by the lessor, purchased the premises from the lessor, and the Court held that the personal right acquired by the plaintiffs under the cession to treat the lease as a subsisting one and receive the rent until the debt was paid could not be defeated by a collusive arrangement between the lessor and lessees. In the present case the second defendant has obtained an unconditional transfer of the land. If the lessor had himself transferred the land, it would have been obvious that he had no shadow of a right to claim the rent in competition with the particular successor to whom he had made an unconditional transfer of the land. It can make no difference, in my opinion, that the transfer was effected by the Sheriff by virtue of a writ of execution and judicial sale. Nor can it make any difference that in the subsequent action brought against him by the cessionary of the lease judgment was given against him with a direction that on payment of the debt the lease should be re-ceded to him. The second defendant was no party to that action. The direction given by the Court, and the consequent recession to the plaintiff, cannot therefore affect the present case. The effect of the payment made by the plaintiff to the cessionary was to put an end to the right of the latter of holding the cession as collateral security for the debt and to replace the plaintiff in his original position as lessor of the land. As such lessor he could not claim the rent from the lessee after an unconditional transfer of the land had been legally effected in favour of the second defendant. It is true that the cessionary protested against the sale unless his rights were preserved, and it may well be that after such protest he would have been entitled to claim the rent until his debt was satisfied. But the plaintiff derived no rights whatever from the cessionary, and simply reverted to the position in which he had been before he made the cession. If he had given valuable consideration for the recession there might have been some plausible argument in favour of his present claim, but even then it would have been difficult to hold that the second defendant was bound to recognise any cession of the lease made by the cessionary after the debt due to the latter had been paid. The notion which the second defendant had was that the cession had been made as collateral security for a debt, and by that notice only was he bound. Upon payment of the debt the collateral security could no longer be transferred. By paying his debt the plaintiff only did what he was legally bound to do, and in no sense can he be said to have given any valuable consideration for the forma recession made in his favour. It is clear, therefore, that he is not entitled as against the second defendant, to recover the rent from the lessee, and that the judgment of the Court must be given in favour of the defendants with costs.

Mr. Justice Buchanan and Mr. Justice Maasdorp concurred.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn; Defendants' Attorney's, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

REGINA v. NEL. } 1897. Nov. 17th.

Masters and Servants Act 18 of 1873, section 2, paragraph 1.

Mr, Justice Buchanan said that the case Queen v. Nel, a European labourer, had come before him from the Special Justice of the Peace at Oudtshoorn. The charge against the accused was that of contravening section 2, paragraph 1, of the Masters and Servants Act, in that the accused failed to commence a contract of service entered into by him with the complainant on the due date. The whole of the evidence in the case was that in April last the prisoner went to reside on the complainant's ground, and was allowed to reside there free of rent, on condition that when required he was to give his services to the complainant whenever he (the complainant) gave him notice that his services were wanted. The complainant had given him notice that his services were wanted, but the man failed to turn up on the day he was wanted. His lordship thought the Masters and Servants Act, in making criminal the offence of failing to enter into service at a stipulated period, meant that there should be a distinct and clear contract of service commencing at a certain day. In the case before him there was no sufficient contract of service justifying a conviction for a criminal offence. The conviction must, therefore, be quashed.

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

Ex parte GOULD. { 1897. Nov. 18th.

Attorney—Admission.

Where the applicant had been articled to the junior partner of a firm of attorneys and the business had been carried on by the senior partner in the absence of the former for twelve months, service with the senior partner was allowed to count.

Mr. Close applied for the admission of Nathan Gould (formerly known as Nathan Kraevski) as an attorney and notary, the oath to be taken before the Registrar of the High Court of Kimberley. The applicant had been articled to the junior partner of the firm of Coghlan & Coghlan, of Kimberley, who had been absent for the last twelve months owing to ill-health, but the business had been carried on by the senior partner, and the applicant's duties and instruction had gone on in the same manner as before, and at the same place.

The application was granted.

REHABILITATION.

Mr. Buchanan applied for the rehabilitation of the estate of Abraham Humphries, builder. It was admitted by the trustee that most of the applicant's books and papers had been destroyed by fire.

The application was granted.

GENERAL MOTIONS.

GOLDSWORTHY V. GOLDSWORTHY. { 1897. Nov. 18th.

Attachment of salary.

Where a husband failed in the payment of certain instalments of money ordered to be paid for the maintenance of his wife, from whom he was judicially separated, and her minor child, an order authorising the deduction of the instalments from his salary refused.

Mr. Close applied for an order authorising the deduction from respondent's monthly salary of such sums as will ensure the regular payment of the instalments of £2 a month, ordered on the 2nd August last for the maintenance of applicant and her minor child.

Only two payments, it was stated, had been made, and the amount now due was over £4. It was stated that the respondent was employed as an extra clerk at the Table Bay harbour works, and that his wages amounted to about £109 per annum.

The Chief Justice: If we attach this man's wages he may say that it is not worth while remaining with the Harbour Board, and leave.

Mr. Close thought the Court should have the power of enforcing its own orders.

The application was refused.

The Chief Justice said: We are of opinion that the Court ought to refuse the application. An order was made by the Court that the respondent pay a certain sum per month, and the applicant should obtain payment of that sum by the regular methods, If we anticipate the payment of his salary I am afraid by granting the application that it would defeat its own purpose; for if this man is to be deprived of a portion of his salary it is quite possible that he might throw up his situation altogether rather than be compelled to pay. And then the applicant is not entirely without means. She admitted when making the previous application that she was in receipt of £76 per annum for the maintenance of this child, and if the respondent is correct she has other means of support. At all events, it is not such a case as to justify the Court going out of its way in enforcing payment. The application must be refused.

Mr. Justice Buchanan concurred, saying that such an order would defeat the purpose in view.

ROLFES, NEBEL AND CO. V. PORT ELIZABETH HARBOUR BOARD.

Mr. Schreiner, Q.C., applied for the removal of trial to the Circuit Court, Port Elizabeth.

The application was granted.

In re ESTATE OF THOMAS BENNING.

Mr. Buchanan applied on behalf of the executors for leave to raise a sum of £1,000 on mortgage of the landed property, to be spent in repairs and improvements.

The application was granted.

GROBBELAAR V. GOUS.

Mr. Buchanan applied for leave to attach a certain inheritance in satisfaction of a judgment of this Court.

An order had been obtained on the 12th of November, 1896, to attach the inheritance *ad fundandam jurisdictionem*. Since then judgment had been obtained against defendant, but the order did not make the inheritance executable. A further order was therefore necessary.

The Court granted the application, without costs.

PETITION OF WILLIAM MARSH.

Mr. Mackew applied for an order authorising the Registrar of Deeds to issue a certified copy of a mortgage bond for the sum of £500 passed on the 12th August, 1887, by Jacobus François Burger in favour of Gideon Jacobus van Zyl, and by the latter ceded to petitioner, the original of which has been lost.

A rule *nisi* was granted, calling on all parties concerned to show cause why the certified copy should not be granted, the rule to be published in the "Gazette," and returnable next Thursday.

Postea (November 30th).

The rule was made absolute.

PACE V. PACE.

Mr. McGregor applied for a commission to take the evidence of the defendant at Barrydale. She was an old lady of seventy years of age and too ill to travel.

The application was granted, and Mr. Versfeld appointed commissioner.

QUEEN V. LE ROUX. { 1897. Nov. 18th.

Evidence—*Res gestae* Dying declaration—Hearsay—Judicial discretion.

A statement made by an injured person shortly before his death as to the cause of the injury is not admissible as a dying declaration merely because the injury was a mortal one, and the fact of his expressing a hope that God would take him, does not prove that he was under full apprehension of his danger.

Such a statement is, however, admissible (on a trial for murder or culpable homicide) as part of the res gestae, *if the presiding judge, in the exercise of a sound discretion, is of opinion that the statement was made so shortly after the infliction of the injury, as to form part of the same transaction, and that the deceased had had no time or opportunity to devise a story to the disadvantage of the accused.*

This was an appeal from the Circuit Court, Oudtshoorn, on a point of law arising in a case which came before Mr. Justice Solomon at the Circuit Court at Oudtshoorn in the trial of one Le Roux, charged with murdering his wife. The prisoner was charged with having murdered his wife, and it was proved that his wife died from the effects of a gunshot wound. There was no denial that the wound was inflicted by the accused, but the defence raised was that death was occasioned by accident. At the trial certain evidence was admitted by the presiding judge, to which exception was taken by Mr. Graham, who defended the prisoner. At the trial two witnesses were called who repeated what they alleged were words uttered by the deceased after receiving her injuries and shortly before her death. To this evidence exception was taken on the ground that the prisoner was not present when the statements were made by the woman. Mr. Justice Solomon allowed the evidence of these two witnesses to be taken, on the ground that evidence taken so soon after the woman's injuries was admissible as part of the *res gestae*. The jury convicted the prisoner, but before sentence was passed prisoner's counsel took exception to his lordship's ruling on the point. The object of the appeal was to get the ruling of the Court on the point that evidence taken under the circumstances named was admissible or not. The words uttered or ejaculated in Dutch by the woman shortly after she was shot formed the first line of an evangelical hymn, and were, "The murderer before his death will see salvation and be glad."

The following reasons were supplied to the Court by Mr. Justice Solomon:

The prisoner was tried before me at the Circuit Court at Oudtshoorn for the murder of his wife. The deceased woman died in her own house in Oudtshoorn from the effects of a wound caused by a bullet which entered her back and passed through her body. There was no question that the bullet had been discharged from a gun in the hands of the prisoner: but the defence was set up that the gun had gone off by accident.

It appeared that as soon as the report was heard several people in the immediate neighbourhood ran over to the house. Amongst

others were two women named Sanna Moos and Christina Barlou, who were called as witnesses for the Crown.

Counsel for the Crown tendered evidence of statements made by the deceased in the house to these two women shortly after they arrived upon the scene, the prisoner at the time being outside the house. Counsel for the prisoner objected to the admission of the evidence on the ground that they were made in the absence of the prisoner and that they could not be received as dying declarations. I overruled the objection, holding that, though there was no proof that the prisoner could have heard what was said, or that the deceased had given up all hope of recovery at the time, any statement made by her as to the cause of her injuries so so soon after the occurrence were admissible as part of the "*res gestae.*"

The jury convicted the prisoner of murder, and before sentence was passed his counsel gave notice that he intended to appeal against the conviction to the Supreme Court on the ground that this evidence was improperly admitted.

At the trial no authorities were referred to, but I was guided in my ruling mainly by the case of *Rex* v. *Foster* (6 C. & P. 325), which is referred to in *Stephen's Digest of the Law of Evidence, Art.* 3.

That decision has been followed in subsequent cases; but has apparently not been universally accepted, as is shewn by the ruling of Cockburn, L.C.J., in *Regina* v. *Bedingfield* quoted in the same article of *Stephen's Digest.*

I have myself, on previous occasions followed the decision in *Foster's case*, and it seems to me of the greatest importance that its authority should be once for all established in our Courts, as otherwise the effect would be to exclude what is often the very best evidence in that class of case.

In this appeal, however, the further question arises whether the facts proved bring the case within the authority of *Regina* v. *Foster*, or whether the contention of the defendant's counsel should be supported, that the intervals which elapsed between the infliction of the injury and the statement made by the deceased were so long as to make that decision inapplicable.

It is of course clear that in Foster's case there was a certain interval between the accident and the statement made by the deceased, and in subsequent cases also it has not been held necessary that the statement should be simultaneous with the infliction of the injury. What the exact intervals of time were in the present case it is of course impossible to say; but in order that the Court may be in the best position for determining this point I think it best to set out my notes of the evidence of these two witnesses in so far as they bear upon the question:

[The evidence of Sanna Moos and Christina Barlow was here set out.]

Now as regards both these witnesses, if the statements had been made by the deceased immediately upon their arrival at the house I think undoubtedly the case would be completely covered by the authority of Foster's case, because they both lived close by, and went over immediately upon hearing the report. In both instances, however, other events intervened between their arrival and the statements deposed to. The impression, however, made upon my mind by the evidence was that these events occupied a very short time, and that the statements were so intimately connected with the occurrence that they were properly admissible. These statements were made on the scene of the fatal occurrence, while the prisoner was still on the spot and so shortly after the infliction of the injury as to negative any idea of their having been maliciously devised by the deceased.

The questions for the Court to determine are:

(1) Was the evidence improperly admitted?

(2) If so, was any substantial wrong done to the prisoner so as to justify the Court in setting aside the conviction?

Mr. Graham for the appellant: The evidence is admissible only on the ground that it was a dying declaration or that it was part of the *res gestae.* It was not admitted as a dying declaration: the onus of proving that the woman knew she was dying was on the Crown, but the Crown did not prove it. The doctor who attended the woman was not called as a witness. It has not been the practice of our Courts to admit evidence of this nature. *Rex* v. *Foster* (6 C. & P., p. 325) is the authority in England, but I can find no recent cases in which that case has been followed. In two cases of recent date it has distinctly not been followed: *Regina* v. *Bedingfield* (14 Cox, p. 341); and *Regina* v. *Goddard* (15 Cox, p. 7); *Roscoe's Criminal Evidence* (pp. 25, 27). See also *Regina* v. *Megson* (9 C. & P., p. 420); and *Regina* v. *Osborne* (C. & M., p. 622).

[De Villiers, C.J.: In cases of rape statements are generally made some time after the act and therefore they are not admitted.]

In *Regina* v. *Smith* (18 Cox, p. 407), a statement made in the presence of the prisoner, but denied by him, was excluded by Hawkins, J.

[De Villiers, C.J.: I don't think this Court would follow the decision in that case].

In this case there is nothing to show how much time intervened between the act and the statement. A number of people were in the room when the statement was made and it is impossible to know what suggestions were made to her in the interval. If statements of this nature are allowed on behalf of the Crown they would be allowed also on behalf of a prisoner and that would be very dangerous. If the evidence is inadmissible then by the law of England it would be quashed. *Regina* v. *Gibson* (18 Q.B.D., p. 537). The provisions of Act 35 of 1896, section 3€, differ from the English law: the effect of that section is to give the Court the power to uphold the conviction when irrelevant evidence has been admitted but there is also sufficient relevant evidence, but not where relevant evidence which would affect the jury has been admitted improperly. The effect which this evidence would have upon the minds of the jury would be the impressive effect of a dying declaration, although legally not a dying declaration. *Regina* v. *Quin* (1 App. Ca., p. 84); *Regina* v. *Hermann* (1 App. Ca., p. 318) at (p. 321); *Regina* v. *Nikolai* (1 App. Ca., p. 188); *Taylor on Evidence*, as to dying declarations

[The Chief Justice intimated that the Court was of opinion that if the evidence was inadmissible substantial injury had been done to the prisoner.]

Regina v. *Smith* (16 Cox, p. 171) is a very similar case; there the statement was made soon after the act and it was not attempted to put it in as part of the *res gestae* but as a dying declaration. *Regina* v. *Dalmas* (1 Cox, p. 95).

Mr. Molteno for the Crown: This was clearly a dying declaration. *Regina* v. *Foster*, *Greenleaf and Wheat field on Evidence* (p. 182); *Taylor on Evidence* (section 583); *Stephen* (p. 4).

[Maasdorp, J.: Did not the judge below decide that it was not a dying declaration?]

At the particular time at which he gave his decision he certainly was of that opinion. This case is similar to *Rex* v. *Goddard* (15 Cox, p. 7). If it had not been held that the evidence was admissible as part of the *res gestae* the point that it was a dying declaration would have been raised. As to the connection between the declaration and the fact the learned judge below was the best judge of that and he held that it was part of the *res gestae*.

Mr. Graham in reply.

De Villiers, C. J.: The learned counsel for the Crown has contended that evidence of the statements made by the deceased woman shortly after she received the mortal wound was admissible as a "dying declaration." She certainly was *in extremis* and death did ensue, but there is not sufficient evidence to show that she had a full apprehension of her danger. There was no competent person at hand to warn her of her danger and the only statement made by her which might possibly indicate her own opinion is the wish she expressed that God would take her. Such a wish might be expressed by a person desiring to be released from immediate pain or suffering, and does not necessarily indicate a belief in impending death. I am unable, therefore, to support the view that the statements made by her as to the cause of her death were admissible as "dying declarations." The learned judge who presided at the trial of her husband for murder admitted the evidence on the ground that her statements were part of the *res gestae*. She had received a bullet wound, and any exclamation or statement made by her immediately on receiving that wound would undoubtedly be admissible in any judicial investigation into the cause of her death. As was said by Chief Justice Holt in *Thompson* v. *Trevanion* (Skin., 402) "What the woman said before she had time to devise anything for her advantage should be given in evidence as part of the *res gestae*." In the case of *Rex* v. *Foster* (6 C. & P., 325) it was held, on an indictment for manslaughter, that a statement made by the deceased, immediately after he was knocked down by a vehicle, as to the cause of the accident was admissible. That case, which was decided by three judges (Park and Patteson, J. J., and Gurney, B.), has sometimes been disregarded by single judges presiding at criminal trials, but it has never been distinctly overruled. In this colony the principle embodied in that case is well established, and the real difficulty lies in its practical application. The statement of the injured person is clearly not admissible if made after such a lapse of time or under such circumstances as might have enabled him to devise a story inconsistent with the truth. The fact that others had come up to the injured person before the witness to whom the statement was made is not conclusive against the reception of the evidence. In a street accident, for instance, a crowd might instantly assemble, and an exclamation or statement might be addressed to one of the later comers which could not well be excluded merely because he was not the first to arrive. The judge presiding at the trial is in the best position to decide as to the degree of relationship between the question under investigation and the making of the statement, and a wide discretion must therefore be left to him. I am not prepared to say that the learned judge did not, in the present case, exercise a sound discretion. He was satisfied that a very

short time had elapsed between the shooting and the statement, and that the deceased had had no time or opportunity to devise a story to the disadvantage of the prisoner. He might have added that the deceased was still on the spot where she had received her death wound, and that the hope expressed by her that the murderer would still enter Paradise rather negatives the idea of a malicious invention to the injury of her husband. Under all the circumstances, therefore, I am of opinion that the appeal must be dismissed.

Mr. Justice Buchanan: I concur in the opinion that the evidence was admissible as part of the *res gestae*. The authorities sh w that to a great extent the question is left to the discretion of the judge presiding at the trial. In this case the judge is a most careful one, and there has not been sufficient ground shown for interfe ing with the manner in which he has exercised his discretion. I am not prepared to say what I should have done, under similar circumstances. But I think when evidence is tendered which is admissible, no grounds appearing for its rejection, it should be received.

Mr. Justice Maasdorp concurred.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

LYONS v. HESSEN. { 1897. Nov. 22nd.

Pleading — Fraud — Illegality — Absolution from the instance—Appeal—Reasons.

The defence of fraud should be specially pleaded.

In an action for money lent the defendant pleaded a denial of the loan but, in his evidence at the trial, stated that the money had been given to him by the plaintiff in respect of illicit diamond buying transactions. Judgment was given for the defendant, but without any reasons.

Held, *on appeal, that the special defence ought to have been pleaded, and that, by altering the judgment into absolution from the instance, an opportunity should be given to the plaintiff to renew his action and meet the charge of fraud and illegality.*

This was an appeal from a decision of the High Court of Griqualand West, delivered on 3rd September last. Lyons, the present appellant, in the Court below sued the respondent Hessen for £1,500, being for money lent by Lyons to Hessen at various times, in June, July, August, and September, 1892, the total amount being £1,650. But the plaintiff in his declaration stated that he was willing to set off £100 for house rent, and £50 in respect to the purchase of a certain cottage.

The defendant's plea denied all the allegations, except that it said the debt of £150 had been discharged. At the trial, however, he admitted that he had received moneys to the extent of £1,680, but alleged that they were moneys given for a criminal purpose, namely, the illicit purchase of diamonds. After hearing the evidence the Court below gave judgment for the defendant with costs, and against that decision the present appeal was brought.

Mr. Innes, Q.C. (with him Mr. Buchanan), appeared for the appellant.

Mr. Schreiner, Q.C. (with him Mr. Close), appeared for the respondent.

Mr. Innes: The defence is that the defendant is a criminal, and that the plaintiff is one also; there is only the defendant's evidence to support it.

[De Villiers, C.J.: There being no reasons supplied, I must assume that the High Court believed the defendant rather than the plaintiff.]

If the Court below found that the plaintiff had not proved his case, the judgment should have been one of absolution from the instance. The plaintiff is put to serious disadvantage by this judgment, inasmuch as the defence made was not raised on the pleadings. Neither plaintiff nor defendant could have been criminally convicted on this evidence.

Mr. Schreiner: In *Van Niekerk* v. *Fagan* (7 Sheil, p. 57) it was held that evidence of a man's books could not be put in as evidence in his favour, unless properly proved. No application was made in the Court below for absolution. There can be no appeal on the question of costs only in this case, because no leave was obtained from the High Court.

Mr. Innes: The lesser is included in the greater, therefore, as we appeal generally, we are entitled to ask for absolution.

De Villiers, C.J.: It is to be regretted that the judges of the High Court have not favoured this Court with the reasons for their judgment. In the absence of any reasons we must assume that, in giving judgment for the defendant, the Court below believed his evidence and disbelieved that of the plaintiff. But the defendant's evidence was given in support of a defence which had not been raised in the pleadings, and of which, so far as one can judge from the record, the plaintiff had no notice whatever. The action was for money lent and the plea was a simple denial of the loan. The plaintiff was cross-examined as to diamond buying transactions, but it was not until the defendant gave his evidence that, according to the record, the defence of fraud or illegality was raised. He then stated that the plaintiff had never lent him any money but had at various times illicitly bought diamonds from him, and that the cheques produced by the plaintiff as vouchers for his claim had really been drawn for the payment of such diamonds. If this defence was to affect the judgment it surely ought to have been raised in the plea. Rule 330 (C & D), which I take it applies in the High Court, is explicit on the point. But quite independently of any express rules it is an established practice in pleading to give special notice to one's adversary of any fraudulent or illegal conduct with which it is intended to charge him. In the absence of such notice to the plaintiff in the present case, the evidence of fraud and illegality given by the defendant ought not to have prejudiced the plaintiff. It is possible that, quite apart from the defendant's evidence, the Court disbelieved the plaintiff's statement that he had paid various sums of money to the defendant, but it seems more likely that the Court believed that the money had been so paid and that the payments were in respect of illicit diamond buying transactions. In the face of the Court's judgment I am not prepared to enter judgment for the plaintiff, but he ought not to be deprived of the opportunity of suing the defendant again and then meeting the charge of fraud or illegality. The judgment will therefore be altered into one of absolution from the instance, each party paying his own costs in the Court below. As to the costs in this Court, the nature of the defence was not such that the defendant could expect costs in either Court, and the plaintiff does not obtain such an alteration of the judgment as clearly entitles him to costs. Each party will therefore bear his own costs in this Court also.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, Gus Trollip.]

QUEEN v. BUDD AND SHORTLE. { 1897. Nov. 22nd.

Evidence — Theft — Best evidence — Identification — Invoice.

On the trial of two prisoners for theft of certain shirts from S., *the only evidence to connect certain shirts found in their possession with the shirts alleged to have been stolen, was an invoice sent by a firm in Scotland to* S. *describing the shirts which the clerks of* S. *swore had been ordered from the firm. The description given in the invoice corresponded with the patterns of the shirts found in the prisoners' possession, and the mark on the invoice corresponded with the mark on a certain case consigned by the firm to* S., *and lost in transit from the Docks to his stores, but no witness was produced who could speak to the contents of the missing case.*

Held, *that the best evidence that the missing case contained shirts similar to those found in the prisoners' possession had not been produced, and that the invoice was not admissible as evidence under these circumstances.*

This was an argument upon a point of law reserved at the trial of the prisoners at the Criminal Sessions of the Supreme Court held on the 19th October last.

The prisoners were indicted for the theft of a case containing shirts, the property of Messrs. Sellar Bros., of Cape Town. The evidence led by the Crown showed that a certain case marked with a Z arrived at the Table Bay Docks consigned to Messrs. Sellar Bros., and was, with other cases, placed on a wagon and sent to the offices of Sellar Bros., in Hout-street. It ought to have been off-loaded there but through an oversight was not off-loaded, but sent to the Railway goods-station with the other cases. The cases were all off-loaded there, being consigned to country customers, and receipts obtained for all except the one in question. There was no evidence that this case had ever been opened or that it had ever been seen again. But it was proved that a large case had been taken to Shortle's house by

the prisoners about this time, which was opened and burnt; that a large number of shirts were taken out of this case, and placed in two smaller cases, which were consigned by Shortle to Laingsburg. At Laingsburg they were seized by the police. A few shirts were also found at Budd's house. To prove that these shirts were the property of Messrs. Sellar Bros., the evidence of William Kirby and Andrew Angus was taken. Kirby stated that he was storeman at Sellar Bros., and knew from advices that the case contained shirts. In cross-examination he admitted that he had not seen the advices but knew by the books that this was so; the books also showed that the case was cleared through the Customs as a box of shirts. No book was produced in court. Angus said that he was not in the employ of Sellar Bros at the time the order for shirts was sent, but was at present an assistant manager, and knew that such an order had been sent. He deposed to the receipt of an invoice from Muir & Sons, Glasgow, dated May 3. This invoice was marked with a Z similar to the mark on the case, and mentioned several dozens of various shirts, with certain descriptive letters and numbers. He said that the shirts were ordered from patterns in Sellar Bros.' store, and produced the patterns, the marks, numbers and letters of which were the same as those of the invoice. He had also compared the patterns with the shirts, and identified the latter.

The evidence as to the orders given to Muir & Sons and the invoices was objected to by counsel for the prisoners, but the objections were overruled by Mr. Justice Buchanan, and the prisoners were convicted and sentenced—Budd to twelve months, and Shortle to eighteen months, both with hard labour.

On the application of counsel, the following point was then reserved: "That the admission of the evidence given by Andrew Angus and William Kirby as to the nature of any order sent by either of them or by the firm of Sellar Bros. to R. S. Muir, Glasgow, and of advices received by Sellar Bros. from R. S. Muir, and the production of the invoice marked M (referred to above), is irregular and illegal."

Mr. Jones appeared for Shortle; Mr. McLachlan appeared for Budd; and Mr. Sheil, Acting Attorney-General, for the Crown.

Mr. Jones: Angus not being an employé of the firm at the time the order was sent and not having sent the order, his evidence as to this is only hearsay: even if he had given the order he could not state the nature of it. The best evidence must be given; a clerk or representative of Muir should have been called to say that he received the order and acted on it by sending out the shirts. The invoice is clearly hearsay evidence; hearsay applies to what is written as well as what is spoken. The invoice is either a statement of fact or it is not; if it is not, then it is not admissible; if it is, then the fact of which it is a statement should be proved by some person who has knowledge of the fact. The best evidence would be that of the person who wrote the invoice; he might possibly deny that any shirts were sent at all. Evidence of the person who actually packed the shirts should have been obtained. Evidence of this nature is never admitted in civil suits; still less should it be allowed in a criminal prosecution. *Taylor* (section 570); *Russell on Crimes* (Vol. 3, p. 349).

It can only be admitted as part of the *res gestae*, if the fact of the shirts having been despatched were first proved and that it was made out and sent at the same time, but it can't prove the fact.

Mr. McLachlan: The best evidence of the contents of the box should have been given *Archbold* (p. 254); *Roscoe's Digest of Evidence.*

[De Villiers, C.J.: The goods passed the Customs as shirts. Is not that a presumption that they examined the box?]

I submit not. The Custom-house works upon the invoice. No Custom-house officer was called.

[De Villiers, C.J.: If sheep or skins were in question, the onus would be on accused by Act 35 of 1893.]

That does not apply to these goods; the Crown must prove that they were stolen.

Mr. Sheil: The best evidence under the circumstances has been given. The accused broke up the case in which the goods were and so destroyed the only evidence. It is almost impossible to find the person who packed the case where so many cases are packed by a firm. *Best on Evidence* (Section 412). In discussing the maxim "*Omnia praesumuntur contra spoliatorem*" Lord Holt says that if a man destroys evidence against himself very little is taken to supply it.

[Maasdorp J.: That argument assumes the guilt of the prisoners; if the case was theirs they had a perfect right to destroy it.]

None of Muir's employés could have given better evidence than Angus gave. The invoice was sent out from England in the ordinary course of business: the writer of the invoice probably saw no goods and the packer could not absolutely swear to the goods.

De Villiers, C.J.: The prisoners were charged with the theft of a case containing a certain number of shirts, the property or in the lawful possession of Sellar Brothers. The evidence against the prisoners was that a certain case was traced to their possession, that they opened

the case, took out the shirts and sent them to Laingsburg in two smaller cases; that these shirts were of the same pattern as shirts which Sellar Brothers had ordered from Muir & Sons, Glasgow, and that before the alleged theft Sellar Brothers had received an invoice marked with a Z, which was also the mark on a certain case which had been sent from the Cape Town Docks to the office of Sellar Brothers, but was by mistake left at the Railway-station instead of at their office. There was no evidence that the case traced to the possession of the prisoners was marked with a Z. Nor was there any evidence that the case which was so marked contained shirts except the evidence of two clerks in the office of Sellar Brothers, one of whom stated that he knew from the advice received from Muir & Sons that the case contained shirts, and the other stated that an order had been sent for the shirts before he entered into the employ of Sellar Brothers, and that an invoice marked Z had been received from Muir & Sons, which invoice described the shirts sent by them in compliance with the order received by them. After conviction the presiding judge reserved for the opinion of this Court the question, which in substance amounts to this, whether the contents of the case marked Z had been proved by the production of the invoice coupled with the evidence of the two clerks. If it was clear that the missing case did contain shirts of the pattern ordered by Sellar Brothers, there would have been just sufficient evidence to connect the prisoners, in whose possession shirts of a similar pattern were found, with the taking of the missing case. If, however, the invoice was inadmissible without proof that it truly represented the contents of the case, then the conviction cannot be allowed to stand. It is obvious that the clerks of Sellar Brothers could not give any relevant evidence as to the correctness of an invoice, which they had no hand in preparing, or of the contents of a case which they never saw opened. The best evidence upon these points would be that of Muir & Sons' servants who executed the order and wrote the invoice. If the person who prepared the invoice was dead, the invoice might have been treated as an entry made in the usual course of his business, but then it would have been necessary to prove that he was dead and that the invoice was made at the time when the fact which it records took place. It would have been possible to dispense with the evidence of the person who prepared the invoice if the packer had been called to prove that he packed the shirts in the case marked Z, and that they corresponded with the shirts described in the invoice. But evidence that an order for such shirts was sent from Cape Town and that advices of the execution of the order had been received from Glasgow was wholly insufficient. The rule laid down in the 37th section of Ordinance 72 of 1830 still holds good, that the best evidence of which from its nature the fact to be proved is capable shall be given. The best evidence that the missing case contained shirts similar to those found in the prisoners' possession would be that of the person or persons who knew the contents of the case, and not of persons who could only know by reference to the invoice what the case contained. The invoice is not a document which becomes admissible by mere production without oral evidence as to its correctness, and the links in the chain of oral evidence are wanting which would justify the admission of the invoice as evidence. I am of opinion, therefore, that the question reserved must be answered in favour of the prisoners, and that the conviction must be quashed.

Mr. Justice Buchanan: As the case now presents itself the conviction is quashed not so much because this evidence was improperly admitted, but rather as there is a link wanting in the chain of evidence to show that the box traced to the possession of the prisoners contained the property of Sellar Bros. Technically perhaps the evidence was admissible only after the necessary link had been supplied, but that would not be so material if the necessary evidence had afterwards been given. The link which the Court now finds wanting is evidence that Sellar Bros. ever received the shirts found in possession of the accused. If it was properly proved that the box marked Z in diamond contained shirts, the invoice would have been admitted without question. This conviction is quashed more on the ground of insufficiency than of inadmissibility of evidence.

Mr. Justice Maasdorp: I concur upon the grounds and for the reasons stated by the Chief Justice.

BLACK v. LAWRENCE. { 1897. Nov. 22nd. „ 23rd.

Judgment—Execution—Private sale by execution creditor — Acquiescence of execution debtor—Rent—Interpleader—Ownership.

In an interpleader suit brought by the purchaser of certain furniture against the lessor, who had obtained

judgment and a writ of execution for the rent, it appeared that the claimant had before such judgment but after accrual of a portion of the rent purchased and obtained delivery of the furniture from a prior execution creditor by private sale.

Held, *affirming the Magistrate's judgment, that in the absence of proof of acquiescence at the time on the part of the lessee in the sale, the furniture was still his property, so as to be executable for the amount of the lessor's judgment debt.*

This was an appeal from a judgment of the Assistant Resident Magistrate of Cape Town in an interpleader suit, in which the appellant was the claimant and the respondent was the respondent. The evidence on the record was not very clear, but it appeared that one Flanders was the lessee of premises owned by the respondent, Mrs. Lawrence, in which he had placed certain furniture bought by him from Messrs. Thorne, Stuttaford & Co. Messrs. Thorne, Stuttaford & Co., somewhere about the 7th June, 1897, obtained judgment against him for the price of the furniture, and in the same month attached it. There was then some communication between Thorne, Stuttaford & Co. and Messrs. White, Ryan & Co., and a letter was written to the former on the 11th June in which White, Ryan & Co. said "We are prepared to make you a cash offer of £50 together with Court expenses, on consideration of your rescinding all rights to the furniture and effects which were attached on your behalf to our Mr. Black, in which case we free you from any responsibility." This offer was accepted. The furniture was removed from the premises but afterwards replaced, Flanders apparently being still in the house. Subsequently it was attached at the suit of the landlord for rent due for the month of May and this was paid by Black, the claimant. Black himself became lessee of the premises on 1st July and said that on the same day he purchased the furniture from White, Ryan & Co. Subsequent to this the respondent obtained judgment against Flanders for the rent due for June and on the 19th July the furniture was attached by the messenger of the Court in execution of this judgment. Black then interpleaded.

The Assistant Magistrate declared the property executable and ordered the claimant to pay costs. He held that the furniture was the property of the tenant during a portion of June, the month for which rent was sued for, and was actually in the house; that after it had been replaced subsequent to the first attachment there was no delivery to White, Ryan & Co., nor from them to the claimant.

Mr. Graham for the appellant: Thorne & Stuttaford had relinquished all rights over the furniture to White, Ryan & Co., and the latter had sold it to Black. The whole question turns on delivery, and the evidence shows clearly that there was delivery. The landlord lost her lien when the furniture was removed.

Mr. McGregor for the respondent: Assuming that Black obtained delivery, the question is whether there was a sale by White, Ryan & Co. to Black. They were never *domini*. Even if there was a completed sale, Black had notice on the 16th June that the goods were subject to hypothec and he bought them on the 1st July. His conduct brings him within the rule of *Coaton* v. *Alexander* (1879, p. 17).

[De Villiers, C.J.: There was no pledge—no attachment.]

No, but there was a legal hypothec on the 1st July. *Burge* (Vol. 3, p. 590); *Voet* (20, 2, 6, 5); *Hough and Trustee* v. *Heydenrych* (12 S.C.R., p. 318); *Van der Keessel* (Th., 539).

De Villiers, C.J.: The claimant in the Court below, Black, claimed as his own certain furniture which had been attached at the suit of the defendant Mrs. Lawrence, the owner of certain premises, against Flanders the lessee, for rent for the month of June last. Some time in June, after a portion of the rent had accrued, the furniture was attached at the suit of Thorne, Stuttaford & Co., who had obtained a judgment against Flanders for the price of the furniture. White, Ryan & Co. then purchased from Thorne, Stuttaford & Co., for £50, all the rights of the latter to the furniture, and removed it from the premises, but afterwards by some unexplained arrangement between White, Ryan & Co. and Flanders, the furniture was replaced upon the premises. On the 1st of July the claimant obtained possession of the premises as lessee, and on the same day, according to his statement, he purchased the furniture from White, Ryan & Co. The Court below held that there had been no delivery of the furniture by Flanders to White, Ryan & Co., or by them to Black, but the evidence satisfies me that Black at all events did obtain delivery. The real question is, what evidence is there of a sale by Flanders to White, Ryan & Co.? They purchased the right to the furniture from the execution creditors, but these creditors had no right privately to dispose of the furniture without the consent of Flanders the owner. It does not

clearly appear when Flanders quitted the premises, but it must have been some time in June. It is said that he acquiesced in the sale, but the evidence does not shew that he was even cognisant of the sale. Without such evidence it is impossible to hold that the claimant has acquired the ownership of the furniture by his purchase from White, Ryan & Co. to the prejudice of the lessor, at whose suit the furniture has been attached. The appeal must therefore be dismissed with costs.

Mr. Justice Buchanan: The difficulty I have in this case is on a question of fact. I am not prepared to say that the furniture was not properly sold to Black. The Magistrate in his reasons states there was a sale, and there is distinct evidence supporting such a finding. The Magistrate's decision is that notwithstanding the sale, as there had been no delivery, the property was executable. On this ground the Magistrate clearly has erred. The circumstances of the sale were not called in question in the Court below, where if such a line had been taken, additional evidence on the point might have been given. I lean to the opinion that the evidence sufficiently proved a sale for the purposes of the case, and further, that there had been physical delivery prior to the attachment. But my brethren hold a different view on the facts, so that it is useless to discuss the question of law which might arise if my view is correct. I therefore leave the case to be dealt with by the majority of the Court.

Mr. Justice Maasdorp: I concur in the view that the sale was not proved to have taken place.

[Appellant's Attorney, A. P. Kenealy; Respondent's Attorney, A. Steer.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

MARICO BOARD OF EXECUTORS v. AURET. { 1897. Nov 23rd.

Husband and wife—Suretyship—Benefits — Renunciation — Notarial instruments.

The defendant having made two promissory notes in favour of the plaintiff, in payment of a debt due by her husband, was induced by her husband to sign a document whereby she pledged a life policy, as collateral security for the payment of any money which she or her husband might thereafter owe to the plaintiff, she renouncing the benefits of the S.C. Velleianum *and of the* Auth. si qua mulier. *The document was notarial in form but, according to Transvaal practice, in the absence of a notary, it was executed before a Landdrost, who admittedly did not explain its contents or inform the defendant of her rights, but was satisfied with her answer that she knew what she was signing. In fact the defendant believed that she was securing only the promissory notes and had no knowledge of the meaning of the benefits. After her husband's death she paid the two promissory notes but refused to pay the plaintiff's claim for further sums alleged to be due to him for the husband's defalcations.*

Held, *that the defendant had not duly renounced the benefits and was now entitled to plead them.*

This was an action for the recovery of a debt.

Mr. Schreiner, Q.C. (with him Mr. Searle, Q.C.), for the plaintiffs; Mr. Graham (with him Mr. Buchanan) for the defendants.

The plaintiffs' declaration was as follows:

1. The plaintiffs are the trustees or curators of the Marico Board of Executors and Trust Company (Limited), which is a company, the head office whereof is at Zeerust, in the South African Republic, where the company is registered with limited liability.

2. The defendant is the widow of the late Charles Pritchard Auret and executrix testamentary of his estate, and she was married to him without community of goods. She is now domiciled at Beaufort West, in this colony.

3. Before the 30th day of April, 1895, the said Auret had been in the employment of the said company as its secretary, and had been first suspended and then dismissed from such employment by reason that it was, in or about November, 1894, discovered that he had been untrue to the trust reposed in him, and had misappropriated,

or failed to duly account for, sundry sums of money, the property of the company, by him in his said capacity received or taken into custody or under his administration on behalf of the company.

4. On the said 30th day of April, 1895, the amount of the indebtedness to the company of the said Auret in respect of the matters aforesaid, and in respect of moneys lent and advanced to him by the company, was not yet accurately determined, and on the said day the defendant individually, and assisted by her husband the said Auret, executed in favour of the plaintiffs, before the Acting Landdrost of Zeerust aforesaid, and in the presence of witnesses, the instrument, a true translation of which from the original, which is in Dutch, is hereunto annexed, and marked A, which the plaintiff prays may be read as though here set forth in full.

5. By the said instrument the defendant in her individual capacity duly ceded to the plaintiffs the certain life insurance policy therein referred to on the life of the said Auret, which had been ceded to her by the said Auret by ante-nuptial contract on the 10th November, 1888, such cession being by way of collateral security for the due payment of any sum or sums of money which the defendant or her said husband might thereafter owe to the plaintiffs, renounced the benefits of the *Senatus consultum Vellejanum* and *de authentica si qua mulier*, and the benefit of her marriage contract.

6. At the date aforesaid, to wit the 30th day of April, 1895, the defendant was indebted to the plaintiffs under and by virtue of two promissory notes in the sums of £104 1s. 6d and £82 11s. 3d., for the payment whereof *inter alia* she was summoned in this suit, but which amounts she has since the issue of summons paid to the plaintiffs together with interest and costs.

7. Her late husband was on the 30th day of April, 1895, and at his death, indebted to the plaintiffs over and above the sums mentioned in paragraph 6, in the sum of £553 13s, as will more fully appear by reference to the annexed account marked "B," which has been duly rendered to the defendant as executrix testamentary of his estate as aforesaid, but she has, as such executrix, failed and neglected to pay the said sum or any part thereof.

8. The aforesaid policy is lawfully held by the plaintiffs under the instrument and cession aforesaid as security for payment of the said sum of £553 13s., and due notice of the said cession has been given to the insurance society.

9. As to the charge of interest at 8 per cent. in the aforesaid account the plaintiffs say that that rate of interest is the usual rate in the business of the company in which the late Auret was employed.

Wherefore the plaintiffs pray for:

(*a*) Judgment against the defendant as such executrix for the sum of £553 13s., with interest from the 1st day of January, 1896, at 8 per cent.

(*b*) An order declaring the aforesaid policy to be executable for the amount of the said judgment, with interest and costs, on default of payment thereof by the defendant as such executrix.

The plea admitted that at the time the document was signed Auret was indebted to the plaintiff in two sums of £62 and £104 respectively, and no more; that the defendant signed the document on the understanding that only those amounts were owing, and would not have signed it but for that understanding.

Mr. Graham applied for leave to amend the plea by inserting a clause to the effect that when the defendant signed the document it was not read over to her, and that she signed it at the request of her husband without any knowledge of its contents.

Mr. Schreiner opposed the amendment.

The amendment was allowed to be made.

ANNEXURE.
"A"
DEED OF CESSION.

Know all men whom it may concern, that on this the thirtieth day of April in the year of our Lord one thousand eight hundred and ninety-five, at Zeerust, district Marico, South African Republic, before me, Lourens Potgieter, Acting Landdrost for the Marico District, in the absence of a duly admitted and enrolled notary public, residing and practising as such in Zeerust, there appeared Elsie Margaretha Auret (born Meiring), of Zeerust aforesaid, duly supported on this occasion by her husband Charles Pritchard Auret.

And the appearer declared to have ceded and made over, as she by these presents does cede and make over, to and in favour of the curators of the Marico Board of Executors and Trust Company (Limited), of Zeerust or their order, successors or assigns, as collateral security for the due payment of any sum or sums at present owing by her or her husband to the aforesaid curators of the Marico Board of Executors and Trust Company (Limited), of Zeerust, or of any sum or sums which the appearer or abovenamed husband may be hereafter owing to them,—a certain Life Insurance Policy, No. 6,958, dated 5th April, 1882, on the life of Charles Pritchard Auret, and ceded and made over to the appearer on the 10th November, 1888,

And the appearer further declared to renounce all the exceptions "*Beneficium senatus consulti-velleiani*," "*De authenticor si qua mulier*," and the benefit of her marriage contract, and the appearer further declares that she is acquainted with the meaning of these exceptions.

Thus done and signed at Zeerust aforesaid, day and date as above, and in the presence of the undersigned witnesses.

(Sg.) E. M. AURET.
C. P. AURET.

As witnesses:
(Sg.) H. J. NIEUWSTADT.
" J. F. LANGE.

Before me,
L. POTGIETER.
Acting Landdrost.

Certain evidence had been taken on commission, amongst which was that of L. Potgieter, the Acting Landdrost, before whom Mrs. Auret signed the deed of surety handing over her husband's life policy in security for her husband's debts. Before signing he asked her if she knew what she was signing, and the answer she gave was that she did know.

The following witnesses were examined in Court.

Leonard Price Boyce said he adhered to his evidence taken on commission. He produced some of the sheets of the accounts which he found concealed. He had asked Mr. Auret for these accounts repeatedly since he had been suspended. They had never been seen by the auditors, and had never been balanced up. The accounts were found in Mr. De Wet's desk. Mr. De Wet was now in Pretoria, and was no longer in their office. These accounts were rendered from the time of the starting of the company. Auret was nominally the secretary, but practically he had the whole management. The directors were there, but they did not take much part in the business. Witness at that time was bookkeeper to a firm of storekeepers in Zeerust. The Board of Executors acted as a sort of banking establishment in Zeerust. They banked at the Standard Bank, Potchefstroom, in 1894. On February 19, 1894, the cash balance o the Board at the bank was £818 8s. 2d. He knew that Mr. Auret used to keep a large balance because the bank was some way off. There had been no remittance to the bank for twenty-three days previously. It was clear from the books that on that day Auret drew £800. The entry was in Wiley's handwriting. None of the items on the account put in were accounted for to the company. When witness took over the charge of the Board's business he found "good-fors" and promissory notes, signed by Mr. Auret, in the cash-box, amounting to £80, and after treating them as cash he still found an amount of £105 short.

The Chief Justice: Did you discover those frauds, for they are clearly frauds, before Mr. Auret died?

Witness: Yes. Two days before he left Zeerust.

The Chief Justice: Why didn't you prosecute?

Witness: He said he would make it right, and he alleged that there was an amount owing. We thought we would examine the accounts further.

The Chief Justice: You preferred getting the money out of him or his wife to prosecuting him?

Witness: I suppose that was the feeling of the Board.

Mr. Schreiner: As a fact, the Board did not prosecute him or take any steps at all?

Witness: That is so. Continuing, witness said that with respect to the cession of an insurance policy to the plaintiffs by Mrs. Auret as security for her husband's debts, he understood that when Mrs. Auret signed the document she knew she would be liable for misappropriation.

Cross-examined by Mr. Graham: Witness could not remember if he took the documents after they were signed by Mrs. Auret. After the so-called defalcations were discovered he continued to act for the Board because he had all the business of the Board at his finger's end. When he discovered the £300 he considered it was a case or defalcations; not that it was something that further accounting would clear up.

By the Chief Justice: Witness did not inform Mrs. Auret that if it was a case of defalcation, by signing the document she made herself liable for sums the exact amount of which was then not known.

At the time Auret got the £300 he was indebted to the company. The entry showed that Erasmus was debited with the money, and that the Board was responsible. The £327 was paid in a lump sum, and was for debts due by Auret; it had nothing to do with the £300. Witness advanced Auret £40 on the security of his furniture, but afterwards the Board discovered that he had given his furniture as security for other debts, and at the sale the Board only received £8 9s. 9d. Wiley left because he placed before the Board a statement representing that Auret owed the Board a less sum than he actually was. Auret was dismissed; he received a month's notice to leave.

Edwin Wiley, bookkeeper, said he was in the employment of the Marico Board of Executors in 1894, and Auret was his superior. During the time he was there he kept the books produced. He made entries in the books by instructions of the secretary. Sometimes the secretary gave him instructions in writing, sometimes verbally. Auret kept himself informed of what was in the books. There was an account in the books in the name of Erasmus. He had seen the account in the books, and had seen that alterations had been made in the figures. Witness did not make those alterations. The entry in the book produced of £300 debited to Auret must have been made by the secretary's instructions. There was another entry, "N. P. Erasmus to Auret, £300." That entry was also made on the instructions of the secretary. Auret from time to time inspected his account in the books. The alterations had not been made in all the books. Witness never drew a penny from the company except his salary. Witness was dismissed because the Board alleged that he attempted to hide Auret's transactions. This was not so. Witness never participated in anything wrong that may have been done. When Auret was at home he had the keys of the safe, and when Auret was from home witness had them.

Cross-examined by Mr. Graham: Witness had not the slightest idea that there had been defalcations by Auret.

Henry Johannes Nieustadt, from Heidelberg (shown document). He recognised the signature on the document as his, but he could not say when he signed it. Witness lived for ten or fourteen days with the Aurets, and was frequently at their house. He could not remember signing the paper.

Cross-examined by Mr. Graham: He knew Potgieter, Auret, and Boyce. He could not recollect how the document came to be signed.

By the Chief Justice: He could almost swear that he never saw Mrs. Auret sign any document. He knew her handwriting.

Elsie Margareta Auret, the defendant, widow of the late Mr. Auret, stated that she was married by ante-nuptial contract. In 1890 her husband took up an appointment at Zeerust. His salary was either £500 or £600 a year, and shortly afterwards the salary was increased by £100. She never knew that her husband was in financial difficulties, and her husband never discussed his business affairs with her. She remembered signing a promissory note, and afterwards signing a document. Her husband did not discuss the matter with her. He merely asked her to sign, and she signed. She remembered her husband bringing Mr. Potgieter to the house and asking her to sign something, and she signed. Witness was not aware what she signed.

By the Chief Justice: Had she known the contents she would not have signed it.

Witness did not inquire what the contents were. She never knew that there were any defalcations. She had only heard about them and about his dismissal from the Board after his death. It was in 1895 that she knew she had signed away her rights. Her husband died in October, 1895.

Cross-examined by Mr. Searle: Mr. De Smidt, at Beaufort West, she believed, was consulted on her behalf. She knew that the life policy of her husband was for £500, and was solely for her benefit. Witness knew that it was her signature in the document, but when she signed it she did not know that it was the life policy she was signing. She knew that her husband had received assistance from her brother-in-law, Mr. D. J. de Villiers. She knew that in 1894 her husband was in trouble about money matters. It was not true that she said to Mr. Potgieter that she knew what she was signing. Witness had no private property. She signed the promissory notes because, if necessary, she could have got money from her brother. When her husband left Zeerust it was to start a business at Heidelberg.

Re-examined by Mr. Graham: Her husband did not tell her how it was that he was leaving his situation at Zeerust. Her husband told her he was going to resign.

Mr. Schreiner: Mrs. Auret said she knew the contents of the document, and therefore it was due to herself that they were not explained to her.

[De Villers, C.J.: What was her consideration for signing the note?]

Her natural affection and interest in her husband—his position and consequently her position; there was no valuable consideration. If she had not signed he would have been sued. *Oak* v *Lumsden* (3 Juta., p. 144); *Whitnall* v. *Goldschmid* (3 E.D.C., p. 314).

Mr. Graham: The fourth paragraph of the plea substantially says that the *beneficia* were not properly renounced. It is not necessary to plead the *beneficia*. *Mahadi* v. *Kock and Hyde* (H.C. 1, p. 344). The contract was made in the Transvaal and by that law the renunciation must be by public instrument. *Locale Wetten of* 1859 (p. 115) enacts that Van der Linden is to hold and after him Grotius and Van Leeuwen, The first two are silent as to the mode of renunciation. *Van Leeuwen Commentaries* (*Vol* II. (p. 38) *of Kotze's Translation*) says it must be done by public instrument, *i.e.*, by a notary and

two witnesses. Potgieter was only Acting Landdrost, though one witness says that the Landdrost acts as a notary. It is admitted, however, that there were no witnesses.

Mr. Schreiner: The question is one of procedure and must be governed by the law of the Colony. The contract was to be performed here. More proof than has been given is required to show that the Transvaal law differs from ours; in the absence of that proof the law of the Colony as laid down in *Oak* v. *Lumsden* should be followed.

De Villiers, C.J.: The evidence makes it clear that the defendant, as executrix of her husband's estate, owes the plaintiffs the sum of £464 3s. He had been secretary of the plaintiff company and had misappropriated money belonging to the company, and it was in order to cover his defalcations that the company obtained from the defendant, during her husband's lifetime, the document now in suit Before the date of the execution of the document she had made two promissory notes for £104 and £62 respectively in favour of the company. By the document, which is notarial in form but was executed before the Landdrost of Zeerust, the defendant purported to cede to the company a certain policy of insurance on the life of her husband which had been duly ceded to her by ante-nuptial contract. The cession to the company was by way of collateral security for the due payment of any sum or sums of money which the defendant or her husband might thereafter owe to the company, she renouncing the benefits of the *S. C. Vellianum* and of the *Auth. si qua mulier*. After her husband's death the defendant paid the amounts of the promissory notes but she denies any liability under the deed of cession, on the ground that she signed it at the request of her husband under the belief that only the two promissory notes were then owing and without any knowledge of its real contents. I am satisfied that the defendant signed the document, at the request of her husband, without any knowledge of its contents and in ignorance of her right to the benefits which she purports to have renounced, and that she honestly believed that the effect of signing the document was to secure payment of the two promissory notes. The question to be determined is whether this is a sufficient defence to the plaintiffs' claim against her individually to have the life policy declared executable for the whole debt. In the case of *Oak* v. *Lumsden* (3 Juta, 144) the question whether a woman can by an underhand instrument renounce the benefits of the *Senatus Consultum Velleianum* was fully considered and answered in the affirmative. "She may," it was said, renounce the right to avail herself of the privilege, and it makes no difference how that renunciation is effected, provided only it is clear from the evidence that she understood what her rights were and deliberately renounced them." Among the modes enumerated by *Voet* (16, 1, 8) in which a woman may interpose her credit and become entitled to the benefit of the *Senatus Consultum* is that of giving a pledge for the debt of another, and it has not been contended that the defendant would have been bound by the pledging of the life policy for her husband's debt without a formal renunciation of the benefits. In the documents signed by her, she purported to renounce both benefits, and if she knew at the time what her rights were, and, notwithstanding such knowledge, deliberately renounced them, she would have no defence to the present action. The document was executed before a Landdrost and not before a notary, but it has been stated that under Transvaal law a Landdrost may, in the absence of a notary, perform notarial functions. But I take it that under Transvaal law also it is the duty of the notary or of the Landdrost, as the case may be, to explain to a woman about to become surety for her husband and renounce the benefits of the *Senatus Consultum Velleianum* and of the *Auth. si qua mulier* what her rights are, and what benefits she is about to renounce. The presumption would always be that this duty has been duly performed, but in the present case the Landdrost himself admitted that he was satisfied with asking the defendant whether she knew what she was signing. On getting an affirmative answer, he witnessed the document without further ado. She herself denies that the question was put to her, but be this as it may, it has not been suggested that the answer was fraudulently given. She believed that she knew what she was signing, because she trusted to the information given to her by her husband that she was securing the two promissory notes signed by her by the pledge of the life policy. The Landdrost certainly appears to have had a very vague conception of his duties, because one of the persons whose names appear as witnesses to the document denies that it was ever executed by the parties to it in his presence. The defendant has paid the amounts of the two promissory notes, and there is therefore only one item in the plaintiffs' account which can possibly be charged against her individually, namely, the item of £9 9s. 9d. paid by the plaintiff company for premium of insurance in order to keep the policy alive. The judgment will be for the plaintiffs against the defendant, as executrix, for £464 3s. with costs against the estate, with

a declaration that the life policy shall be executable for the sum of £9 9s. 9d. as against the defendant individually.

[Plaintiffs' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS) and a Jury.]

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

DIBBEN V. CAPE DIVISIONAL COUNCIL. { 1897. Nov. 24th. Dec. 1st.

Divisional Councils Act—Directory and obligatory provisions—Contract—Jury—Verdict—Evidence.

At a meeting of the Cape Divisional Council a resolution was passed to accept the plaintiff's tender for the supply of materials exceeding ten pounds in price, subject to a certain alteration in the terms. Immediately after the meeting a member gave notice of review. Notwithstanding such notice, the secretary informed the plaintiff, by letter, of the resolution and asked him whether he was agreeable to the alteration, to which he replied that he was. At a subsequent meeting the Council revoked the resolution whereupon an action was brought and tried before a jury for damages for breach of contract. Before verdict it was arranged by consent of counsel that the question should be reserved for the Supreme Court whether there was any evidence before the jury of a legal contract. The jury found a verdict for the plaintiff for £500 as damages.

Held, *that the provision of the 240th section of the Divisional Council Act, 1889, that contracts upon which the sum to be paid exceeds ten pounds shall be signed by not less than two Councillors is imperative, that the secretary had no legal authority to bind the Council by his letter to the plaintiff, and that judgment of absolution from the instance must be entered.*

This was an action for specific performance of a contract or for damages.

The plaintiff's declaration was as follows:

1. The plaintiff is a contractor, residing at Simon's Town, in the Cape Division, and the defendant is the Divisional Council of the Cape.

2. In the month of May, 1897, the defendant Council caused to be published the advertisement, copy whereof is hereunto annexed, and marked A, which the plaintiff prays may be read as though here inserted.

3. The conditions and specifications of the proposed contract were thereafter inspected by the plaintiff at the office of the Council, and a copy of the said contract is hereunto annexed and marked B, which the plaintiff prays may be read as though here inserted.

4. Thereafter in the said month of May the plaintiff, in response to the said advertisment and with reference to the terms, conditions, and specifications of the said contract, sent in the tender in writing, copy whereof is hereunto annexed and marked C, which the plaintiff prays may be read as though here inserted.

5. Thereafter on the 25th day of May aforesaid the defendant Council after consideration of the tenders sent in resolved to accept the plaintiff's offer upon condition that he would agree to the following terms in connection with his tender, to wit: "The Council taking 15,000 cubic yards of macadam at 8s. per cubic yard during the first year, and 15,000 cubic yards more or less per annum during the second and third years at the same rate, and siftings as quoted," that is to say, siftings at 5s. 6d. per cubic yard.

6. The secretary of the defendant Council on the said day duly communicated the said resolution to the plaintiff by letter, and on the same day the plaintiff in writing agreed to accept the said terms.

7. Thereupon the defendant Council and the plaintiff became bound by a contract in terms of the said contract and tender, subject to the terms agreed upon by the plaintiff as set forth in paragraph 6, the period of the said contract being three years from the 1st day of July, 1897.

8. In accordance with its contract with the plaintiff, it became and was the duty of the defendant Council on the 1st day of July aforesaid to deliver to the plaintiff possession of the quarry referred to in annexure B, and also of the plant therein mentioned, and the plaintiff engaged an engineer and other employés for the purpose of carrying out his contract, and was and is ready and willing to carry out and perform the same in all respects.

9. In breach of its duty aforesaid the said Council wrongfully and unlawfully repudiated the said contract with the plaintiff and wrongfully and unlawfully refused to deliver to the plaintiff possession of the quarry and plant aforesaid on the 1st day of July, 1897, or at any time thereafter, whereby the plaintiff has sustained damages in the sum of £100 sterling.

10. The plaintiff is, notwithstanding the premises, ready and willing, and hereby tenders and offers to carry out and complete his said contract with the defendant Council upon payment of the sum of £100 sterling as and for damages as aforesaid, and submits that he is entitled to claim a decree of specific performance and judgment for the said sum of £100 sterling as and for damages already sustained.

11. In the alternative, if this honourable Court should not decree specific performance of the said contract, the plaintiff says that by reason of the breach by the defendant Council of its said contract he is damnified in the sum of £1,000 sterling as and for damages already sustained, and as and for loss of profits which he would have made in case the said contract had not been repudiated or broken by the defendant Council.

Wherefore he prays for: (*a*) A decree of specific performance of the said contract, and judgment for the sum of £100 sterling, as and for damages already sustained, or in the alternative (*b*) judgment for £1,000 sterling, as and for damages and loss of profits aforesaid, or that he may have such further or other relief in the premises as to this Honourable Court may seem meet, together with costs of suit.

The defendants' plea admitted paragraphs 1, 2, 3, and 4 of the declaration. It admitted that the resolution referred to in paragraph 5 was proposed and carried on the 25th May, but said that notice of review of the resolution was forthwith given, and that it was rescinded at the following meeting. It denied that the letter from the secretary was an acceptance of the tender, and further said that the letter was written without the knowledge, consent, or authority of the Council, and the Council was in no way bound thereby. It specially denied acceptance of the tender, and that there was any complete and binding contract between the plaintiff and the Council.

The replication was general.

Mr. Schreiner, Q.C. (with him Mr. Molteno), for the plaintiff; Mr. Graham (with him Mr. Jones) for the defendants.

Clause 9 of the contract annexed to the declaration was as follows: "*Acceptance and Security*—The Council shall have the power to accept any tender they consider most suitable, and after such acceptance the contractor shall be bound to enter into a deed of contract with the Council, and he must be prepared to find approved security to the extent of £500 (sterling) for the due performance of the works embraced in the specification, condition, and contract."

Act 40 of 1889, section 240, is in the following terms: "Every Council acting in pursuance of the provisions of this Act may, from time to time, enter into any contract with any person or company for any work to be done, or for any materials or things furnished for the purposes of this Act, and all contracts upon which the price or sum to be paid may exceed ten pounds sterling shall be in writing and shall specify the work to be done, or the materials or things to be supplied, and the price or sum to be paid for the same respectively; and, in the case of work to be done, the time within which the same shall be completed; and shall provide some penalty to be suffered in case of non-performance of the contract, and shall be signed by not less than two Councillors, and also by the person or persons contracting; which contract, or a copy thereof, shall be entered in a book to be kept for that purpose."

George E. Dibben, contractor, Simon's Town, gave details about offering for the Cape Divisional Council's contract. He saw the conditions of the contract, framed an estimate, and sent in a tender for the hire of quarries and crushing of stone. He sent his tender by Mr. Hugo, a member of the Council. (Tender produced.) It was written on the 20th May, and there was a meeting of the Council on 25th May. Witness went to Cape Town on the 25th, and he saw Councillor Mocke, and in consequence of what he was told he called on Mr. Lind, the secretary. Mr. Lind told him the Council had agreed to accept his tender if he agreed to certain conditions. Witness agreed to the conditions, which were that he would supply 15,000 cubic yards of macadam the first year, and 15,000 more or less for the second or third year, at the rate of 8s. per cubic yard. Witness afterwards formally agreed to and signed letter accepting the Council's terms conveyed in a letter from

Lind. He had no knowledge that there was a notice of review possible, but he saw from the newspapers that there was such a thing claimed. In June witness entered into an engagement with Bastock, who was to superintend the crushing operations at the quarry, at the rate of £100 for three years with profits. He also engaged Bastock's brother as engineer. These contracts were entered into on 16th June. Witness at the same time ordered certain new rock-drilling and other machinery. During the month of June he had no notification whatever that the Council did not intend to carry out their contract. He wrote on 29th June asking members of the Council to meet him at the quarry for the handing over of the machinery, &c., preparatory to his beginning work on the 1st July. He received a letter from the secretary saying that the contract had not been accepted, but that it had only been left to witness to say yes or no to the conditions of the contract. At the next meeting of the Council it was agreed to rescind the contract, but witness got no notification of that from the Council. He learned the fact, however, and put the matter in the hands of his attorney. Mr. Bastock claimed £312 as salary, and £85 for expenses in leasing a house for three years, and repairing it.

By the Chief Justice: This claim was put in in writing.

Witness had entered into a second contract with the other Bastock. He had taken the younger Bastock on as an apprentice at a much higher rate than otherwise he would have got. He had prepared an estimate which showed that for the first year the income would be £6,275, and the expenses £4,395, leaving a profit of £1,879 19s. 3d. on the year. On the second and third years the profits would be much larger, considerably over £2,000. Witness considered the contract a valuable one. He got the use of the crusher in terms of the contract, and paid only £25 per year.

Cross-examined by Mr. Graham: Witness did not tell Mr. Lind that he was not much of a scholar, and he did not ask Mr. Lind to get one of his clerks to write a letter. When witness went to the office the second time Mr. Lind was not there. It was false that Mr. Lind told him that the matter had not finally come before the Council. He was never told that. Mr. Lind had a letter written for him, but witness did not tell him what to put in the letter. He understood that his contract was accepted. Witness had a little experience of quarrying at Portland, in England. He had been in the Colony for about fifteen years, and had done a little quarrying for his own purposes on the mountains near Simon's Town. Bastock is in the Imperial service; he was a quartermaster. He was still in that service. He was in charge of all the batteries. The other Bastock he had taken on as an apprentice carpenter. Witness was paying him 4s. 6d. a day, as he had to learn the business, he being an engineer. Witness did not consider that he was doing 4s. 6d. worth of work. Bastock and he made the estimate together. He had no figures to go on when he prepared the estimate; he had only his experience, that of a practical builder, that he acted on.

Re-examined by Mr. Schreiner: He had a large number of men employed at present. He had been guided largely by Mr. Bastock in preparing the estimate. He was at present getting macadam from Mr. Bunne, at the rate of 5s. per cubic yard.

C. R. E. Bunne, Simon's Town, said he had had contracts with the Divisional Council, and always received notification when his contracts were accepted from the secretary of the Council. He was at present supplying macadam at 5s. per cubic yard. He knew the quarry in question at Elsje's Bay, and was familiar with the class of stone. With a rental of £25 per annum and with a stone crusher supplied he should say that Mr. Dibben's contract would have been a very profitable one. He thought that Mr. Dibben's clear profits should have been 3s. 6d. a cubic yard. That was higher than Mr. Dibben's estimate of profits. He based his estimate on his experience and his knowledge of the stone in question.

Cross-examined by Mr. Graham: Witness had taken stone out of the quarry in question. He based his estimate of 3s. 6d. on his knowledge of the quarry. He only took out a couple of pieces from that quarry. He had quarried granite at 4s. 8d. per cubic yard and had a profit out of it.

Albert R. Bastock, mechanical and mining engineer, at present in the Imperial service, said he was at liberty to leave the service on three months' notice. His experience of mechanical and mining matters went back to his youth. He had a good deal of knowledge of mining in Wales and in other places. He leased a cottage near the quarry. The claim he made against Mr. Dibben was a genuine one, and he intended to press it. Witness corroborated Mr. Dibben in his estimate of profits, which had been put in. When he saw the crusher it was in fair condition, and it satisfied the terms of the advertisement, that it was "in full working order."

Cross-examined by Mr. Graham: Witness had been in the Imperial service for twenty years,

He had done no quarrying in South Africa. He was employed in the preservation of the mechanism of heavy guns in all the forts. Witness had free quarters; his rent was paid. He spent about £75 on repairing the cottage.

Edward Bastock, brother of the previous witness, spoke concerning the two contracts made with Mr. Dibben. The first contract "didn't come off," so he made the second, agreeing to be taught carpentering by Mr. Dibben. His wages were 4s. 6d. a day.

Cross-examined by Mr. Graham: He didn't think he was at present earning 4s. 6d. a day, although he received that amount.

Peter Hugo, Simon's Town, said he was a nephew of Mr. Hugo, a member of the Divisional Council. He became surety for Mr. Dibben, and was ready and willing to be surety now.

Edmund Jacob Britzell said he was the owner of property at Simon's Town. He had been surety for Mr. Dibben, and was ready and willing to be surety now.

George Herbert Dunn, partner of the firm of Findlay & Co., stated that Mr. Dibben ordered machinery of his firm to the value of £300 in June. He withheld the order in consequence of seeing in the newspapers that there was a question about the contract.

Cross-examined by Mr. Graham: The order might have had to be detained a little, as witness required to get information about the machinery.

Cornelius Lind, secretary of the Cape Divisional Council, called for the defence, spoke to calling for the tenders. After the meeting of 25th May Mr. Dibben called on him, and witness said he had written a letter to which he wished a reply in writing. Witness did not tell Dibben that there was a notice of review. There was a standing rule to that effect. Mr. Dibben read the letter, and said it was all right, but witness said he wanted his answer in writing. Mr. Dibben said he was not a good scholar, and asked if one of the clerks could not write the letter. This was agreed to, and he said he would come back and sign the letter. There was no further conversation on the subject. Witness dictated to a clerk what he had to write. Dibben afterwards returned, and witness handed him the letter, which he signed, and then witness said to him, "Mind you, this is not final, it has to come before the Council again." The assistant secretary was at his desk in the room at the time, sitting behind a glass screen. At a subsequent meeting, Mr. Jenkinson gave notice of review. The Council had been using the quarry in question, although witness could not say for how long. He produced statement showing that for two years the cost to the Council of the macadam had been 11s. 11½d. per cubic yard.

Cross-examined by Mr. Schreiner: Witness had been secretary for about fifteen years. He could not exactly say the number of years. His mind was a little hazy on that point. His mind was not hazy as to what took place when Mr. Dibben called at the office. Witness did not tell him when to call back, but Mr. Dibben came back. Witness could not say if Mr. Dibben called after two o'clock.

Mr. Schreiner: But your memory is not so good as it has been?

Witness: I don't know.

Mr. Schreiner: You have had a long period of illness?

Witness: From time to time.

Mr. Schreiner: And your memory is not what it was?

Witness: I am sorry to hear it.

Mr. Schreiner: You force one to put it. Don't you feel that your memory is not so precise as to enable you to put your recollection of what took place against that of Mr. Dibben's?

Witness: I don't know about it. Continuing, witness said he received the letter from Mr. Dibben about the taking over the quarry, and he replied that it would be referred to the Finance Committee

Mr. Schreiner: But the Finance Committee cannot override what the Council does?

Witness: I don't know about that.

Mr. Schreiner: You don't know that. Surely you do not mean to admit that you do not know that a Finance Committee cannot override a decision of the Council?

Witness: I don't know.

Mr. Schreiner: You put great store on the Finance Committee?

Witness: Yes.

Mr. Schreiner: I suppose because it holds the purse?

Witness said a meeting of the Council was called for 15th June, but acting under the instructions of the Finance Committee he altered the date of the meeting to the 30th June. On 2nd July he wrote to Mr. Dibben, stating that the contract was not final, and that it was left to him to say "yes" or "no." Mr. Dibben's letter of the 29th June, asking to be put into possession of the quarry, was before him then. He did not remind Mr. Dibben that he informed him that the contract was not final. Witness did tell Mr. Dibben that there could be a notice of review. He told him that the matter was not final. He wrote that the Council were agreeable to take certain quantities, and Mr.

Dibben accepted the conditions. He did not tell him that this had been agreed at a meeting of five, and that he (witness) was doubtful if the other members would agree to it. He could not remember Mr. Jenkinson censuring him for writing a letter without the authority of the Council on 8th June. Witness wrote that letter in the interests of the Council. The meeting to hear the review fixed for 15th June was cancelled, and on 6th July a special meeting was held, when the review was decided on. The standing rules and regulations were dated 1885. He did not know that the Act of 1889 repealed these rules and regulations. He was working under the 1889 Act, but adhered to the 1885 rules. With respect to the statement put in by him, the total working expenses were from January, 1895, to January, 1897. He could not say how long the quarry was worked during that period.

Mr. Schreiner: So you can give us no information as to the length of time the quarry was worked?

Witness: I cannot say.

Mr. Schreiner: So that whoever wants to give evidence about the working of the quarry, it cannot be you.

Stephen John Galloway said he wrote the two letters put in. One letter Mr. Lind dictated to him, and it was written on behalf of Mr. Dibben. Mr. Dibben was not present when the letter was written. Witness could not say for certain when Mr. Dibben returned. Witness gave him the letter, which he (Dibben) read, and afterwards signed. Before Mr. Dibben signed Mr. Lind said to him, "Remind, this is not final; it will have to be brought before the Council again." That was all that he knew about the matter.

Cross-examined by Mr. Schreiner: That was absolutely all he knew. He had a clear recollection of everything, and that was all that took place. He could not say, however, at what time Mr. Dibben returned; he thought it was after noon. He could not remember anything else that took place. He did not hear Mr. Lind say anything about wanting everything in writing.

Henry van der Westhuisen, assistant to Mr. Lind, stated that he knew Mr. Dibben had sent in a tender. He never saw Mr. Dibben at the office, and he never heard any conversation on the subject with Mr. Lind. He knew nothing further than that Mr. Dibben had sent in a tender. One day while he was sitting at his desk he heard "the chief," Mr. Lind, say to somebody, "Remind, this is not final." He only heard the remark; he could not say to whom it was addressed. As to the date, he could not swear. He thought it was a remark addressed to the clerk.

Cross-examined by Mr. Schreiner: Witness thought it was addressed to the clerk, who might have done something wrong. Mr. Lind at the time was acting in a fussy, peculiar, confused manner.

Mr. Schreiner: He was acting in a fussy, peculiar, confused manner?

Witness: Yes; and I thought he was making for the clerk.

Edward Gattey, Inspector Divisional Council, stated that, as much as possible, he had supervised the working of the quarry. They had tried a rock-drill but it had not worked well. He thought the drill was not a very good one. They had been working at the quarry with the crusher. They worked regularly, except when the crusher broke down; it had broken down twice. It was witness's opinion that Mr. Dibben, would have made a very small profit on his tender. The profit might have been £200 or £300 a year. The material would now cost the Council about 9s., although he believed that the plaintiff could work at a slightly reduced rate. The Council engaged a qualified engineer.

Cross-examined by Mr. Schreiner: Witness was not a qualified engineer, but he was a practical man. They had had several engineers. The engineer was really not an engineer; he was an engine-driver. Witness had about 200 miles of road to supervise, and he visited the quarry about twice or thrice a week. There was a quarryman, who controlled the working.

Re-examined by Mr. Graham: Bunne was taking out what was made macadam. The cost of quarrying at the Council's quarry would cost three or four times more that at Bunne's place. Witness never had a contract, and had no experience of economising as much as possible so as to secure a profit. Before going to the Divisional Council he was in the Forest Department of the Cape Government.

This concluded the evidence, and counsel addressed the jury.

Mr. Graham relied *inter alia* upon the fact that Act 40 of 1889, section 240, had not been carried out, and that there was no legal contract between the parties.

[De Villiers, C.J.: You should have asked for a non-suit on that ground. However, the best course now is to leave the question as to the validity of the contract to the Supreme Court.]

The jury found a verdict for the plaintiff in terms of prayer (*b*) and awarded £500 damages.

The Chief Justice said he would reserve for the opinion of the Supreme Court the question

whether there was any evidence of a legal contract between plaintiff and defendant. Pending the decision judgment would be reserved.

Postea (December 1st).

The question reserved was argued before the Chief Justice, Mr. Justice Buchanan, and Mr. Justice Maasdorp.

Mr. Schreiner, Q.C. (with him Mr. Molteno), for the plaintiff: The question as to the binding power of the contract is not pleaded. There was a clear acceptance of the contract in the letters. Lind had in mind section 241 of Act 40 of 1889, which says the Council "shall accept"; the Council had accepted. "A reeable" is a word of agreement.

[De Villiers, C.J.: I must say that as between individuals it was binding; I don't see how the Council could have got out of it. But section 240 of Act 40 of 1889 is put in for the protection of the rate-payers. Moreover Lind should never have written the letter; it was *ultra vires*.]

The secretary of the Divisional Council is its ostensible authority: he takes the place of the common seal in English corporations. As to that authority, *Standard Bank* v. *Union Boating Co.*, (7 Juta, p. 257); *Faure* v. *Louw* (J. 1, p. 3). In all ordinary transactions the ostensible authority is in th secretary. It is not as if no resolution had been passed by the Council: in that event the secretary would have had no right

[De Villiers, C.J: Bu in view of section 92, notice of review having been given, it must be taken that no resolution had been passed. The effect of a notice of review is to suspend it]

The provisions of section 240 of the specification are contained in the contract; the provision as to the signatures of two Councillors is only directory. If Dibben had refused to enter into the written contract the Court would have ordered him to do so.

South of Ireland Colliery Co. v. *Waddle* (3 C.P., p. 463 and 4 C.P., p. 617).

[Maasdorp, J.: Is not the liability a liability to enter into the written contract?]

That is what we are suing for—but as the jury has found damages we ask for damages; the Court would not decree specific performance. *Maxwell* (p. 518 *et seq.*), as to the imperative or directory effect of words.

Mr. Graham: We are bound by the facts as found, viz.: that Lind did not tell the plaintiff that the matter would have to go before the Council again, but we can still argue that there was no legal contract on the letters. *Taylor on Evidence* (section 40); that is a matter for the Court and not for the jury. As to the duties of a secretary, *Evans on Principal and Agent* (p. 108); *Barrett* v. *South London Railways Co.* (182 B.D., p. 875). As to the binding effect of a contract which has to be put in writing but is not, *Rossiter* v. *Miller* (5 Ch.D., p. 648); *Maxwell* (p. 524); *Hunt* v. *Wimbledon Local Board* (4 C.P.D., p. 48); *Young* v. *Mayor and Corporation of Leamington* (8 App. Ca., p. 517).

[De Villiers, C.J.: Some of the provisions of section 240 are clearly not imperative. Have you any authority to show that where there has been a series of provisions like this some of them have been held directory and some imperative?]

That was so in the statute under consideration in the last mentioned case. *Brice on Ultra Vires* (pp. 562, 564, 652, 653); *Leominster Canal Navigation Co.* v. *Shrewsbury & Hereford Ry. Co.* (3 K. and J., p. 654). In that case the contract should have been signed by two directors and they refused, and it was held that the contract was invalid. Exception was not taken, because it was thought that as the defendants were a public body the whole matter should be put before the Court.

Mr. Schreiner: Most of the cases referred to are based on the common law doctrine of a common seal imported into statutes. *Rossiter* v. *Miller* comes under the Statute of Frauds.

De Villiers, C.J.: The question reserved for the opinion of this Court is whether there was any evidence before the jury of a legal contract between the plaintiff and the defendants. That question might well have been raised by the defendants' counsel after the plaintiff's case had been closed. It was not then raised, but after the evidence for the defendants had been given and before verdict it was arranged by consent of counsel on both sides that if the verdict should be for the plaintiff the question should be reserved. The action was for specific performance of a contract by which the defendant Council were to deliver to the plaintiff their quarry at Fishhoek and certain plant and to take 15,000 cubic yards of macadam from him for three years at 8s. per cubic yard, with an alternative claim for £1,000 as damages for breach of contract. At the trial I intimated that it was not a case for specific performance and the jury found a verdict for the plaintiff of £500 as damages. The evidence of the alleged contract was contained in two letters, both of them dated the 20th May, 1897, the one from the Secretary of the Council to the plaintiff, stating that the Council had considered the plaintiff's tender and asking whether he was agreeable to certain alterations, and the other, from the plaintiff to the Council, stating that he was agreeable. The secretary had not been autho-

rised by the Council to write the letter. A resolution had been passed by the Council to accept the plaintiff's tender if he would consent to the alterations, but immediately after the meeting and before the secretary's letter was written notice of review of the resolution was given by a member of the Council. One of the standing rules of the Council, framed before the passing of the Divisional Councils Act, 1889, and never since altered, expressly prohibits the carrying out of any resolution as to which any notice of review had been given. So far, therefore, from the secretary having been authorised to conclude the alleged contract with the plaintiff, he was actually prohibited from acting after notice of review had been given. The plaintiff's counsel has, however, rightly urged that any private instructions given by the Council to their secretary cannot affect the plaintiff, if the secretary had been held out to the world as having the requisite authority and could legally exercise it. There was some evidence that the secretary had, on two previous occasions, accepted tenders on behalf of the Council, but no details were given. The secretary would of course be the person to give notice to tenderers of the acceptance of their tenders, but the question still remains whether there is a legal and binding contract until the 240th section of the Act has been complied with. That section enacts that "all contracts upon which the price or sum to be paid may exceed ten pounds sterling shall be in writing, and shall specify the work to be done, or the materials or things to be supplied. . . . . and shall be signed by not less than two councillors, and also by the person or persons contracting; which contract, or a copy thereof, shall be entered in a book to be kept for that purpose." Some of the provisions of this section are no doubt directory, but is the provision that the contract shall be signed by two councillors to be also regarded as only directory? In my opinion it cannot be so regarded. It is the only provision which defines the mode of executing contracts with Divisional Councils and it does so, not upon an incidental point affecting part of the contract only, but upon an essential matter affecting the whole of the contract. The 241st section has been relied upon as showing that the provision was not intended to be obligatory. After directing that proposals for the execution of any work or furnishing of any goods to the amount of fifty pounds or upwards, should be publicly invited the section enacts that "The Council shall accept the proposal, which on a view of all the circumstances appears to them to be most advantageous, and may take security for the due and faithful performance of every such contract, or the Council may decline or accept any such proposal." It is urged that an acceptance of the proposal is sufficient without a formal contract, but the whole context shows that a formal contract is in each case required. The provision that every contract shall be signed by not less than two councillors, is in my opinion imperative. It was not intended that a secretary should have the power to bind the Council by any informal agreement, even where the Council has resolved to accept a tender. The power of the Council to revoke or alter any resolution is expressly recognised by the 92nd section of the Act, the only limitations being that notice of the intention to propose such revocation or alteration should be given to each councillor fourteen days at least before holding the meeting, and that such revocation or alteration should be determined on by a certain majority. In the present case notice of review was given immediately after the meeting at which the original resolution was passed, and at a subsequent meeting the resolution was revoked. Notwithstanding such revocation the plaintiff insists upon his right to enforce his alleged contract. In my opinion the contract was never executed so as to bind the Council, and the question reserved must be answered accordingly. Judgment of absolution from the instance with costs must be entered.

Mr. Schreiner asked that there might be no order as to costs: exception should have been taken to the declaration.

[De Villiers, C.J.: Are there any cases where the Court has granted costs of exception only?]

Mr. Graham: *Alexander* v. *Armstrong* (1879, p 233) is the only reported case where such an application was allowed. In *S.A. Association* v. *Van Staden* (J. 9, p. 95) it was refused. Here there was no clear issue for exception; the course adopted was the correct one, as the defendants are a public body; it was the course followed in the English cases cited.

The application was refused.

De Villiers, C.J.: It would be impossible to lay down any general rule, that where a defendant has not excepted where he might have excepted to the declaration, he should not be allowed his costs of the action. There may be some such cases. In the present case there is not such a clear issue raised for exception that the defendant could have excepted without admitting certain facts which he did not admit were true.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret; Defendants' Attorneys, Messrs. W. E. Moore & Son.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), Mr. Justice BUCHANAN, and Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

KOENIG AND CO. V. VADASZ. { 1897. Nov. 25th.

Mr. Searle, Q.C., applied for a decree of civil imprisonment against Vadasz, he having failed to pay £11 and £1 9s. 6d., being the balance of a bill of costs in an action in which he (Vadasz) was the plaintiff and the present applicant the defendant. Absolution from the instance with costs was granted, and he had satisfied the bill of costs with the exception of £11.

The defendant appeared in person. On going into the witness box, he said he had no money and no capital. He had a claim against Koenig & Co. for six weeks' salary at the rate of £15 a month. He was not working or earning any money.

Cross-examined by Mr. Searle: Witness was to start on January 1 as a commission agent, and he had rented an office at the rate of £3 a month. He had gone to two solicitors in order to institute an action for the recovery of his salary, but they had refused to act unless he made a deposit. He was living on borrowed money and in furnished rooms, for which he had to pay 10s. a month. He had not paid anything for the rooms up to the present.

The Chief Justice said it was clear that the defendant had no money, and therefore the application would be refused.

Mr. Justice Buchanan concurred, saying that from the evidence given in the original action he believed that defendant had a *bona-fide* claim against the plaintiff. From the circumstances disclosed at the trial, his lordship thought that Vadasz had the right to bring the action against the plaintiff in his counter-claim.

DU TOIT V. NOLTE.

Mr. Gardiner applied for judgment, under Rule 319, for the sum of £25, being one year's rent of property hired by the defendant.

The application was granted.

EXECUTORS OF VAN GASS V. VAN GASS AND OTHERS.

Mr. Graham applied, under Rule 319, by default of appearance, for an order for the transfer to the applicants of the farm Morran, in the Maclear district, together with costs incurred in passing transfer.

Judgment was given for the plaintiffs, with costs, except as against Theunis Botha.

MOLL V. CIVIL COMMISSIONER OF PAARL AND ANOTHER. { 1897. Nov. 25th.

Voters' list—Civil Commissioner's Court—Illegality—190th Rule of Court—Mandatory interdict—Alien.

An application to correct an illegality committed by a Civil Commissioner in revising or amending voters' lists under the 25th section of Act 9 of 1892, should be by way of mandatory interdict and not by means of a summons under the 190th Rule of Court.

No relief will be granted unless the existence of a legal right on the part of the applicant and an illegal infringement of such right by the Civil Commissioner have been clearly established.

A person whose father's name had been on the voters' lists and whose own name had been for seventeen years on the voters' lists of the Paarl Division was objected to before the Civil Commissioner's Court on the ground that he was an alien. He admitted that he had never been naturalised and that he had come to the Colony with his parents at the age of three years without stating where he came from.

Held, *that even if the Court had the power to interfere at the suit of an objector the evidence was wholly insufficient to justify such interference.*

This was the hearing of a summons for review of the proceedings of a Revising Court held at the Paarl, before the first-named defendant, on the 27th September last.

The following were the grounds of review stated in the summons:

1. Because of the gross irregularity of the said proceedings, in that the said Civil Commissioner, having heard the said Rosenstrauch, and on his admitting that he was an alien and had not been naturalised, and on his omitting to prove his qualification in terms of sections 25 and 26 of Act 9 of 1892, the said Civil Com-

missioner failed to deal with the matter properly in accordance with the law, and decided that the said Rosenstrauch was entitled to remain on the list of registered voters, and that he, the Civil Commissioner, had no power to remove his name from the list of registered voters of the Paarl.

2. Because the proceedings in the matter by the said Civil Commissioner were otherwise wholly irregular and contrary to law in awarding costs against the plaintiff when he was acting in strict compliance with the law.

The respondents were lastly called upon to show cause why they, or either of them, should not be ordered to pay the costs of plaintiff, both here and below.

On the 18th August last the applicant lodged the following objection with the registering officer appointed to make out the list of voters in the field-cornetcy of Southern Paarl, in the division of the Paarl: Please take notice that I object to the name of Ertman Rosenstrauch being retained on the list of voters in the above field-cornetcy, and that I shall support my objection at the time fixed by law for that purpose, the ground of my objection being "not naturalised."—(Signed) Cornelius Moll.

The following is the record of the proceedings in the Revising Court, held on Monday, September 27, 1897, before the Civil Commissioner, Paarl:

Ertman Rosenstrauch, sworn, states: I was registered as a voter on the last voters' list. I have lived here thirty-five years, and I have voted three or four times already for members of Parliament.

By Mr. Marais (who appeared for the objector): I have not been naturalised.

Judgment: Claim allowed, with costs. (*Voters' List*, 1892. No. 290.)

August Rosenstrauch, sworn, states: I was registered on last voters' list. I voted twice for members of Parliament. I have lived here twenty-four years.

By Mr. Marais: I have worked about twenty years at machinery.

Mr. Marais does not press his objection in this case.

The Civil Commissioner gave the following reasons for his decision: I have no jurisdiction or authority to review the proceedings of previous Revising Courts, or the action of previous revising officers. Were these fresh applications they could easily be dealt with, but these persons have appeared on several previous biennial registration lists of voters, and especially the two preceding lists (section 76 of the Constitution Ordinance), and no attempt is made to deny that this is so. The only objection to them that can be taken is that they no longer possess the qualification in respect of which they had been registered. This has not been done, and no other objection can be received. Further, these names appear in the list of January, 1892 (section 33 of Act 9 of 1892), and they continue to reside in the electoral division of the Paarl (section 3 of Act 9 of 1892). Under these circumstances I am unable to remove the names from the voters' list.

The applicant now alleged that he was a registered voter, and entitled to vote in the division of the Paarl under the provisions of Act 9 of 1892.

That in terms of section 14 of the Act he objected in due and proper form to the name of Rosenstrauch being placed on the list of Parliamentary voters in the Field-cornetcy of Southern Paarl, in the division of the Paarl; that he also gave notice that he would support his objection at the time fixed by law for that purpose, and that the grounds for his objection were that the said Rosenstrauch was not a naturalised subject, whereupon the Field-cornet noted the objection.

That subsequent thereto the said Rosenstrauch sent in a claim to be registered as a voter, and thereafter—namely, on Monday, the 27th September, 1897—the Civil Commissioner of Paarl attended his Court and heard the claim of the said Rosentrauch, and deponent's objection thereto.

That at the hearing aforesaid Rosenstrauch admitted that he was an alien, and had not been naturalised, but through his attorney urged that as he had been registered as a voter in the previous list framed, the 3rd section of Act 9 of 1892 precluded the registering officer from removing his name from the present list, and the Civil Commissioner, after reading the said section of the Act quoted, held and decided that the registering officer was not entitled to strike off the name of the said Rosenstrauch, on the ground that his name had appeared on the former list of voters, and awarded costs against deponent.

That he (deponent) felt aggrieved by the said judgment, ruling, or decision, and desired to have the same reviewed by the Supreme Court.

The Civil Commissioner filed an affidavit in reply, in which he alleged that paragraph 3 of the applicant's affidavit was misleading.

That Rosenstrauch made no application for registration of his name on the list of voters, as alleged by the applicant, his name being already registered, and having appeared on several previous lists of voters.

That Rosenstrauch appeared before the Revising Court only to reply to the notice of the applicant that he would take objection to the retention of the said Rosentrauch's name on the list of voters.

Rosenstrauch filed an affidavit, deposing that he came to this colony in 1861 with his parents at the age of three years, and had resided here ever since; that he was not aware whether his father had ever obtained letters of naturalisation; that he himself had been on the Parliamentary voters' list for the field-cornetcy of the Southern Paarl for the years from 1880 to 1884 inclusive, and the years 1889 to 1895 inclusive, and that he had exercised the franchise at several elections; that the registering officer had placed his name on the provisional list for 1897 in the usual course without his putting in any claim. He also deposed that he spoke Dutch and a little English, and had always been under the impression that he was a British subject, and entitled to the franchise. He denied that he had admitted that he was an alien. All he had said was that he had not been naturalised. He had always been registered as a wagonmaker and householder.

Mr. Schreiner, Q.C., appeared for the applicant.

Mr. Sheil appeared for the Civil Commissioner.

Mr. Ward appeared for the respondent Rosenstrauch.

Mr. Schreiner: This is the only procedure available. *Botha* v. *Garcia* (6 Juta, p. 86). O legg's case is in point and is a precedent for showing that there is a review in cases such as this. There has been gross irregularity. No one can be registered unless he is a British-born subject or has been naturalised: there is nothing which includes the children of naturalised persons. *Constitution Ordinance* (section 10.) According to Act 14 of 1887, the Field-cornet must make out a new list every two years of persons entitled to vote in his field-cornetcy. Section 5, no name is to be inserted unless the registering officer is satisfied as to his qualification. Act 9 of 1892, section 3, does not do away with the necessity for proper qualification simply because the claimant is an old voter. Section 76 of the Constitution Ordinance was intended to meet the question of the depreciation in the value of property: whatever it meant, it is repealed by Act 14 of 1887. All the old lists are made null and void and of no effect.

[De Villiers, C.J.: That provision could only refer to lists in existence at that time.]

Mr. Schreiner: That is in conflict with Constitution Ordinance, section 76.

[De Villiers, C.J.: Is there any review here of the Civil Commissioner's Court? it an "inferior court"? It is not a Court of Justice.]

Mr. Schreiner: The Court has heard reviews of proceedings of Licensing Courts under rule 190.

[De Villiers, C.J.: Since the decision in *Botha* v. *Garcia*, Act 9 of 1892 has been passed, and section 25 has the words "according to law" substituted for the words "as justice shall require" in the old Act.]

Mr. Sheil: The first point that presents itself in this matter is that the 14th section of Act 9 of '892 was not complied with, in other words no valid or legal objection was raised to Rosenstrauch's name remaining on the register of voters. If the statutory form of objection given in section 14 be looked at it will be found that it is necessary to state *the ground of objection*, whereas in the notice given by the applicant the only ground of objection stated is "not naturalised." Not being naturalised is not a disqualification under section 10. "Being of alien birth and not naturalised" is a ground of disqualification under section 10 of the Constitution Ordinance, but there is no allegation in the applicant's form of objection that Rosenstrauch is an alien. And statutes affecting the liberty of the subject or the right of a man to exercise the franchise must be construed strictly in favour of such person. *Nosewortky* v. *Buckland* (9 L.R.C.S., 233); *Smith* v. *Huggett* (11 C.B.N.S., 55, and 31 L.J. 41).

[He was stopped.]

Mr. Ward was not called upon.

De Villiers, C.J.: This application comes before the Court by way of a summons under the 190th Rule of Court. That rule, however, applies only to proceedings "in any suit or action, civil or criminal, in any inferior Court of this colony." The Court held by a Civil Commissioner under the 25th section of Act 9 of 1892 is not such an "inferior Court" as was contemplated by the rule. In the case of *Botha* v. *Garcia* (6 Juta, 86) it seems to have been assumed that the rule was applicable to proceedings before the Civil Commissioner under the Registration Act of 1887, but the application for review was dismissed, and the case cannot be regarded as an authority for the view that a Civil Commissioner's Court for hearing claims and objections to the insertion of names in the voters' lists is an inferior Court whose proceedings may be brought in review under the 190th Rule. It does not, however, necessarily follow that a person the insertion of whose name or whose objection to the insertion of a name has been improperly and illegally disallowed by the Civil

Commissioner is without any remedy. The case of *Botha* v. *Garcia* was decided under a different Act. The 26th section of the Act now under consideration enacts that "the Civil Commissioner shall finally determine all questions brought before him and revise and amend the voters' lists according to law." I do not wish to be understood as admitting that, if a Civil Commissioner were to revise or amend the voters' lists in a manner contrary to law, this Court would be powerless to assist persons who may thus have been deprived of their statutory rights. The wide power possessed by the Court under our law of interdicting illegal acts implies the power, as pointed out in *New Gordon Co.* v. *Dutoitspan Mining Board* (9 Juta, 154), of compelling the performance of a specific duty, at all events on the part of a public officer, by mandatory interdict or other form of "mandament." It also implies the power of correcting an illegality committed by such public officer, so long as it is capable of correction, if the rights of an individual are infringed by such illegality. But it is obvious that relief will not be given where such rights are of a doubtful nature or where the public officer has acted in the exercise of a discretion left to him, but only where the existence and continued infringement of an absolute legal right have been clearly established. The applicant complains that his objection to the insertion of the second respondent, Rosenstrauch's, name was disallowed, notwithstanding his admission that he was an alien and had not been naturalised. But he never admitted that he was an alien. He did indeed admit that he had never been naturalised, and that he came to this colony with his parents in 1861, when he was three years of age. It is not stated where he came from, nor indeed could he speak of his own knowledge on this point considering his age when he came. This man, whose vote is now objected to, is the son of a man whose name in 1880 was on the list of voters. Since that year he himself has been a recognised voter in the Paarl district; his name appears on the lists framed in 1880, 1882, 1884, 1889, 1893 and 1895. After the second respondent had enjoyed and exercised the franchise for so many years, the applicant appears before the Civil Commissioner, the first respondent, to object to the further insertion of the name because the man is an alien. Surely the least that could have been expected was clear proof that he was an alien. It may have been difficult to obtain such proof, but the applicant cannot complain of it as a hardship that full proof is required. He was not forced into court. Acting, no doubt, from the best motives he thought it his duty to bject to the name, but still it was his own voluntary act, and if ever there was a case in which a complainant should clearly prove his case, it is the present. We are asked to infer that the man is an alien because he admitted that he had never been naturalised, but why should the Court draw the inference? I do not yet know where the man came from. It is quite consistent with all the evidence before the Court, that he and his parents may have come from Great Britain or from a British colony. Judging by the name it may be quite probable that they came from Germany, but when the Court is asked to compel a public officer to do his duty, it is not enough to show that he is probably mistaken. Even if the Court had the power to interfere at the suit of an objector there should at least be absolute proof of the existence of a right on his part, and of an illegal infringement of that right by the public officer. For these reasons the application must be refused, and as the applicant has asked for costs against the respondents, the refusal must be with costs.

REHABILITATION.

Mr. Buchanan applied for the rehabilitation of the estate of George Alexander Whitehead. The final account had not been filed, but there was an explanatory affidavit from the sole trustee in the estate.

The application was granted.

GENERAL MOTIONS.

ESTATE OF THE LATE JANE MOODIE POWELL.

Mr. Joubert applied for leave to raise the sum of £100 on mortgage, for the purpose of paying the debts, &c., of the estate.

The application was granted.

Re ANN MCEWAN. } 1897. Nov. 25th.

Lunatic—Curator.

Mr. McGregor applied for the appointment of a curator to Ann McEwan, an alleged lunatic, who was detained in the Graham's Town Lunatic Asylum under Act 20 of 1879. Certain money and property was due to her from her father's estate. The application was made on behalf of Peter McEwan, who was willing to act as curator.

[De Villiers, C.J.: In a previous case, *Ex parte Howes* (p. 381) it was intimated that a detention order should be obtained. Has she been declared a lunatic?]

No.

Mr, Schreiner, Q.C., *amicus curiae*, referred to the case of Oelotse, to whom Colonel Griffith had been appointed curator without a declaration of lunacy. But that was after inquiry. The application was refused, with leave to apply again if necessary, the Court intimating that the proper course of procedure was to get a detention order and lay the papers before a judge in Chambers in terms of Act 35 of 1891.

PORT ELIZABETH HARBOUR BOARD V. MACKIE, DUNN AND CO. { 1897. Nov. 25th. „ 26th.

Document—Oral evidence—Variation—Rectification.

In an action brought by the Port Elizabeth Harbour Board, to recover charges under a certain tariff for conveyance of goods to the defendants' stores, the defendants pleaded that it had been specially agreed between the parties, that in consideration of a lease of land taken by the defendants from the plaintiff, a lesser sum should be charged to the defendants for such conveyance.

In support of such plea the defendants produced the lease as well as oral evidence taken on commission of certain communications between the parties before the execution of the lease.

It being clear that the document was intended to be a final and complete statement of the whole of the transaction between the parties,

Held, *that the previous communications would not justify the Court in importing into the contract a term inconsistent with the lease so long as such lease was recognised by both parties as binding.*

This was an action for the payment of £ 65 18s. 10d. for services rendered by the plaintiff to the defendants.

The declaration was as follows:

The plaintiff represents the Port Elizabeth Harbour Board, and sues in his capacity as the Chairman of the said Board, which is lawfully constituted under the Act No. 36 of 1896, whereby in relation to the port or harbour of Algoa Bay, powers are conferred upon and vested in the said Board for the control, management and regulation of the said port or harbour, and more especially for the purposes of this suit, it is necessary to refer to the powers so conferred and vested by the said Act with regard to the control, management, and regulation of the shipping and landing of goods at the said port or harbour.

2. By lawful regulations made by the said Board in the exercise of its powers there is, and in the months of January, February and March, 1897, was in legal force in the said port or harbour, and binding upon the defendants, who carry on business in partnership as merchants as Mackie, Dunn & Co. at Port Elizabeth, a certain tariff of charges duly proclaimed, whereby *inter alia* charges regarding the shipping and landing of goods at the said port or harbour are lawfully made and imposed.

3. Amongst the said charges one of four shillings per ton is and was during the said months lawfully made and imposed as aforesaid in respect of the landing of goods, including in such landing the conveyance of goods from the ship's side, the landing thereof into railway trucks, and the conveyance to the depositing ground or yard of the consignee of such goods.

4. The defendants, carrying on business as aforesaid, are the lessees from the said Board under a certain lease in writing of date the 27th August, 1895, of a certain depositing ground at the South End of Port Elizabeth.

5. On many occasions during the months aforesaid of January, February and March, 1897, the said Board by its duly and lawfully constituted agent acting at the special instance and request of the defendants, shipped and loaded, or caused to be shipped and loaded cargo or goods the property of or consigned to the defendants and thereby rendered service to the defendants, in respect of which the defendants became liable to the said Board for the charges provided for in the aforesaid tariff, and from time to time detailed accounts were duly rendered to the defendants showing the amounts due to the said Board in respect of such services.

6. The defendants wrongfully and unlawfully claimed and claim to deduct from the amount shown to be due upon the said account sums amounting in all to £165 18s. 10d., the defendants wrongfully and unlawfully contending that there is due by them three shillings and four pence only, and not four shillings per ton as provided by the said tariff, in respect of certain goods landed as aforesaid and duly loaded and conveyed by the said Board or its aforesaid agents to the said depositing ground and there

duly delivered to the defendants, in respect of which goods the charge referred to in section 3 is lawfully payable.

7. The defendants have paid to the said Board the amounts due upon the account so rendered, save and except the said sum of £165 18s. 10d., which amount they wrongfully and unlawfully refuse to pay.

Wherefore the plaintiff prays for judgment for the sum of £165 18s. 10d., or that he may have such further or other relief in the premises as to this Honourable Court may seem meet together with costs of suit.

The defendants' plea was as follows:

1. They admit the allegations in paragraphs 1 and 4 of the declaration.

2. They admit the allegations in paragraphs 2, 3, 5 and 7, except that in respect of paragraphs 2 and 3 they deny that the tariff of charges therein referred to is binding on them; and except that in respect to paragraph 5 they deny that their refusal to pay the sum of £165 18s. 10d. is wrongful and unlawful.

3 They admit in respect to paragraph 6 that they do claim to deduct the sum of £165 18s. 10d. from the accounts therein referred to, and that they contend that they are liable at the rate of three shillings and fourpence only and not four shillings per ton; but they deny all and other the allegations in the said paragraph contained.

4. And the defendants say specially that in or about the month of July, 1895, it was agreed between Mr. Heenan, the then Resident Engineer and General Manager of and as representing the plaintiff Board, and Messrs. L. G. Macfarlane and Searle as representing the defendants, that the plaintiff would land, load on railway trucks, and convey to certain depositing ground at the South End of Port Elizabeth goods for and on behalf of defendants at a rate which would be less than that charged for similar services of landing, loading and conveying to certain depositing grounds known as the North End Timber Yards by a certain amount, namely the difference between the rate being then actually charged to the said North End Timber Yards and the rate to a certain other depositing ground known as the Board's ordinary depositing ground, which difference amounted to the sum of eightpence per ton.

5. The consideration for the agreement referred to in the preceding paragraph was an undertaking on the part of the defendants that they would enter into a certain lease, to wit, the lease referred to in paragraph 4 of plaintiff's declaration, and they did enter into such a lease.

6. The rate per ton for landing, loading into railway trucks, and conveying goods to the North End. Timber Yards during the months of January, February and March, 1897, was 4s., and the defendants were therefore liable for similar services performed for them to the depositing ground at the South End at the rate of 3s. 4d. per ton, at which rate they have discharged for such services and are no further liable to plaintiffs. Wherefore defendants pray that plaintiff's claim may be dismissed with costs.

The plaintiff excepted to the plea as affording no defence, inasmuch as:

(*a*) The defendants admit that the tariff referred to in the declaration is of legal force and effect, yet they deny that the same is binding upon them.

(*b*) The defendants attempt to justify their denial that the tariff is binding upon them by setting up an agreement alleged in paragraphs 4 and 5 to have been entered into in July 1895, anterior to and in consideration of the written lease which is referred to in paragraph 4 of the declaration, and which is admitted to have been executed on the 27th day of August, 1895, but which alleged agreement is not stated in the said plea, to be embodied in the said written lease, and which alleged agreement it is not legally competent to the defendants to plead by way of defence to the plaintiffs's claim or to prove by evidence at the time of trial.

(*c*) Any such agreement as is alleged as aforesaid would be bad in law, as purporting to confer upon the defendants a special exemption not provided for by Act 36 of 1896, and not conferred by the tariff aforesaid which is admitted to be of legal force and effect.

(*d*) The said paragraphs 4 and 5 of the plea, together with paragraph 6, are by reason of the premises bad in law and should be expunged, and apart therefrom the plea discloses no defence to the plaintiff's claim.

This exception was followed by a replication in general terms.

Mr. Schreiner Q.C. (with him Mr. Molteno), for the plaintiff.

Mr. McGregor (with him Mr. Buchanan) for the defendants.

The clause in the lease upon which the defendants relied was as follows "That the charge for landing goods and hauling them to the ground hereby leased shall not at any time exceed those for the same service during a like period to the ordinary depositing ground of the lessors."

R. H. Hammersley-Heenan, Engineer-in-Chief and General Manager of the Port Elizabeth Harbour Board, said that he negotiated a lease on behalf of the Board with Mackie, Dunn & Co. The property in question was ground for-

merly used as a public depositing ground. He conducted the negotiations. The Harbour Board had framed a certain tariff of charges, but these were no longer in force. It was under the old tariff that the charge was made. A new tariff had since that time been introduced.

Cross-examined by Mr. McGregor: He represented the Harbour Board in the negotiations, subject to the approval of the Board. The ground now leased by the defendants adjoined the public depositing grounds. At that time the Associated Boating Company was doing all the landing, and they had differential rates. The price he believed at that time for depositing goods on the depositing ground (Nos. 3 and 4 on plan) was 3s. 4d., and on the ground at the North End (No. 5 on plan) the charge was 4s. At that time they had an agreement with the Railway Department to supply trucks, but the arrangement was a loose one. The Board had no responsibility at that time as to land; the responsibility rested with the Boating Companies. There was frequently a pressure for want of trucks. In 1894 Storey was the lessee of ground No. 4. In 1895 he was informed that Mackie, Dunn & Co. had purchased ground near plot 5 as depositing ground. Mr. Jas. Searle pointed out to him that as Mackie, Dunn & Co. were large importers, it would be advisable to as far as possible divide the traffic, and witness said he would be agreeable to lease the ground (No. 4) to the firm on the expiry of Mr. Storey's firm. Afterwards witness saw Mr. Searle, jun., and Mr. McFarlane on the subject. Mackie, Dunn & Co. advanced reasons against taking the ground No. 4, the paramount one being that they had ground at No. 5, and at a cheaper rate. Witness in consequence induced the Board to reduce the rent of the ground from £500 to £475 per year, and to improve the ground by levelling it and placing a spur siding on the ground. Into Storey's yard (No. 4) the charge was 8d. a ton less than to the North End (plot No. 5). At that time the charges to No. 3 were the same as to No. 4. The difference of 8d. meant the extra railway work incurred, with which witness had nothing to do. For three months the difference in the rates meant the £165. The saving was evident at the time, and it may have induced the firm to give up ground No. 5. Under the Boating Company's tariff, the charge for putting goods on the depositing ground at the South End was 3s. 4d., and 4s. to the North End yards. Witness could not say if the 8d. represented the railway haulage; the Railway Traffic Manager could give better evidence on that point. This tariff went on to September, 1896, when a new tariff was introduced, but witness was in England at the time. That tariff would still secure to the defendants the advantage of 8d. per ton. Then in January, 1897 (in witness's absence) that was taken away by simply making both North and South Ends the same rate. There was no extra charge made for the haulage from the jetty to ground No. 5. Witness was away at the time, and knew nothing about the charge; he had avoided going into the matter.

Re-examined by Mr. Schreiner: Mackie, Dunn & Co. complained of the tariff of September, but eventually they got the benefit down to the end of December, 1896. Then came the new uniform charges in 1897, by which the firm did not receive the reduction of 8d. on goods for the North End. To-day, on the Board's depositing ground, the charge of 4s. per ton was in force.

By the Chief Justice: In 1895 the Harbour Board had no control over the charges of the Boating Companies. The work of landing and dealing with cargoes on the sea was done by the Boating Companies; the cargoes were then craned by the Harbour Board, and the haulage was done by the Board. The Board had therefore the key of the situation, and to allow any reduction the Board could if necessary do the work for nothing.

G. Cresswell Clarke. Traffic Manager, Midland system Cape Government Railways, deposed that at present the railway took the loaded trucks from the jetties and conveyed them to the different sidings. The Harbour Board had the control of the landing from the ship's side to the yards. At present the Boating Company got 3s., the Harbour Board 6d., and the Railway Department 6d. Whether the railway hauled near or far they got 6d. per ton. Since December 31, 1896, the same charge was made to the Harbour Board's ground as to the ground (No. 4) of Mackie, Dunn & Co. For every ton of goods there 4s. was paid. The Boating Companies acted as collectors for the Harbour Board. From September 1 to December 31 an allowance was given to Mackie, Dunn & Co. in consequence of their complaints as to the disparity. Witness got the allowance from the Government. The Harbour Board gave up 6d. and the Railway Department 2d. to make up the allowance required by Mackie, Dunn & Co. The railway took over the work in September, 1895; before that the railway charges were separate from the Harbour Board's charges.

By Mr. Justice Buchanan: The railway before September, 1886, charged 3s. per truck. They charged direct to the merchants.

Witness said that before September, 1896, the tariff was 4s. for the depositing floors at the South and North Ends.

Edward M. Searle, principal salesman and confidential clerk with Mackie, Dunn & Co., said that in 1894 the firm hired ground from Mr. Storey for a depositing ground, and later they acquired the ground at the South End, marked on the plan No. 4. Subsequently they acquired ground at the North End, for which they paid £800. Witness one morning was asked by Mr. Heenan why they were going to the North End. That was about July, 1895. Witness said because it was cheaper to go there instead of using the South End depositing grounds. Mr. Heenan pointed out that there, would be the naulage, and said that by it the rent of the South End yard would be equalised. At that time there was a block at the North End, and Mr. Heenan said that he wished to get Mackie, Dunn & Co. from the North to the South End. Witness recommended Mr. Heenan to see Mr. McFarlane, and Mr. Heenan called at the office and the interview took place. Ultimately it was agreed that witness should see the chairman, Sir Frederick Blaine, and put their case before him. Mr. Heenan said that there would be a reduction allowed of 8d. per ton on the goods going to their South End depositing ground (No. 4).

The Chief Justice: I very much doubt if a Harbour Board can give a firm a preference over another.

Witness, on receiving the lease, noticed that there was nothing in it about the reduction of 8d. per ton, and the lease was sent back to the Board's attorneys and a clause (clause 5) was inserted. After the lease was drawn up they paid the same rate for the South End, but 8d. a ton less for the North End. From September they charged 4s. to the North End, but the 8d. was ultimately returned them. Since the beginning of this year the charge had been 4s. to both ends. The firm had not received the benefit of the 8d. as arranged.

James Searle, sen., managing director of the Associated Boating Companies of Port Elizabeth, deposed to the mode of carrying on the work at the Port Elizabeth Harbour already referred to. Since September, 1896, the Railway Company did the delivery work. In 1895 he knew that certain ground was becoming vacant (No. 4), and that Mackie, Dunn & Co. had ground at the North End (No. 5). There was a tremendous block at the North End at the time, and he advised that steps be taken to induce Mackie, Dunn & Co. to transfer their goods, mainly timber, to the South End. He saw Mr. McFarlane, on Mr. Heenan's suggestion, and afterwards negotiations were entered upon between the Harbour Board and Mackie, Dunn & Co. The 8d. advantage was the reason that Mackie, Dunn & Co. gave up the ground at the North End.

Evidence taken on commission corroborative of the evidence for the defendants was read.

Mr. Schreiner submitted that the onus was upon the defendants as the lease was admitted.

Mr. McGregor: I admit that the onus is upon us.

[De Villiers, C.J.: Can you claim exemption from a tariff which is legally enforced?]

The Harbour Board cannot raise the question of illegality. *Mersey Dock and Harbour Board* v. *Gibbs* (1 L.R.H.L.C., p. 93) quoted in *Gifford* v. *Table Bay Dock and Breakwater Management Commission* (1874, p. 96.) We cannot get the tariff set aside; that is a matter between the Board and the Government; but as between ourselves and the Board the position is different. The agreement as to paying 8d. per ton less is not a contradiction of clause 5, Act 36, of 1896, section 32, forbids any preference being granted to any vessels, &c., but that does not refer to commercial contracts. They relieved the congestion of traffic and got a high rent.

Even if the agreement was not a collateral one, then there was mistake as to the lease. There was consideration given and this consideration was left out. *Story on Equity* (sections 152—155.) The mistake was innocently made. *Erskine* v. *Adeane* (8 Ch. App. p., 756)

[De Villiers, C.J.: If you were sued upon the lease you might set up this case and claim a rectification of the lease; but you try to set this up as a defence on the tariff.]

We set up a *pactum de non petendo*. *Collector of Customs* v. *Cape Central Railway Company* (6 Juta, p. 402) is not in point. The Harbour Board cannot be compared with the Crown; it is not a Government body. *Taylor on Evidence* p. 966. The inducement to it was that the Board intended to equalise the rates payable at the two places and intended to bind themselves for five years.

Postea (November 26th).

Without calling on Mr. Schreiner, the Court gave judgment.

De Villiers, C.J.: This is an action to recover a sum alleged to be due to the plaintiffs for work and labour in landing the defendants' goods at Port Elizabeth, and conveying them to their stores. The charges were made under a tariff which is admitted to have been legally framed by the plaintiffs. The defence is that there was a contract between the parties that the charge for conveying goods to the defendants' stores would in every case be eight pence

less per ton than is charged for conveying goods to the North End at Port Elizabeth. It is admitted, however, that both parties intended that the written contract which was actually executed should embody all the terms of their agreement. In order that no mistake might be made, a clause was proposed by the defendants after the draft of a contract had been submitted to them. The clause, which was agreed to by the plain iffs, was as follows: "That the charge for landing goods and hauling them to the ground hereby leased shall not at any time exceed those for the same service during a like period to the ordinary depositing ground of the lessors." The ordinary depositing ground was near to the defendants' stores and the charge for conveying goods to that groun l was at the time of the execution of the contract eight pence less per ton than it was for conveyance to the North End. The charges were afterwards equalised by the plaintiffs, with the result that the defendants were called upon to pay at the same rate for conveyance of goods to their stores as was paid by others for conveyance of goods to the North End. This charge, they say, was a breach of contract It could, however. only be a breach of contract if a further term had been introduced into the written contract "that in every case the charge made for conveyance to the ordinary depositing ground of the lessors shall be eight pence less per ton. than the charge for conveying goods to the North End." Upon what principle can the Court now import such a term into a written contract which admittedly was intended to embrace all the terms of the agreement? If the parties had not intended the document to be a complete and final statement of the whole of the transaction between them, it would have been possible for the defendants to rely upon a separate oral agreement as to a matter on which the document was silent [and ,which is consistent with its terms. As the case stands, however, such a defence is not open to them. Of course if one of the terms of the agreement between the parties was by mistake omitted. that might be a ground for re-forming or rectifying the document butvery different evidence would be required in an action for such rectification. It would not be enough to prove that one of the parties to the agreement understood that the omitted term should be inserted. To succeed in such an action proof would be required that both parties had agreed to the term and that by mistake or fraud it was omitted. There is no evidence in the present case that the plaintiffs even intended, or led the defendants to believe that they intended to deprive themselves of the power to equalise the rates. One of the inducements held out by their General Manager to the defendants to take the lease was the fact that at that time the rate to the ordinary despoiting ground was less than to the North End, but there was no promise express or implied that the difference would continue during the whole period for which the lease was to run. If there was such a promise the defendants, may even have the right to claim a cancellation of the lease on the ground that it did not correctly embody the terms agreed upon, but they cannot claim to have the full benefit of the lease and at the same time enjoy an exemption which is inconsistent with the terms of the lease. The judgment of the Court must therefore be for the plaintiffs with costs.

Mr. Justice Buchanan and Mr. Justice Maasdrop concurred.

[Plaintiffs' Attorneys, Messers. Fairbridge, Arderne & Lawton; Defendants' Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP,

HARRIS V. HARRIS. { 1897. Nov. 26th.

This was an action brought by Mrs. George Arthur Harris for the restitution of conjugal rights and failing compliance, for divorce.

Mr. Graham appeared for the plaintiff.

Mrs. Harris said she was married before the Resident Magistrate at Cape Town, on the 10th August, 1893. Her husband at the time of the marriage was an engineer on board the Great Northern, a steamship employed in the cable service in Table Bay. After marriage they lived for ten days at Sea Point, and after that witness went to England, where she lived with her husband's people for about a year. When she returned to Cape Colony she lived with her husband at a boarding-house at Green Point. Her husband's duties frequently took him up the coast, but he practically lived there. In August, 1896, her husband left the Great Northern, she believed he had to leave, and he went to Johannesburg. She wrote and telegraphed to him, but the only answer received was a telegram requesting her to send him money,

She threatened proceedings against him, and in February he came down from Johannesburg, and a reconciliation was effected. She agreed to go to Johannesburg and live with him, and on his suggestion she delayed her departure for a week after he had returned. She wrote and telegraphed him stating the exact day and hour she would arrive, but on reaching Johannesburg nobody met her at the station. There was only hotels to go to, and she went to one. On making inquiries, she found out the whereabouts of her husband, and called on him. The only excuse he could give for not meeting her was that he had forgotten all about the matter. She learned that her husband was not behaving as he had promised to do, and that he was drinking heavily. At that time he had employment, and was earning £40 a month. Her husband did not take her to his hotel, and he gave her no money. Soon after that her husband became ill, and witness nursed him. Meantime witness was staying with her own friends, while her husband remained at his hotel, which was not a nice place—it was a miserable place. Her husband's illness was caused by drink. Witness asked him to contribute to her support, but he refused, and told her she could do as she liked, and that she had better go back to her people. Since August, 1896, and for some time before that her husband had not contributed to her support. For the past eighteen months he had not contributed a penny. It was through the assistance of her friends and relatives that she got back from Johannesburg. She supported herself by assisting her mother.

The Chief Justice: He is still at Johannesburg, I suppose?

Mr. Graham said there had been personal service on Harris at Johannesburg.

Decree was given for the restitution of conjugal rights, with costs, defendant to return to, or receive the plaintiff, before December 31, 1897, failing which, to show cause before January, 1898, why a decree of divorce should not be granted. Personal service to be effected if possible, and failing that, one publication in the Johannesburg "Star."

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

HEINEMANN v. DU PREEZ. } 1897. Nov. 26th.

Sale of land — Brokerage — Agency—Ratification.

The purchaser of landed property, in making payment to the seller's broker of the purchase price, deducted the brokerage. In an action to compel the seller to pass transfer the declaration alleged that the purchase price had been paid: the seller pleaded that the property was sold without her instructions or knowledge, that no specific time had been arranged for transfer, that the purchaser was in possession, and that transfer had not been passed because the transfer deeds had been lost

Held, *that this plea amounted to a ratification of the sale and that the question as to the plaintiff's right to deduct the commission could not now be raised.*

Per De Villiers, C.J.: A broker authorised to sell land is not necessarily authorised to receive payment.

This was an action brought against the defendant praying for an order to compel her to pass transfer of certain property sold by her to the plaintiff and for £25 damages.

The plaintiff was a builder and contractor, and in June, 1897, he purchased the property from the defendant Mrs. Du Preez for the sum of £600. It was agreed that payment should be made in cash, and the transfer should be passed to the purchaser. The plaintiff had paid to the defendant the sum of £600, and a further sum of £12 as transfer duty, as part of the contract. Notwithstanding this, the defendant refused transfer, and thus failed to carry out the contract, and plaintiff had thus been prevented building on the ground, and had in that and other respects suffered loss to the extent of £25.

The defendant's plea was that the sale took place without her knowledge, and that the transfer could not take place owing to the loss of the transfer deeds. She claimed in reconvention for £25, for rent and costs of suit.

Mr. Graham for plaintiff.

Mr. McLachlan for defendant.

Mr. McLachlan said the claim in reconvention had been withdrawn, and the transfer had been passed.

Mr. Graham said the transfer deed had not been delivered.

Daniel R. J. Heinemann, the plaintiff, said he purchased the property in question through Mr. Brittain. The purchase was effected in June, 1897. He bought the property for a particular purpose, that of building a stable upon it. He had not yet got transfer, and was anxious to have possession.

Cross-examined by Mr. McLachlan: Witness purchased the property through Mr. Brittain and never saw Mrs. Du Preez. He left the matter entirely in Mr. Brittain's hands. For a month after he bought the ground he had had occupation.

James Brittain, licensed broker and enrolled agent, said Mr. Du Preez, husband of the defendant, in June last asked him to find a purchaser for the property. He knew the property. Witness did his best to effect a sale, and he got offers, and submitted them to Mr. Du Preez as Mr. Du Preez had requested. Later Du Preez told him that Mr. Van Noorden was acting for his wife. The plaintiff's offer was accepted, and he paid the purchase price (£600) to Mr. Van Noorden, who in August, 1897, forwarded him the cheque for that amount, less his commission of £15, and asking witness to hold the money against the transfer of the property. Since that time he had been unable to get transfer. Since then Du Preez had frequently promised to hand the transfer to witness.

Cross-examined by Mr. McLachlan: Witness had not seen one Stephan about the matter.

Emile van Noorden said he saw Du Preez about the matter in June last. The property was originally bought through him by Mrs. Du Preez for £500. Mr. Stephan had a bond over Mrs. Du Preez's property of £600, and he went to look at this property in question. Stephan told witness to sell the property as soon as possible. He gave witness no power of attorney. A few days later Mr. Du Preez told him that Mr. Brittain had a customer for the property, and witness asked for £650, but ultimately agreed to accept £600. Witness informed Mr. Du Preez of the offer, and he appeared quite satisfied. Witness went to Stephan's office, but the bond could not be got, Stephan being absent, and witness wrote to Stephan telling him what had been done on his return. Some time afterwards he heard about the transfer having been lost. Du Preez was informed by him that the price was to be £600, less the 2½ per cent. of commission.

This closed the case for the plaintiff.

H. P. du Preez, husband of the defendant, said at a meeting with Stephan and Van Noorden, Van Noorden said he thought he could sell the property for £700, and another property for £300. Stephan acted for Mrs. Du Preez, as he held a bond over the properties. Stephan said to Van Noorden that the property could be sold with Mrs. Du Preez's consent. Stephan told one Gunning that Van Noorden could sell the property, and that the proceeds of the sale would go to pay his bond. Witness always said that he was not agent for his wife.

After various letters had been read,

Henry R. Stephan said he advanced Mrs. Du Preez, Sir George Grey-street, £600, for which he received a bond. He was therefore agent for Mrs. Du Preez in the sale in question. He told Van Noorden that if he covered his bond and interest that the sale could go on. Witness received letter (produced) and sent the cancelled bond to Van Noorden. Witness wanted his £600, and he would not have cancelled his bond for less. He gave Van Noorden instructions not to sell for less than £600. Witness had no intention of employing an agent in the matter. He certainly never agreed to make a loss on the property. Witness a few days later received a cheque for £17 10s. less than £600, but this he refused to accept. The bond was now cancelled. The property was in the hands of Heinemann, and witness had not received a penny on his bond.

James B. Gunning, bookkeeper at Mr. Stephan's, stated that he was present at a conversation between Stephan and Van Noorden with respect to a property over which Stephan had a bond of £600. Witness was instructed not to receive less than £600 and interest, and if there was a balance over that it would go to the credit of Mrs. Du Preez.

Cross-examined by Mr. Graham: The bond was over the property in question.

Frederick H. Boosé, broker, said that it was very seldom that a broker received the purchase money. The money was handed to the attorney who passed the transfer.

Cross-examined by Mr. Graham: It was not the rule that the brokerage should be deducted by the purchaser's agent. His rule was to get the brokerage from the seller's attorney. Had he transacted the same business he would not have acted as Mr. Brittain had done.

After argument by Mr. McLachlan, without calling on Mr. Graham,

Judgment was given for the plaintiff, with costs.

The Chief Justice said: It is a matter of the greatest difficulty to arrive at the facts in this case. From reading the plea no one would suppose that the real question to be decided in the case was whether the £15 commission was to be deducted from the £600. That point was not raised, directly or indirectly, by the pleadings, and it is only as the case has advanced that it has been gradually discovered that that is the real position. The defendant was informed that the property had been purchased for £600, and that the purchase price had been paid to Mr. Van Noorden. In her pleadings the defendant stated that the property was sold without her knowledge, and contrary to her in-

structions; that no specific time was arranged for giving transfer, that the plaintiff was in possession, and that transfer had not been given because the transfer deeds had been lost. If that meant anything at all, it meant that although originally the agent might not be authorised to do what he did the act was ratified by the defendant. The point that Mr. Van Noorden had no authority to receive the money has never been raised by the pleadings. It may be taken as Mr. McLachlan had said, that, as a general principle, the party who sells is not bound to receive the money. In the case of the sale of land I am not prepared to say that the payment to a broker would be a good payment at all. He (the broker) was only authorised to sell, and he was not necessarily authorised to receive payment; but the difficulty in the present case is that the payment to the broker was recognised, that by the acceptance of this transaction as a completed transaction the payment to the broker *pro tanto* was accepted, and there was no further allegation in the plea that the broker had no authority to receive the money. On the contrary, the receipt by the broker was accepted. Now, the question is raised, was he entitled to deduct this commission? In point of fact, from the evidence it does appear that the sum of £600 was paid by the purchaser, but it was only paid to Brittain. Brittain was his own agent, so it was not a good payment. Brittain paid to Van Noorden £600, minus £7 10s., so that to the extent of £7 10s. there was a deficient payment. If this question had been raised as to the authority of the broker to receive money, the whole thing would have been before the Court, but now, by this plea, there was a ratification of the authority of the broker to receive the £600. With this plea I do not see how the question can further be raised now. As to the justice of the case, it strikes me that if Mr. Du Prees knew that the seller was to pay the brokerage that he might just as well have allowed the money to be deducted. In regard to Mr. Stephan's statement and the charge made against Mr. Van Noorden, I do not think it ought to have been made. There is nothing whatever to show that this was an improper transaction. Judgment will be for the plaintiff with costs.

Mr. Justice Buchanan and Mr. Justice Maasdorp concurred.

Mr. Graham said that he withdrew the claim for damages.

[Plaintiff's Attorney, A. P. Kenealy; Defendant's Attorney, H. P. Du Prees.]

REGINA V. VILJOEN. { 1897. Nov. 26th.

Culpable insolvency—Failure to keep proper books—Evidence.

A conviction for culpable insolvency upheld on appeal, although inadmissible evidence had been produced at the trial which would not have affected the nature of the verdict.

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate of Worcester.

The appellant, Johannes François Viljoen, a general dealer and wagonmaker, of Worcester, whose estate was sequestrated on the 11th August, 1897, was charged with the crime of culpable insolvency, in contravention of section 71 of Ordinance 6 of 1843, as amended by section 9 of Act 38 of 1884, in that before or at the time of the sequestration of his estate as insolvent the said Viljoen did not keep, or cause to be kept, such reasonable or proper books or accounts containing all such entries concerning and exhibiting the nature of his dealings and transactions as (regard being had to his particular trade or calling) might reasonably be expected or required, and against the form of the Ordinance and Act aforesaid.

The accused pleaded not guilty.

The insolvent's schedules showed liabilities to the amount of £577 19s. 8d., and assets estimated at £271 0s. 10d., leaving a deficiency of £306 18s. 5d.

The insolvent alleged at his trial that he commenced business in partnership with his sister on the 2nd July, 1895, his turnover during the two years in which he was in business amounting to £1,799 6s. 1d.

The books kept by the insolvent were four pass books and one small account book, showing goods sold on credit; three exercise books, containing entries of goods sold for cash, and a number of invoices and receipts. The statement of the insolvent made at the second meeting meeting of his creditors was put in evidence; in that he made no mention of the partnership. The trustee's report was also put in.

The insolvent's defence was that he left the management of the business in the hands of his sister, who had to keep the books, as he had no knowledge of bookkeeping.

At the conclusion of the evidence for the defence the insolvent's agent applied for his discharge on the grounds that there had been an erroneous sequestration of his estate, as it was

a partnership estate existing between the accused and his sister, Catherine Viljoen, the partnership business not having been liquidated up to date. He quoted in support of his application *Re Le Riche* (3 Menzies, 290), and contended that creditors should proceed, under section 9 of Ordinance 6 of 1843, against both partners.

The Magistrate refused this application, found the accused guilty, and sentenced him to fourteen days' imprisonment without hard labour. From this sentence the accused now appealed.

Mr. Schreiner, Q.C., was heard in support of the appeal.

Mr. Sheil, Assistant Law Adviser, for the Crown.

Mr. Schreiner: Documents were put in which were clearly inadmissible and they probably swayed the Magistrate's mind. The insolvent's examination at meeting of creditors was put in: this was clearly inadmissible. Ordinance 72 of 1830, section 28; Ordinance 6 of 1843, section 61, must be read for the Ordinance 64 of 1829 section 61. *Regina* v. *Joseph* (S. 4, p. 1); *Regina* v. *Louw* (Malmesbury Circuit Court, 1888).

[Buchanan, J., refers to Act 38 of 1884, section 7.]

That strengthens the argument. The trustees, report was put in *en bloc*: that also was irregular. The books and invoices which were kept by the insolvent may be held sufficient to satisfy the requirements of the Ordinance.

[De Villiers, C J.: How would the statement of the insolvent, even if inadmissible, affect the question of keeping books?]

At his trial both he and his sister alleged that they were in partnership. In this statement he did not say anything about the partnership. This affects the keeping of books, because in a criminal case one partner is not liable for the acts of the other. There must be a *mens rea*. A sleeping partner may take it for granted, that the managing partner is keeping the books properly. *Maxwell* (p. 126) as to *mens rea* in statutory crimes. *Regina* v. *Wright* (4 Sheil, p. 104). When a man is charged with a negative act it is necessary to show something more than the fact that the thing is not done. It must be shown that he knew that the law had been broken.

Mr. Sheil was not called upon.

The appeal was dismissed.

The Chief Justice said: The question which the Magistrate had to decide was whether accused kept, or caused to be kept, reasonable and proper accounts to exhibit the nature of his transactions. The main evidence required to enable the Magistrate to decide such a question was first of all the production of the books. The books were produced, and the Magistrate, knowing what the nature of the transactions were, was in a position to judge whether there was a contravention or not. Evidence was admitted which was not admissible, but we must consider whether its admission affected the result. In my opinion the Magistrate would have been bound to convict, apart from the evidence which was not admissible. I do not attach much importance to the fact that the accused placed his sister in the shop because he was living in Worcester, and he could have easily exercised sufficient supervision to see that proper books were kept. It would have been different if he had placed in the shop an experienced salesman or an experienced accountant. Had he done that there might have been something to be said for him. The evidence which was not admissible was not of such a nature as would in any way have affected the verdict. The appeal must therefore be dismissed. I have looked at the books, and I consider that they are not books which would be expected from any person carrying on business, especially purchasing goods from merchants.

Mr. Justice Buchanan said: I have looked at the evidence which was admitted to see if I could gather if substantial wrong had been done to the accused. I have looked at it in the interests of the accused, but I have failed to find anything in the evidence improperly admitted which might lead one to expect that any substantial wrong has been done to the appellant.

[Appellant's Attorney, V. A. van der Byl.]

QUEEN v. ABEL. { 1897. Nov. 26th.

Liquor Licensing Acts—Bottle store—General store.

The holder of a "bottle licence," authorising him to sell on "Erf No. 106, Hopefield," withoutany further restriction, sold a bottle of wine in the door of his general store, which was about ten yards distant from the bottle store, but on Erf No. 106.

Held, *that he could not be convicted of selling liquor at a place where he was not authorised to sell.*

This was an appeal from a sentence passed upon the appellant by the Acting Assistant Resident Magistrate of Malmesbury. The appellant was charged with contravening Act 28

of 1883, section 75, in that upon or about the 23rd day of October, 1897, and at or near Hopefield, in the district of Malmesbury, the said Samuel Richard Abel did wrongfully and unlawfully sell or offer, or expose for sale, intoxicating liquor at his premises, used as a general dealer's store, on erf No. 106, Hopefield, such being a place where he was not authorised by his licence to sell the same.

The prisoner being arraigned pleaded not guilty.

On the 6th July, 1896, the appellant applied through his attorney for a bottle licence on erf No. 106, Hopefield.

This application was accompanied by a plan showing the building in which the bottle-store business was to be carried on. This building was distant about ten yards from the appellant's general store, but both buildings were on the same erf. The licence granted was as follows: "I, the undersigned, grant licence to Samuel Abel, of erf No. 106 in Hopefield, to sell on the said premises, but not elsewhere." On the 10th April, 1897, the licence was renewed.

The evidence for the prosecution showed that about 7.15 p.m. on the 23rd October last the head constable at Hopefield, with the object of trapping the accused, sent two boys, Jan Holloway and Abraham Willemse, to the accused's shop for a bottle of wine, giving them a 2s. piece and an empty bottle.

The boy's evidence was to the effect that the sale and delivery of the wine took place in the general dealer's store; whereas for the defence it was alleged that the sale took place on the stoep of the general dealer's store.

The prisoner's boy who brought the wine from the bottle-store and delivered it to Holloway was not able, owing to illness, to be present at the trial, and consequently there was no evidence for the defence as to where delivery took place; but all the accused's witnesses, including himself, swore that neither the sale nor the delivery took place in the shop.

The accused was found guilty, and sentenced to pay a fine of £7 10s, or in default of payment, seven days' imprisonment.

From this sentence the present appeal was brought.

Mr. Schreiner, Q.C., was heard in support of the appeal.

Mr. Sheil, Assistant Law Adviser, for the Crown.

Mr. Schreiner: The bottle store is on the erf, and the appellant was therefore authorised to sell there.

Mr. Sheil: The licence was originally granted in terms of a special application accompanied by a plan: this must be read with the renewal.

[De Villiers, C.J., refers to Act 28 of 1883, section 9.]

Mr. Schreiner: *Regina* v. *Schmidt* (2 J., p. 97).

De Villiers, C.J.: The accused was charged with a contravention of the 75th section of the Liquor Licensing Act, 1883, by having sold liquor at a place where he was not authorsied to sell. The licence which was a bottle licence authorised him to sell on "Erf No. 106, Hopefield," and the sale took place in the door of his general dealer's store. His bottle store was about ten yards distant from his general store, and at the time of applying for his licence he sent in a plan showing that the two stores were separate and apart from each other. Unfortunately, however, the licence granted to him did not confine his right of selling liquor to the bottle store, but gave him a general authority to sell on the erf, of which the general store formed a part. If the licence had been an ordinary retail liquor licence the prohibition of the 17th section of Act 25 of 1891 against selling in the same place in which a general dealer's business is carried on would have applied. But there is no similar provision in regard to bottle licences and as the Licensing Court has omitted to restrict the appellant's sales to his bottle store the Court has no power to supply the omission. He has sold the liquor on Erf No 106, and therefore he could not be convicted of the offence of selling at a place where he was not authorised to sell. The appeal must accordingly be allowed.

[Appellants' Attorney, D. Tennant.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice MAASDORP, and the Hon. Mr. Justice SOLOMON.]

MORUM BROS. v. HACK. { 1897. Nov. 29th.

This was an application by Mr. Graham for the arrest of Mathew Hack. The petition set forth that the defendant was indebted to the petitioners in various amounts on promissory notes, that he had booked his passage for England by the Tartar, sailing from Cape Town on December 1, and that

the petitioners believed he had no intention of returning to this colony. They therefore asked for an order for his arrest and imprisonment until he gave satisfactory security. Counsel stated that £15 was due on the first promissory note, which was entirely unsecured, and £33 was also due, which was secured on the endorsement of the wife, but this endorsement counsel held was worthless, she having no property.

The Chief Justice: Have you any precedent for such an application?

Mr. Graham: I have no precedent except that this man is leaving in this sudden fashion and there is this debt due.

The Chief Justice: His wife is remaining behind?

Mr. Graham: Yes.

The Court refused the application, and instructed counsel to proceed in the ordinary course, holding there was not sufficient cause for arrest.

KLEIN V. KLEIN.

This was an action for divorce, instituted by the husband Henry Klein on the ground of adultery on the part of his wife. The parties were married in community of goods on the 17th December, 1890, and there was one surviving child of the marriage.

Mr. Buchanan for the plaintiff.

Mr. Barry, of the Colonial Office, produced the register of the marriage.

Henry Klein, the plaintiff, stated that there had been five children born of the marriage. Witness after his marriage liyed at Hugo's farm, not far from Simon's Town. After he left the farm his wife was in the habit of returning to the farm. He had occasion to scold his wife because of her intimacy with one John Farley. His wife left him three years and six months ago. She left on account of the scolding, and she went to live at Hugo's farm. Johnny Farley was staying at that farm. He heard from his wife a year ago, when he wrote to her asking her to return, but she refused. He went to see his wife, and found her in bed with a man named Haigh. She was living with that man now.

The defendant appeared and admitted adultery.

Decree of divorce was granted, and the plaintiff given the custody of the child.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

VAN DER BYL AND HAUPT v. SCHOLTZ. 1897. Nov. 29th.

Will—Undue execution—Acquiescence—Minors—Heirs *ab intestato*.

The Court will exercise great caution in declaring null and void by reason of undue execution a will which has been duly registered and acted upon, but will not refuse relief to the heirs ab intestotor *of the deceased if there has been no acquiescence on their part. The fact that they have not instituted their action until ten years after the registration of the will is not sufficient proof of such acquiescence if they were minors at the time of such registration and instituted proceedings within a reasonable time after they became of age.*

This was action for a declaration of rights.

The declaration was in the following terms:

1. The plaintiffs are Johanna Cornelia Haupt (married without community of property to Andries Christoffel van der Byl, and assisted by him in so far as need be) and Johannes Jacobus Haupt. The plaintiffs reside at the Paarl. The defendant is Willem Adolf Scholtz, J.son, residing at the Paarl. and he is sued both personally and in his capacity as executor under the will of his late wife, Helena Susanna Elizabeth Scholtz, formerly Haupt (born De Villiers).

2. The plaintiffs are children of the said late Helena Susanna Elizabeth Haupt (born De Villiers), widow of the late Carl Albrecht Haupt, and subsequently married to the defendant, and hereinafter called the testatrix; there are five other children of the testatrix four of whom are minors.

3. On the 1st February, 1887, the testatrix died at her farm called Rhone, situated at Groot Drakenstein, in the district of the Paarl.

4. On the 28th January, 1887, a mutual will, purporting to be executed by the testatrix and defendant, was signed at the said farm Rhone, and the witnesses purport to be one Charles Haupt and one H. D. Schwartz. A translation of the said will is hereunto annexed, marked "A," from which it appears that the said will purports to have been signed on the 7th January, 1887. The defendant has taken out letters of administration as executor under the said will.

5. The said H. D. Schwartz, who purports to be a witness to the testatrix's signature to the said will, and whose full name is Hendrik

Daniel Schwartz, did not see her sign the said document, nor was he present at the execution of the said will, and the said will is therefore null and void, as not having been executed in conformity with the provisions of Ordinance 5 of 1845.

6. Under the said will the survivor was appointed sole heir of all the estate of the first dying. The said estate of the testatrix was at the date of her death of considerable value, and the chief assets therein have recently been sold for about £8,000 or £9,000.

7. The defendant has realised the said estate, and has in his possession the whole of the funds thereof.

Wherefore the plaintiffs claim: (*a*) That the said will of their late mother (the testatrix) may be declared null and void, as not having been executed in accordance with law, and that their late mother has died intestate; (*b*) that the defendant be ordered to account to such person as may be appointed executor dative in the testatrix's estate for the value of the estate, and to pay over to him the portion to which the plaintiffs are entitled as heirs *ab intestato*; (*c*) alternative relief; (*d*) costs of suit.

And for an alternative claim the plaintiffs say:

8. They crave leave to refer to the matters pleaded above in paragraphs 1, 2, 3, 4, 6 and 7.

9. The said will was not signed freely and voluntarily by the testatrix, and at a time when she was in full and complete possession of all her faculties, but she was unduly influenced to sign the same.

10. Prior to signing the said will, the testatrix dictated to the defendant the terms of the will which she desired to make, including the terms that the defendant should receive £500 from the testatrix's estate, and should live upon and work the farm, the farm belonging to her for the benefit and support of the children of testatrix, and that thereafter upon the majority of the testatrix's two eldest sons the said farm should become their property.

11. Thereafter, at the instance of the defendant, the testatrix, being in a feeble condition of body and mind, and neither fully understanding the terms of the document nor acting entirely of her own free will, but being persuaded and influenced unduly thereto by one Carl Albrecht Haupt and the defendant, signed the will, a copy of which is hereunto annexed.

Wherefore the plaintiffs claim: (*e*) That the said will be declared null and void; (*f*) that the testatrix be declared to have died intestate; (*g*) that the defendant be ordered to account to such party as may be appointed executor dative for the portions accruing *ab intestato* to the plaintiffs; (*h*) alternative relief; (*j*) costs of suit.

The defendant, in his plea, admitted the allegations contained in the first four paragraphs of the declaration, save that he said (*a*) he resides at Somerset West; (*b*) the farm Rhone was at the death of his late wife registered in the name of her former husband, Carel Albrecht Haupt; (*c*) the will was duly executed and attested as it purports to be on the 7th January, 1887.

2. He denied the allegations in paragraph 5, and also the allegation that the estate of the testatrix was at the date of her death of considerable value, inasmuch as there were heavy liabilities then resting thereon, which the defendant during subsequent years paid and discharged.

3. He denied the allegations in paragraphs 9, 10, and 11 of the declaration.

The replication admitted the registration in the name of Carl Albrecht Haupt and joined issue.

Mr. Searle, Q.C., appeared for the plaintiffs.

Mr. Schreiner Q.C. (with him Mr. McGregor), for the defendant.

Mr. Searle stated that the alternative claim had now been withdrawn.

The following evidence was led:

Johanna Cornelia van der Byl said she was born in 1872, and was married in 1891. Up to the time of her marriage she lived on the farm Rhone in the Groot Drakenstein with her mother. Her mother died on the 1st February, 1887. Four days before her death a will was signed. Mr. Carl Haupt and Mr. Scholtz came out of her mother's bedroom with a will in their hands. Her brothers Johannes and Carl were in the room, and also Schwartz, an overseer. Scholtz, her stepfather, placed the will on the dining-room table, and asked Schwartz to sign it, but Schwartz replied that he could not write. He then went into the kitchen. Scholtz then called on witness to send Schwartz into the dining-room. Schwartz came back, and Scholtz again asked him to sign, and Schwartz again said that he could not write. Mr. Haupt said he would take his time. Schwartz afterwards signed the will. The farm was well wooded, and during the time she was there Scholtz disposed of a great deal of wood, and her brothers were engaged almost daily carting away wood. Now, most of the large trees are cut down. Susanna, witness's sister, was teaching at Pretoria, and she supported herself. Helena, another sister, lived with witness. She had been living with her for about two years. The younger children, twelve and

fourteen, were with Mr. Scholtz. One brother was at Wellington studying, another had been working at the Paarl. After her marriage witness and her husband lived first at Stellenbosch, and afterwards at the Paarl. Witness had about £113 awarded to her from her father's inheritance. It was paid her when she married, Schwartz remained on the farm about two years after the will was signed. Scholtz was her father's overseer before he married witness's mother. After Scholtz married her mother her brothers had to work very hard, and they received no decent clothing.

Cross-examined by Mr. Schreiner: Witness had guardians. Scholtz objected to her marriage.

By the Chief Justice: Witness's father died in 1885.

Witness adhered to the statement that her brothers worked hard, and they were not properly clothed. They were at school, but she did not think for so long as six years. Scholtz made her brothers work like the niggers. She did not know for what the farm was sold. She knew that the farm Rhone and the Saldanha Bay farm were bonded. She knew now that all the bonds had been paid by Scholtz. Scholtz had stopped the interest due to her two sisters—the interest that he received for them from the Master. Witness had not asked Scholtz for the money, for she believed, although she had not asked him, he would have refused. Witness and her husband never had any conversation about her mother's will until she spoke about making her own will. It was then that she told him about the will, because she thought her mother had left her money. On the Sunday before her mother died she took farewell of the children, but she did not tell them that she had left everything to Scholtz. The will was signed on the Friday. Witness did not know that her mother had repeatedly asked Scholtz to go to the Paarl, and get her will drawn out. Witness knew nothing of her mother signing the will or of Scholtz and Haupt signing. When they entered the dining-room Scholtz asked Schwartz to sign the will. At times during her illness her mother's mind was not perfectly clear. She wandered in her talk frequently. Witness thought that Scholtz used undue influence while her mother was not in a proper state of health to force her to assign her whole estate to him. Scholtz had re-married. Scholtz made the children walk to school in all kinds of weather. The distance was half an hour by cart.

Re-examined by Mr. Searle: Witness had been told by others that Scholtz used undue influence to secure the estate for himself.

Hendrik Schwartz, Paarl, said that at the beginning of 1887 he was on the farm Rhone. He went there after Mr. Haupt's death, and after Mr. Scholtz's marriage. Witness was overseer. He could remember signing a will as witness. Witness and Carl Haupt came in from the vineyard that morning about eight o'clock. Scholtz and Haupt came into the room, Scholtz with a paper, Haupt with a pen. Scholtz asked witness to sign the paper, but witness said he could not sign. Afterwards witness signed the will. From the place where he signed the will it was not possible to see Mrs. Scholtz. Scholtz told him that it was Mrs. Scholtz's signature.

By the Chief Justice: Mrs. Scholtz did not sign in witness's presence, and she never acknowledged to him that the signature was hers.

Witness signed no other document about that time. He did not consider himself well treated by Scholtz and left the farm.

Cross-examined by Mr. Schreiner: He fixed the day of signing the will because Mrs. Scholtz said farewell to the children on the following Sunday, and died early on the morning of the next Tuesday. Witness was not told by anybody that it was January 28 when he signed the will. He could remember the date very well. He was a man of deep thought. He knew it was the 28th. Nobody told him the date of Mrs. Scholtz's death. He could not remember when he left Scholtz's service, neither could he remember when he went to the Paarl. Just now he was doing anything to make an honest living. He traded and trained horses, and did other things. He was not a loafer. He had steady employment. He was now thinking about starting to buy fruit. Witness had said that the mind of Mrs. Scholtz was unhinged for sixteen days before her death. He could only remember being in her bedroom once, but he could not remember what took place then. He did not know why he put in his affidavit that her mind was unhinged for so long before her death. It was fourteen days before her death that he was in her room. He could not remember who were in the room at the time he was there. One day he came and stood at the door of the bedroom. It was not true that Scholtz sent for him one day, that he stood in the doorway while Mrs. Scholtz signed the will and that he afterwards signed the will on the dressing-table in the bedroom. He did not wish to sign the will because he was ashamed to do so. The reason he was ashamed to sign was because he had never signed a will before. He believed the real reason for not wishing to sign was because he did not understand the will. He had been at school and could easily read and write.

The Chief Justice: He had no right to read the will. He had only to witness the signature, or attest it if the party signing had declared to him that it was her handwriting.

Witness, in reply to the Chief Justice, said he never saw Mrs. Scholtz sign any document; she never told him that she had signed any document, and he did not know her handwriting. Witness never heard of Mr. Scholtz going to the Paarl to get a will drawn out.

Johannes Jacobus Haupt, eldest son and second child of the late Mr. and Mrs. Haupt. He was born in 1874, and was at present at the Public School, Wellington, preparing for the ministry. The morning the document was signed he was in the dining-room, and saw Scholtz and his uncle Haupt coming out of his mother's bedroom. Schwartz at the same time came in from breakfast, and Scholtz asked him to sign the will. Schwartz, after having been again asked, signed the document. Witness's brother, Charles Albrecht, and his sister were also in the room. Witness remained on the farm until he was of age. He worked with the labourers all the time. There was a good deal of wood on the farm and witness assisted to cart the wood away. Most of the wood went the Paarl, and a large number of sleepers were sent to Cape Town to the Railway Department. At the present time all good timber has been removed.

Cross-examined by Mr. McGregor: Witness was an applicant to the Court some months ago. At that time he had only made an affidavit in reply. He had seen no affidavits up to that time. He made an affidavit at the request of Mr. Van Eyk. He made an affidavit to the effect that Mr. Scholtz had treated him badly. Witness was thirteen years of age when his mother died, but he remembered distinctly what took place the day when the will was signed. After his mother died he was, he thought, about two years at school. The day before his mother died she called all the children into her room, divided some jewellery amongst them, and after some words to them asked Scholtz if he would look after her children. She had to ask Scholtz three times before he replied and promised to do that.

By the Chief Justice: He made the affidavit stating that Scholtz treated them badly, because Scholtz made them work like niggers, and gave them very poor clothing.

Carl Haupt, twenty-one, a younger brother of the previous witness, stated that he remembered the circumstances connected with the signing of the will. Witness corroborated his brother and sister as to Schwartz signing the will in the dining-room that morning. He further corroborated as to the extensive cutting of wood on the farm by Scholtz.

Cross-examined by Mr. Schreiner: Witness left school when he was fifteen. He was not a party to the action, but he expected to share the benefits, if there were any.

Henrick Philip van Eyk, attorney, Paarl, said that Mr. Van der Byl came to his office about 14th or 15th April with reference to Mrs. Scholtz's will. In consequence of what was said they went and interviewed Schwartz, and took a short affidavit from him on the matter. A few days afterwards he saw Mrs. Van der Byl on the matter. Witness asked Van der Byl to get Carl Haupt, and he saw them at Van der Byl's house. Witness did not take an affidvait from Carl, but he told witness all about the matter. Carl made an affidavit in August. Johannes also made an affidavit.

Cross-examined by Mr. Schreiner: Witness made as strong a case as possible. Van der Byl did not suggest to see Schwartz; he came to see if a parent could disinherit his children, and on going to Schwartz it came out by mere chance that the will had not been properly signed.

John J. Piton stated that he valued the estate of the late Mr. Haupt.

The Chief Justice: But what has this to do with the question, is the will valid? If the will is not valid, an executor dative will have to be appointed who will call on the defendant to give an account of his intromissions.

William Adolph Scholtz the defendant, said he married the widow of C. A. Haupt in February, 1886. His wife died on February 1, 1887. Mr. and Mrs. C. A. Haupt came to his farm before the new year of 1887. They came to see his wife, and at his request they remained. His wife asked him to have a will made, and on 7th January he went to the Paarl to have a will made, or to bring an attorney to the farm. He went to the place of J. S. Marais, but he was not at home, and witness saw Isaac Marais who drew up the will. Witness left the Paarl with the will about one o'clock. Mr. Marais gave him instructions as to the execution of the will. When he got home C. A. Haupt was in the dining-room, and Mrs. Haupt was in his wife's bedroom. He showed Mr. Haupt the will, who took it into the bedroom. When witness entered the room Mr. Haupt was reading the will to his wife, and holding the document in front of her. At the time Schwartz was in the field, and he sent for him. When Schwartz came, he first stood at the door. Schwartz was at the door before his wife signed the will. Schwartz was brought in, the will was placed on a writing case in front of his wife, and she at

once signed it. Witness signed the will after his wife, and was followed by Haupt and Schwarts. He thought the will was signed on the dressing-table, but was not certain. The will was signed on the day witness went to the Paarl and saw Mr. Marais, and that was the 7th January. No such thing took place as that told by the previous witnesses, Van der Byl and Haupt. The will was not even taken out of the bedroom. His wife was in her sound mind when she signed the will. The witness Van der Byl married against his wishes. On the Sunday before his wife died the children were called into his wife's bedroom to say good-bye to them. She told them that she had nothing to give to them, and she asked witness if he would take care of the children. He hesitated, for he was only twenty-seven years of age, and there were seven children. In the room at the time there was a Miss Voigt and Mr. and Mrs. Abraham de Villiers.

Cross-examined by Mr. Searle: Witness married again four years after his first wife's death. The story told by the sister and the two brothers and by Schwarts was a pure invention. They must have invented the story. Witness thought that Schwarts was just the very kind of man who would make up a story. Mr. and Mrs. Abraham de Villiers were now his father-in-law and mother-in-law. Miss Voigt was a sister of Mrs. De Villiers. He had kept the interest belonging to two of the children. His wife gave him everything, and gave him as a legacy to the children. At the time of signing the will the children were having a nap.

Re-examined by Mr. Schreiner: At the time of his wife's death there was a bond on the estate for £4,000, and that he had cleared off.

By the Chief Justice: Haupt, who read the will to his wife, had studied for a barrister. He also told them how to execute the will.

Isaac Marais, brother of J. S. Marais, notary, auctioneer, &c., Paarl (shown will) deposed that he had not the slightest recollection of drawing out the will. The will, however, was in his handwriting. He could not remember Scholtz coming about the will. All he could say was that the will was in his handwriting.

Josias Mathias Hoffman spoke to attending the late Mrs. Scholtz towards the end of the year 1886. She died of typhoid on February 1, 1887. So far as he observed she was of sound mind.

Cross-examined by Mr. Searle: In typhoid there is always a little delirium.

Anna Margareta Voigt corroborated Scholtz as to her being in the room on the Sunday before the death, and to Mrs. Scholtz saying that she had left everything to Scholtz. Witness was the aunt of the present Mrs. Scholtz.

The Court agreed at this stage to call Carl Haupt.

In answer to the Chief Justice, Carl Haupt said he remembered being at the Scholtzes' house early in the year 1887 (shown will) The will, so far as he could remember, was signed on the day Scholtz brought it from the Paarl. Witness was not able to swear how the will was signed. He saw Schwarts sign the will, but could not say if it was done in presence of Mrs. Scholtz. He could not swear that the will was signed in the bedroom or the dining-room.

The Chief Justice: But you have already sworn both ways, havn't you?

Witness said that at the time he made his affidavit he said things he would now be very sorry to say.

The Chief Justice: If Schwartz swears that he signed the will in the dining-room, are you prepared to contradict him?

Witness: I am not.

The Chief Justice: And you are not prepared to support him?

Witness: I say nothing at all about it.

The Chief Justice: Your mind is a blank on this point?

Witness: My mind was a blank, for I was suffering severely from insomnia at the time, and I hardly knew what I said. The insomnia was made a great deal worse by having to come to Cape Town.

By the Chief Justice: The will was not signed on the day it was brought from the Paarl, the 7th January. It was signed at the least a fortnight after that date. He and his wife did not go to the Scholtzes before the New Year. It was after the New Year that he went. He spent the New Year with Danny de Villiers.

Mr. Schreiner examined witness at length on his two contradictory affidavits which he had signed.

The Chief Justice said that what the witness had said appeared to be a good reason for throwing out the two affidavits.

Mr. Haupt, wife of the previous witness, examined by the Court, said she was prepared to say that Schwartz did not sign the will in the bedroom. She could not remember ever seeing Schwartz in the room. When she made her affidavit she could scarcely remember anything about Schwartz, and it was only after she was reminded about him that she said that her impression was that Schwartz signed the will in the dining-room. Before she made the affidavit she said: "Although I was to lose my life I would say that Schwartz signed the will at the bottom end of the dining-room table."

Cross-examined by Mr. Schreiner: Her impression was that the will was signed on the

day it was brought from the Paarl. Her witness, Mr. Scholtz, did not appear to be pleased with the will. She told Scholtz that.

After argument by Mr. Schreiner, without calling on Mr. Searle,

Judgment was given for the plaintiffs in terms of prayer (*a*) of the declaration, costs to come out of the estate.

De Villiers, C.J.: I quite agree with Mr. Schreiner as to the extreme caution which the Court should excercise when asked to set aside a will which has been duly registered with and accepted by the Master of the Supreme Court, and has been acted upon by those concerned in its provisions. The necessity for such caution becomes sti'l more obvious when, as in the present case, a period of ten years has elapsed since the death of the testator. On the other hand, it is impossible to lay down any rule as to what lapse of time should foreclose the heirs from objecting to the validity of a will. The lapse of ten years would afford strong proof of acquiescence on their part, but it is not conclusive where a reasonable and satisfactory explanation of their silence is forthcoming. The explanation given by the plaintiffs in the present case is that they were minors at the time of the death of their mother; that after their mother's death they continued to live with their stepfather the present defendant; that they were wholly ignorant of the law as to the proper excution of wills, and that within a reasonable time after they became of age and were informed of their rights they instituted the present action. The explanation is satisfactory so far as it goes but it should not, under the circumstances, dispense with the clearest proof as to the undue execution of the will. If, for instance, the witnesses to the will were now dead it would be difficult to induce the Court to accept the statement of other persons who were present at the signing of the document that a will which had been acted upon for so many years had been unduly executed. In fact both the witnesses to the will in question are still alive and gave their evidence. One of them swears positively that the signature of the testatrix was neither made nor acknowledged in his presence, and that he did not attest the will in the presence of the testatrix. He gave a clear account of all the circumstances under which the document was executed and was not in the least shaken in cross-examination. The other witness to the will, Charles Haupt, spoke doubtfully as to what took place, and was not prepared to deny the statement that Schwartz signed the document in a different room from that in which Mrs. Scholtz was lying. Seeing that Charles Haupt has made two contradictory affidavits as to the manner in which the document was executed, I prefer to dismiss his evidence from consideration altogether. The defendant himself is positive that all the requisite solemnities were observed. His wife, he says, was anxious to leave him all her property on condition that he should look after her children, and he had in consequence asked Mr. Isaac Marais, of the Paarl, to prepare the will. It would have been more prudent if he had also asked a lawyer to be present at the execution of the will. His wife was very ill, she was about to appoint him as her sole heir to the exclusion of her children by a former husband, and the least he could have done was to see that she was properly assisted and advised in the execution of her will. The eldest child, Mrs. Van der Byl, who is one of the plaintiffs, swears that Schwartz was not present at the execution of the will and she is supported by her two brothers. One of them speaks with some animus against his stepfather, who, he says, had made him work "like a nigger," but the evidence does not support him. The young man says he is a theological student, and I trust when he comes to have a congregation of his own he will teach them the dignity of labour rather than degrade labour by speaking as if it were only fit for a nigger. On the whole I have come to the conclusion that the will was not duly executed, and judgment must be given accordingly, with costs out of the estate.

Mr. Justice Maasdorp and Mr. Justice Buchanan concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. Walker & Jacobsohn.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

ADMISSION. { 1897. Nov. 30th.

Mr. Buchanan applied for the admission of Mr. Gideon Brand van Zyl as a conveyancer.

The application was granted.

PROVISIONAL ROLL.

THE MASTER V. POTGIETER.

Mr. Sheil applied for an order calling upon defendant to file an account in the estate in which he is executor.

The application was granted.

THE MASTER V. DICKSON.

Mr. Sheil applied for an order for the defendant to file an account in the estate in which he is executor.

The application was granted.

THE MASTER V. ROODE.

Mr. Sheil applied for provisional sentence for the sum of £6, being interest on a mortgage bond from January 1 to June 30.

Provisional sentence was granted.

VAN DER POEL V. COETZER.

Mr. Buchanan applied for provisional sentence on a promissory note for £60 5s. 3d., for value received, and for interest from January 1.

The application was granted.

LINDENBERG AND DE VILLIERS V. MCMILLAN.

Mr. Close applied for provisional sentence on a promissory note for £32 3s.

The application was granted.

BRUMMER AND CO. V. VOGEL.

Mr. Buchanan applied for the final adjudication of this estate as insolvent.

The application was granted.

VAN DER POEL'S EXECUTORS V. MALAN.

Mr. Schreiner, Q.C., applied for provisional sentence on three promissory notes for £100, £500, and £250. Certain instalments had been paid on account, and the sum sued for was £450

Mr. Innes, Q.C., for the defendants.

The defence was that Van der Poel, the father-in-law of defendant, had released him from all his indebtedness prior to his death.

After argument,

The Court ordered the plaintiff to go into the principal case.

The Chief Justice said it was impossible to ascertain upon the documents as they were before the Court if any of the documents or promissory notes were included in the debt, which really was released.

PARKER V. MATCHAM.

Mr. Maskew applied for judgment under rule 329 for the sum of £28 5s. for rent, less £10, paid since the issue of the summons.

The application was granted.

SCHWEIZER V. MYBURGH.

Mr. Gardiner applied for the discharge of the provisional order of sequestration.

Granted.

DELPONTE V. DELPONTE AND DU PREEZ.

Mr. Innes moved for judgment in terms of a consent paper.

The application was granted.

Ex parte PLANT.

Mr. Close applied for the rehabilitation of S. M. Plant. The matter stood over from the 26th August for explanation of statements in the trustees, report. A satisfactory explanation was now given and the application granted.

CAUSE LIST.

GLADSTONE V. GLADSTONE.

This was an action for the restitution of conjugal rights.

Mr. Buchanan appeared for the plaintiff.

William Gladstone, Observatory-road, said he was married to the defendant in February, 1884. There had already been an action brought in this Court by the wife for the restitution of conjugal rights, and at that time the marriage was proved. There had been four children of the marriage, two of whom were alive. He was a carpenter and contractor. He went to Mashonaland, and was in Victoria in 1892, when he saw in the papers that his wife was applying for the restitution of her conjugal rights. He knew nothing about the application until he saw mention of it in the newspapers. He left and came south, and it took him seven weeks to get down. He arrived here in April, and lived with his wife until June. In June she left him, taking the two children with her. She refused to come back and live with him. He had not been so successful as he could wish, and had not so much money as he had when he married her. His wife said she earned as much money as he did, and that she did not want to have anything more to do with him. Before she left there were some bickerings between them, as she had taken £35 out of a drawer without his knowledge. Some years ago he had an income of £500 a year, but that he had lost. Since

he lost the money there had been a great change on the part of his wife. He had spoken to his wife on the street, and she had told him not to speak to her.

Decree was granted, ordering the defendant to give restitution of conjugal rights, the return to be on or before December 31, failing which the defendant to show cause on the 12th January why a decree of divorce should not be granted.

[Plaintiff's Attorney, H. P. du Preez.]

THE PETITION OF ANNATJE BOOY.

Mr. Joubert applied for an order authorising the Cape of Good Hope Savings Bank to pay to petitioner the amount standing to the credit of her husband, who has not been heard of for some years past. The husband, to whom petitioner was married in community, had not been heard of for thirteen years.

[De Villiers, C.J.: Regulation 107, of the Savings Bank authorises such payment without the appointment of an executor.]

The Court gave authority to the Savings Bank to pay the money applied for to the petitioner.

INSOLVENT ESTATE OF DANIEL HENDRIK ANDRIES SWARTZ.

Mr. Close applied for the appointment of a trustee, in the room of Julius Ascher, who has left the Colony.

Their lordships granted a rule calling on the trustee Ascher to show cause, by 12th January, why he should not be removed from the trust, owing to his absence from the Colony.

Postea (January 12th).

On the application of Mr. Jones, the rule was made absolute.

THE MINORS SNYMAN.

Mr. Close applied for the appointment of a *curator ad litem*, and for leave to raise, upon mortgage, a certain sum to defray the expenses of surveying and subdividing certain land.

The Court granted an order in terms of the Master's report, and appointed C. S. Snyman *curator ad litem*.

ESTATE OF THE LATE THOMAS JONES.

Mr. Jones applied for leave to raise a sum of £150, to be expended in improvements and in payment of debts.

The Master had made a report in favour of the application.

The application was granted.

PACE V. PACE.

Comparuit costs.

This was an application for the restitution of conjugal rights.

Mr. McGregor, for the defendant, stated that at twenty minutes past ten, after the Court had opened, intimation was received that plaintiff was not going to proceed with the case. He asked for *comparuit* costs.

The Court granted a rule *nisi* calling on the plaintiff to show cause on Tuesday next why he should not pay all the costs of the action.

Postea (December 7th).

The rule was made absolute.

ESTATE OF JONAS FORTUIN.

Mr. Graham applied for the appointment of a commissioner for the purpose of examining certain persons regarding the trade dealings or estate of the insolvent. He suggested that Mr. Gardiner be appointed the commissioner.

The application was granted.

IN THE MATTER OF JACOBUS PETRUS ROUX.

Mr. Graham applied for the appointment of a curator of the estate of Dr. Jacobus Petrus Roux on the ground that the said Roux was unable to take care of his affairs.

The Court appointed Mr. Schreiner, Q.C., *curator ad litem*, and granted a rule *nisi*, returnable on Tuesday, calling on Dr. Roux and his *curator ad litem* to show cause why a curator should not be ap- pointed.

Postea (December 7th).

Mr. Schreiner said he was of opinion that Dr. Roux was unable to manage his own affairs.

The rule was made absolute and Mr. W. Currey appointed curator.

IN THE MATTER OF PAUL ROUX.

Mr. Graham applied for the appointment of a curator to Paul Roux, a lunatic, in place of Mr. Jacobus Petrus Roux, who was alleged to be of unsound mind.

The application was allowed to stand over until the result of the rule in Jacobus Petrus Roux was known.

Postea (December 7th).

The application was granted.

FOX V. WALKER AND SONS.

Mr. Currey applied for the award of the arbitrators in this case to be made a rule of Court.

The application was granted.

IN THE MATTER OF PAARL FIRE ASSURANCE AND TRUST COMPANY, IN LIQUIDATION.

Mr. Innes, Q.C. (with him Mr. Schreiner, Q.C.), submitted the first and final report of the official liquidators, and asked for the usual order.

The usual order was granted.

IN THE MATTER OF THE PETITION OF SANNA SWARTBOOL.

Mr. Joubert applied for the rule *nisi* in this case, granted under the Derelict Lands Act, to be made absolute.

The application was granted.

COLONIAL GOVERNMENT V. BELLE.

This was an application for leave to sue by edictal citation.

Mr. Sheil (Acting Attorney-General) appeared for the Crown, and stated that on 7th June, 1893, one John Belle purchased from the Colonial Government six plots of land for the sum of £251 under the provisions of Act 15 of 1897. He had failed to pay the necessary sums, and his present whereabouts was unknown. He had lived at East London.

The order was granted, personal service if possible; failing that, one publication to be made in the "East London Dispatch." Returnable 1st February, 1898.

GOGA V. RESIDENT MAGISTRATE OF KOKSTAD. { 1897. Nov. 30th.

Griqualand East — Licence — Trader—General dealer—Proclamations 112 of 1879, 327 of 1890.

Semble: *That the discretion given to the Chief Magistrate under section 56 of Proclamotion* 112 *of* 1879 *has reference only to traders' licences on Crown land occupied by native locations.*

This was an application on notice to the respondent calling on him to show cause why a *mandamus* should not issue ordering him to grant a general dealer's licence to the applicant.

The affidavit of Mr. P. H. Leroux, a partner in the firm of Zietsman & Leroux, attorneys, set out that applicant was an Indian residing in Ladysmith, Natal; that on the 14th June, 1897, he had on behalf of the applicant applied to the respondent for a general dealer's licence in the following terms:

"Sir,—We have the honour to apply to you on behalf of Amod Mamod Goga, an Indian, of Natal, for the granting of a wholesale and retail dealer's licence in his name, allowing him to carry on the said business in the town and district of Kokstad, and enclose you our cheque for £15 to cover the licence fees.—(Signed) Zietsman & Leroux."

That the respondent refused to entertain the application, as will be seen from the following document:

"Sir,—With reference to your letter of even date I have the honour to inform you that the Government will not grant licences to Indians to trade in this district; I therefore return the cheque for £15 you enclosed."

That he thereupon interviewed the Chief Magistrate of East Griqualand, who decided that a formal application should be made to him for the purpose and with the object of taking evidence as to the character and standing of the said Amod Mamod Goga and to hear objections as to the application.

That on the 14th August, formal application was made to the Chief Magistrate, as would be seen from the document annexed (this document was similar to the first application except that the words "and district" were omitted.)

That no inquiry was held by the Chief Magistrate on the said application, but that on the 8th October deponent's firm was informed by the Chief Magistrate that it is undesirable that persons of this class, viz., Indians, should be permitted to carry on a wholesale and retail business in East Griqualand and that the licence would therefore be refused.

That deponent had every reason to believe that the applicant was a man of good standing and character in Natal, as would more fully appear on reference to certificates annexed.

That the only means the applicant had of obtaining a general dealer's licence in East Griqualand was to obtain an order from this Honourable Court ordering the respondent to grant the said licence.

Mr. Innes, Q.C., for the applicant: Under the Annexation Act the Governor has power to legislate by proclamation. Proclamation 112 of 1879, section 53, is similar to Proclamation 110 of 1879, section 53, and is to the effect that no person shall be allowed to trade in Griqualand East unless he shall have obtained a licence from the Chief Magistrate or from a Magistrate in Griqualand East. Such licence may authorise the holder to move from place to place for the purpose of his trade, or to establish some fixed trading station at a place to be approved by the Chief Magistrate. The Chief Magistrate shall be at liberty, if he shall consider it necessary,

to refuse to issue any such licence. Sub-sections 55, 56. We do not ask for a trader's licence: the words "district of Kokstad" are surplusage. We now confine ourselves to an application for an importer's and a general dealer's licence and tender £15. By section 72 the same duties upon stamps and licences are payable as may from time to time will be payable in the Colony. In *Regina* v. *Coulter* (7 Juta, 192) it was admitted by the Crown that a trader's licence is not the same as the licence for which stamps are payable under Act 38 of 1887. What we apply for is a licence under section 72, whether it is properly called a general dealer's licence or not. The Magistrate has no right to draw a line between Indians and any other people; that was not the intention of the Legislature. *Wynberg Municipality* v. *Wilson* (7 Juta, p. 298); *Musgrove* v. *Chun Teeong Toy* (A pp. Ca., 1891, p. 272). There it was held by the Privy Council that the Collector of Customs had a discretion as to receiving the amount tendered in respect of illegal immigrants, but that was because of the intention of the Legislature to exclude Chinese above a certain number.

Mr. Sheil for the respondent: None of the Stamp Acts have been applied to Griqualand East. Proclamation 112 of 1879 only applies to trading licences. In *Regina* v. *Coulter* an importer's licence had been granted and the Court held that the Government was estopped. It was practically admitted there that Act 38 of 1887 was made applicable by section 72 of the Proclamation, but that admission must have been made *per incuriam*. I cannot make the admission that a Proclamation issued in 1879 applied an Act which had not been passed at that date. An absolute discretion is given to the Chief Magistrate under section 56.

Mr. Innes: The position of the Crown in *Regina* v. *Coulter* was untenable; the Acts in force in that case were really Acts 3 of 1864 and 13 of 1870.

[De Villiers, C.J.: Is Proclamation 372 of 1890 still in force? Section 1 says that nothing contained in sections 53-58 and 60-66, of Proclamation 112 of 1879 shall apply to persons who carry ontrade as general dealers or importers upon land which has been alienated from the Crown or which is held under lease from the Crown.]

Mr. Sheil: I believe it is still in force.

Mr. Innes: That proclamation supports my contention; it applies to all traders, whether trading at the time or not.

[Maasdorp, J.: Should you not amend your application?]

I will ask that it may stand over for that purpose.

De Villiers, C.J.: It appears that the Chief Magistrate's discretion only applies to land which is occupied by native locations.

The matter was allowed to stand over until the 12th January, 1898.*

THE MASTER V. CLOETE.

This was an application for contempt of Court, on the ground of the respondent's failure to file a satisfactory account.

Mr. Sheil appeared for the Crown.

An account had been filed, but it was not complete.

The application was ordered to stand over for more information.

PETITION OF SIR DONALD CURRIE, G.C.M.G.

Mr. Jones applied for an order authorising the Registrar of Deeds to transfer certain landed property purchased from one Wilkinson, and situated in the Gardens, Cape Town. This property had been purchased by himself at various times, but transfer had been passed to the Cape Land Company. Portion had been transferred to Lachlan MacLean and W. C. Andrew, as trustees for the Cape Land Company. The Cape Land Company had never been in existence, and Sir Donald Currie was the only person who had any interest and ownership in the land.

The Court granted an order authorising transfer to be passed by Mr. Andrew.

BEILES V. BEILES.

Mr. Buchanan, in this case, applied for a decree of divorce on the ground that the defendant, the husband, had not returned to the plaintiff within the time ordered.

The application was granted.

IN THE MATTER OF THE PETITION OF JOHAN MARTINUS.

Mr. Currey applied for an order for the release of the petitioner from custody, to which he had been sent for contempt of Court. Affidavits were read showing that Martinus was aged was suffering from lumbago, and that confinement in gaol aggravated his illness.

The application was granted.

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*The matter did not come before the Court again as the applicant amended his application by applying for an importer's and general licence in the town of Kokstad, and they were issued to him by the Magistrate.—REP.

ESTATE OF CHARLES STRICKLAND.

Mr. Molteno applied, in the insolvent estate of Charles Strickland, Burghersdorp, on behalf of creditors representing £1,688 14s. 6d. out of an estate of £2,655, for the appointment of a provisional trustee to carry on the business pending the appointment of a permanent trustee.

The application was granted.

ESTATE OF THE LATE JOHAN DANIEL VAN ROOYEN.

Mr. Buchanan applied for an order confirming certain exchanges of land.

The proposed exchange of land was authorised.

MALONY V. CHSIPITZ.

Mr. Close applied for leave to attach certain property at Beaufort West *ad fundandam jurisdictionem* in an action to be instituted to recover the sum of £52 10s. 0d. and to sue by edictal citation.

The application was granted; the citation to be personally served, returnable 1st February, 1898. Leave given to serve intendit and notice of trial with the citation.

REGINA V. ABEL. { 1897. Dec. 1st.

Evidence—Malicious witness.

Where a conviction for contravention of Act 28 of 1883, Section 73, sub-section 7, was based upon the evidence of only one witness, who admitted that he had threatened to be revenged upon the accused, the conviction was ordered to be quashed.

This was an appeal from a sentence passed upon the appellant by the Acting Assistant Resident Magistrate of Malmesbury, sitting at Hopefield, on the 11th November last.

The appellant was charged with contravening Act 28 of 1883, section 73, sub-section 7, in that, upon or about the 15th day of August, 1897, and at or near Hopefield, the said Abel did wrongfully and unlawfully sell one bottle of Cango brandy to one Wybrand Elias Visser, of Hopefield, such date being a Sunday, and a time when he, the said Abel, was not authorised by his licence to sell liquor. The prisoner, being arraigned, pleaded not guilty. The only evidence of the alleged sale was given by one Visser, who swore that on Sunday, 15th August last, he went to accused, and asked him to supply witness with a bottle of Cango brandy Abel said he had not his keys, but that witness could go to his clerk, Mattley, and he would supply him. That he did not go to Mattley, but sent one Andries Louw, a lad aged sixteen, to Mattley for the brandy. Louw went, and after a few minutes returned with the brandy. He stated in further examination that he paid 2s. 6d. for the brandy to Mattley on the following day (Monday).

In cross-examination this same witness made the following statements: I lost a case in which accused was plaintiff, and I, as a member of the firm of Visser Bros., was defendant at Malmesbury a short time ago, and, after judgment, I told accused in the presence of witnesses that I would be revenged. I lodged the complaint in this case after judgment in the civil action.

The case for the defence was that there had been no sale by Abel to Visser, but that the brandy which was delivered to Louw was a bottle of brandy which belonged to the accused's clerk, Mattley, and which the latter lent to Visser. Mattley stated that on the following day Visser bought a bottle of brandy at accused's bottle-store and gave it to him, Mattley, in discharge of the loan made on the previous day.

The accused was found guilty and sentenced to pay a fine of £5, or, in default of payment, to five days' imprisonment.

From this conviction the present appeal was brought.

Mr. Schreiner, Q.C., was heard in support of the appeal. There is nothing to show that the brandy supplied was that of the appellant. Where a witness makes statements without which the case would fail entirely and that witness is admittedly revengeful they should not be considered. In *Regina* v. *Bisset* (not reported—about 1887 or 1888) a witness named Aggett had said that he would be revenged, and the Court held that as the prosecution rested entirely on his evidence the conviction should be quashed. There is no evidence of the sale besides Visser's.

Mr. Sheil for the Crown: The question of credibility is one for the Magistrate. Visser was not cross-examined as to the lending of the brandy.

The Court allowed the appeal.

The Chief Justice said: The Court is always loth to interfere with the decisions of a magistrate on pure cases of credibility, but cases do arise in which the Court is compelled, for the protection of persons accused, to reverse decisions. In the case before the Court it would have been wholly impossible to convict the accused without the evidence of Visser, and that evidence was entirely contradicted by the witness Mattley, who stated that the brandy in

question was not bought, but lent. Visser admitted that in a civil suit brought by Abel he (Visser) was the defendant, and that judgment went against him, and that he said he would be revenged. Visser having lost the case, raked up an old affair, not in the interests of justice, but for the purpose of revenge. In my opinion it would be a most dangerous thing to accept such evidence, and I think the Magistrate should not have accepted evidence so tainted. Further, I think the Magistrate should not have believed the man Visser. The conviction must therefore be quashed.

[Appellant's Attorney, D. Tennant.]

THOMPSON v. BROWN. { 1897. Dec. 1st.

Defamation—"Outsider."

The word "outsider" applied to a person in the bar of a canteen held *not defamatory.*

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town.

Mr. Graham appeared for the appellant and Mr. Buchanan for the respondent.

The appellant had been sued by the respondent for defamation of character, in having in his canteen, the Victoria Hotel, called Brown a thief and an "outsider." An action for £20 damages was raised, and the Magistrate awarded Brown £5 as damages. Against this decision the appeal had been raised.

The Chief Justice: Does "outsider" mean "uitlander"?

Mr. Graham: I'm afraid not, my lord. If it did there might be a large number of such cases before your lordship.

Mr. Buchanan: "Outsider" is a relative term, gathering its meaning from surrounding circumstances. *Rudd* v. *De Vos* (9 J., p. 441); *Hare* v. *White* (1 R., p. 246); *Bennet* v. *Morris* (10 J., p. 233).

Mr. Graham was not called upon.

The appeal was allowed with costs.

The Chief Justice said: The Magistrate appears to have found that the word "thief" was not used, and to have relied on the fact that the appellant was called an "outsider." The word "outsider" does not seem to me to be capable of any defamatory meaning under the circumstances. The man was called an "outsider" by the keeper of the canteen, and the only meaning that could be drawn from the word was that in the opinion of the canteen-keeper the man should not have been amongst those frequenting the bar. I think the word was, in those circumstances, rather a word of commendation than otherwise. The real test is whether the word injured the appellant amongst the topers frequenting that bar; in my opinion it could not have done so. The Magistrate should have dismissed the case, and therefore the appeal will be allowed with costs.

[Appellant's Attorney, D. Tennant; Respondent's Attorney, A. P. Kenealy.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

WHITEHEAD v. SHEARER'S EXECUTRIX. { 1897. Dec. 2nd.

Transfer—Diagram—Boundary pointed out at sale.

The plaintiff's predecessor in title and the defendant purchased adjoining lots of ground at a public sale in 1879, and a certain line was then pointed out to the defendant by the auctioneer and the surveyor, as the boundary between the two lots. The transfer deeds passed were not, however, in accordance with the boundary as pointed out. The property was occupied for eighteen years subsequently in accordance with the boundary pointed out.

Held, *that in the absence of any proof that plaintiff knew before he purchased, that the wrong boundary had been shown at the sale, he could not be deprived of the land as described in his deed of transfer.*

This was an action for a declaration of rights as to the boundaries between the properties at Newlands of the plaintiff and the estate of the late William Shearer.

The plaintiff alleged in his declaration that he was the owner of portions of lots 7 and 8 of the Palmboom estate, and that the true boundary of his property on the north-west side,

where it adjoined that of Shearer's, was a certain line marked E F on the plan annexed to the declaration, but that the defendant contended that the true boundary was a line marked L M. This line was about five yards to the south-east of the line E F.

The defendant in her plea admitted that this was the contention, but she said that in January, 1879, William Shearer had purchased the property on the north-west side of plaintiff's property by public auction, and that on the day of sale two wooden pins were pointed out to him by the auctioneer and surveyor as defining the extremities of his south-east boundary, and that these pins occupied the extremities of the line L M. That these pins were replaced by iron pins, and subsequently a hedge or fence was placed by Shearer along the said line. She said that transfer was passed to Shearer on the 6th May, 1879, and that until April, 1897, he had occupied the land up to L M continuously, peaceably, and as of right. That at the same sale William Carroll purchased the land now occupied by the plaintiff, and that the same pins were pointed out to him as his boundary.

She claimed in reconvention that L M might be declared to be her boundary, and she further claimed £30 damages against the plaintiff, in that in April, 1897, he trespassed upon her property, and removed and destroyed her hedge. The replication was general, and the plea in reconvention admitted the removal of the hedge, but denied that such removal was unlawful.

Mr. Graham (with him Mr. Buchanan) appeared for the plaintiff.

Mr. Searle, Q.C., (with him Mr. Jones), for the defendant.

Robert Whitehead, the plaintiff, said he had been living in the neighbourhood of Newlands for upwards of thirty years. He was owner of lot No. 8 and portion of lot No. 7 of the Palmboom estate. When he purchased the property Shearer was the owner of the adjoining property. At that time there was a cat-tail hedge between his lot and Shearer's. Shearer owned portion of No. 7, but it was occupied by a tenant. In March, 1897, he employed Mr. William de Smidt to survey the ground, and he pointed out the boundaries. Witness placed his peg on Shearer's side of the fence as he wanted to settle the question of boundary amicably. He asked Shearer to come out, but he never went out, and witness asked Mr. De Smidt to mark off his exact boundary. After that was done witness removed the cat-tail hedge and put up a fence on the other side. He gave notice to Shearer before doing that. There was a cow-shed, made of old corrugated iron, which projected over witness's property, and this he had removed. After removing the shed, notice was given him that legal proceedings had been instituted against him. Witness afterwards removed the fence in accordance with the order of Court. The properties were originally subdivided by lines of oak trees and the trees on the opposite side of the road. They appeared to be of the same age as those along the water edge on the road reserved by the seller.

Cross-examined by Mr. Searle: Since witness lived there the oak fence on the south-east side had been there. The trees on the water side of the road were about 4 feet in circumference. Witness went there about thirty years ago, and at that time the fence was there. When he bought the property in question five years ago the cat-tail fence was about five feet high. Witness's boundary line went to within four feet of Shearer's stable, and witness had put up a wire fence there. Wallace's fowls went through the fence on to witness's property. The fowls came from all directions.

There was an old iron peg which witness saw when he removed the hedge. There was no evidence that there ever was a defined boundary between lots 7 and 8, or that a fence was ever in existence there. Witness had let the property to different tenants. If he got the land he claimed it would block up the defendant's access to his stables in one direction, but he could certainly reach them by going over the property of other parties, that was, if they would let him.

Charles Marais, Government land surveyor, said that he surveyed the property in July last; he found the original subdivision of the property in 1836, at the Surveyor-General's office. Plaintiff pointed out peg M. to him, also peg at F. He found lines of oak trees agreeing with the sub-divisional boundaries of the property. The transfers convinced him that the lines of trees were the original boundary lines. He tried to find the original line between lots 7 and 8. He measured from the line of trees on the lower side, allowing 25 feet for the road. This brought him to B on the diagram, which was directly opposite to row of trees, Q Q. Measuring from B to L gave four feet too much to lot 7. Continuing the line to C he found two trees on the line, and one slightly off. B C was in a line with Q Q The angles agree with those on the old diagram.

Cross-examined: There is no statement made on the diagram, that the width of the road is 25 feet.

William de Smidt, Government land surveyor, said he surveyed the property in March

last. He pointed out the boundary of plaintiff's property, and a peg was put in well within the boundaries.

He fixed on B C as the boundary of lots 7 and 8. He saw no trees along B C

Wm. James Shearer, son of the late W. Shearer, said his father died in 1882. He remembered the sale of Dockrell's estate, which took place in 1879. Witness was present with his father. There were wooden pegs where there were now iron ones, and these were pointed out by the auctioneer. There was a hedge then in existence of cat-tail and quince. His father and himself put in the iron pegs, and they still remained. There was an old house on the property which his father bought, and an addition was made to it by him. Part of the addition still remained. The property was ultimately let to one Wallace. Wallace telegraphed to witness that Whitehead was pulling out the fence. He had seen Whitehead on the subject, and Whitehead said he would allow the fence to remain if he got £50. He also said that if witness removed the hedge that he would put up a fence.

Cross-examined by Mr. Graham: Witness had to use Nezer's road, on the adjoining property, to get to his stable. That road was private property. Mr. Whitehead had closed up their road, and since that time Mr. Nezer's road had been used.

Joubert H. Watermeyer, Government land surveyor, stated that he made survey of the property in question, and made a plan. He found that the distances corresponded with those on the diagrams. He inspected the property in April last. There was an iron peg at M. and a large iron at L. They were old pins, on the line of the old fence which had recently been dug out. Starting from A. the boundary would be at F. The road was 20 feet wide. There was no beacon at B. The trees on the south-east side were over 20 feet old. There was nothing on the diagram of lot 8 to show any oak hedge along the road. It not infrequently happened that a diagram did not fit in with the boundaries.

Samuel Wallace, tenant of Mrs Shearer, said he had lived on the property for ten or eleven years. The fence taken out by Mr. Whitehead had been there for as long as witness could remember. The boundary between Whitehead and Nezer's property had always been the same as it was at present.

Frederick William Rix, Henry Wentzel, and Peter von Holdt also gave evidence as to the oak fence and trees on the south-east side.

Mr. Marais (recalled) in answer to the Chief Justice, said that Nezer had nine feet more than he ought to have. Were the five feet taken from him by shifting defendant's boundary he would still have five feet more than he ought.

Mr. Graham: Plaintiff produces the strongest surveyor's evidence. If B C is fixed as we say it ought to be, the plaintiff must win his case. Even if no pegs were pointed out, nevertheless plaintiff bought according to his diagram. It is clear that the south-east road must be 25 feet broad.

Mr. Searle: The fact that Nezer has too much land is no reason for the plaintiff getting too much, and he now has his full extent of frontage. There is no evidence that th re ever was a line of trees along B C. B C may be only an imaginary line of the surveyors. All the predecessors of the plaintiff occupied up to the hedge on the south-east side. Both Carroll and Shearer bought according to beacons pointed out, but Carroll had the old transfer deed passed over to him. Houses have been built on the land and access reserved, and it is entirely against equity that the occupation should now be disturbed by a person who has all along stood by. The principle laid down in the Land Beacons Act 7 of 1865 should be followed, as was done in *Jansen* v. *Conradie* (Sheil, 1, p. 226).

Mr. Graham: *Hirsch* v. *Gill* (10 Juta, p. 159).

De Villiers, C.J.: The decision of this case must depend upon what is found to be the true and original boundary of lot 8. The plaintiff has transfer of the lot, and in his deed of transfer and accompanying diagram the boundaries are clearly defined. As to lot 7 a portion belongs to the plaintiff, another portion to the defendant, and the remaining extent to Nezer. In 1879 both lots belonged to Dockrell who sold the land at a public sale. Carroll bought lot 8, and the portion of lot 7 which adjoins lot 8, and the defendant's father bought the next adjoining portion now belonging to the defendant. At the sale a hedge was pointed out as the boundary between the plaintiff's and defendant's land, but when transfer came to be given to the purchasers that boundary was departed from. The plaintiff was not present at the sale, but afterwards bought the land from Carroll. The subsequent occupation has been in accordance with the boundary as pointed out at the sale, but unfortunately for the defendant thirty years have not elapsed so as to give him a right by prescription. In the absence of any proof that the plaintiff knew before he purchased the land that the wrong boundary had been shown at the sale, he cannot be deprived of the land as described in his deed of transfer. That land clearly extends

to the north-western boundary claimed by him. The judgment of the Court must be for the plaintiff with costs.

[Plaintiff's Attorneys, Messrs. Walker & Jacobsohn; Defendant's Attorney, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

RONDEBOSCH MUNICIPAL COUNCIL V. CAPE DISTRICTS WATERWORKS COMPANY. { 1897. Dec. 3rd.

Contract — Construction — Stipulation —Municipal area.

By a contract entered into between the Rondebosch Municipal Council and the District Waterworks Company, the latter undertook to lay down pipes for the efficient supply of water in all thoroughfares and streets at its own cost, upon receiving a guarantee from the owners of property within the Municipality for whose sake such pipes might be laid down that they would take sufficient water to yield a certain return of interest.

Held, *in the absence of any provision in the contract to meet the case of an extension of the area of the Municipality, that only the owners of property which was within the Municipality at the time of the contract could take the benefit of the stipulation made on their behalf by the Council.*

This was an action for specific performance of a contract or damages.

The plaintiff's declaration was as follows:

1 The plaintiff is the Rondebosch Municipality, a body duly incorporated under the provisions of Act 45 of 1882; the defendant company is a joint-stock company, carrying on business in this colony, and duly registered with limited liability according to law.

2. On the 6th March, 1890, an agreement was entered into between the plaintiff Council and the defendant company, in terms of which the plaintiff Council granted to the defendant company for a term of twenty years, reckoned from the 1st January, 1889, the right to lay pipes and construct works for the supply of water within the Municipality of Rondebosch, and specially the right to lay down and fix pipes, hydrants, and other appliances for such supply in or across any of the public streets or Municipal lands within the Municipality of Rondebosch.

3. In terms of the said agreement, and in consideration of the privileges granted to it by the plaintiff Council, the defendant company undertook to supply such quantity of pure water, not exceeding 300,000 gallons per diem, as the said Council and the inhabitants of the Municipality entitled thereto might require, at a certain price per hundred gallons, to be paid by each person or body to whom water was supplied.

4. The defendant company further undertook as aforesaid to erect, at the cost of the company, hydrants for the purpose of extinguishing fires at such spots within the Municipality as the Council should from time to time indicate, provided that such spots were within sixty feet of any main of the company, and to supply water for Municipal purposes at such hydrants.

5. It was specially provided by the said agreement that the defendant company should be bound to lay down main or other pipes (exclusive of private water-leadings) necessary for the efficient supply of water in all thoroughfares and streets at its own costs and charges upon receiving a guarantee from the owners of property within the Municipality, for whose sake such main or other pipes might be laid down, that they would take a supply of water for a term of three years sufficient to yield a return equal to 10 per cent. per annum on the amount expended on the main or other pipes specially laid down for the supply of water to such proprietors. It is not necessary for the purposes of this action to set forth the further terms of the agreement.

6. It is greatly to the convenience and advantage of the plaintiff Council that the provisions of the said agreement which are set forth in the preceding paragraph hereof, should be observed, and that mains should be laid down and water supplied by the defendant company in as many streets and thoroughfares within the Municipality as possible.

7. A certain street or thoroughfare called Sandown-road duly exists within the Municipality, and no main or other pipe has been laid down along the said thoroughfare east of the Black River.

8. The owners of property bordering on the said thoroughfare, and for whose sake a main or other pipe along the said road for the supply of water would exist if laid down, have requested the defendant company to lay down such a pipe, and have duly guaranteed to the defendant company that they will take a supply of water for a term of three years sufficient to yield a return of 15 per cent. per annum on the amount which the company would have to expend in laying down such main or other pipe along the said thoroughfare.

9. Notwithstanding the premises, the defendant company declined and refused to lay any main or other pipe along the said road. Thereupon the said owners of property called upon the plaintiff Council to enforce the terms of the aforesaid agreement as against the defendant company. The plaintiff Council thereafter conveyed to the defendant company the fact that a guarantee aforesaid had been duly given, and called upon the said company to lay down a main or pipe along the said thoroughfare as aforesaid; but the defendant company refuses so to do, and does not admit the right of the plaintiff Council to demand that such main or pipe shall be laid down.

The plaintiff Council claims: (*a*) An order compelling the defendant company to lay down down a main or other pipe along the said Sandown-road east of the Black River, for the supply of water to the owners of property along the said road entitled thereto, and to supply water in terms of the said contract to such owners; or (*b*) payment of the sum of £10,000 as damages; (*c*) alternate relief; (*d*) costs of suit.

The following was the defendant's plea:

1. The defendant admits paragraph 1 of the declaration.

2. With regard to paragraphs 2, 3, 4, and 5 of the declaration, the defendant annexes hereto a true copy of the agreement of date the 6th day of March, 1890, referred to in the said paragraphs, and craves that it may be read as though here set forth, and the defendant says that it is bound by the said agreement, but does not admit the said paragraphs save in so far as they are in accordance with the terms of the said agreement.

3. With regard to paragraph 6, the defendant submits that the allegations therein contained are irrelevant and inconsequential in this action, and the defendant does not admit that it is under any duty to lay main or other pipes at the request of the plaintiff other than such duty as is imposed by a true construction of the terms of the above agreement.

4. On the 6th day of March, 1890, there did exist, and there still exists, within the limits of the Municipality of Rondebosch, as the said Municipality at that date lawfully extended, a certain road or thoroughfare called Sandown-road, and along the said road the defendant laid and has maintained a main pipe for the supply of water.

5. The road beyond or lying east of the Black River, and joining or continuing the aforesaid road, and also called the Sandown-road, did on the 6th day of March, 1890, lie outside of the limits of the said Municipality, and was not included therein until or about the 17th day of April, 1896, and was not one of the thoroughfares or streets contemplated by the terms of the said agreement.

6. The said road lying east of the Black River is moreover in fact not duly formed or constructed or lawfully taken over by the plaintiff as a public street or thoroughfare.

7. The Council and the inhabitants entitled to water under the said agreement did not, under clause 2 of the said agreement and within the period of eighteen months therein stipulated, require the defendant company to supply any water by any main, or extended main, or otherwise, for the use of any person or persons residing along the said road lying east of the Black River, nor was the plaintiff entitled to any further period of time after the expiration of the said period of eighteen months for the purpose of making any such requisition on the defendant.

8. Certain inhabitants owning land along the said road lying east of the Black River, and since the 17th day of April, 1896, included within the said Municipality, were for some time in negotiations with the defendant with a view to obtaining an extension of the defendant's main pipe along the said road, but no agreement was completed nor any guarantee accepted whereby the defendant was or is bound to the said inhabitants so to extend the said main pipe.

9. The defendant admits that it has refused, and submits that it is justified by reason of the premises in refusing to comply with the plaintiff's claim, that it is bound by the agreement of the 6th March, 1890, to extend its main pipe along the said road lying east of the Black River, whether it is or is not willing to do so.

10. Save as aforesaid the defendant denies the allegations in paragraphs 7, 8, and 9.

11. The defendant specially denies that the plaintiff is entitled under the said agreement of the 6th March, 1890, to obtain from this Honourable Court such an order as is prayed for, or, in the alternative, the payment of damages laid at

£10,000, and craves leave to refer to clause 10 of the said agreement, by which the plaintiff's remedy, if any, is provided.

Wherefore the defendant prays that the plaintiff's claim may be dismissed, with costs

Clause 2 referred to was as follows: "The said company undertakes and agrees to supply such quantity of pure and wholesome water not exceeding 300,000 gallons per diem, as the said Council and inhabitants entitled thereto may require within eighteen months from the date of the signing of this agreement."

The replication admitted that on the 6th March, 1890, the Sandown-road did lie outside the limits of the Municipality of Rondebosch, but said that in April, 1896, the boundaries of the Rondebosch and Claremont Municipalities were readjusted, and the said road, which prior to that date fell within the limits of the Municipality of Claremont was thereafter included in the Municipality of Rondebosch, and denied that the defendants had suffered any prejudice by the abovementioned fact, inasmuch as there existed in April, 1896, and still existed between the Claremont Municipality and the defendant company an agreement similar to that annexed to the plea.

The rejoinder admitted the agreement with the Claremont Municipality, but said it was irrelevant to the matter in dispute.

Mr. Graham (with him Mr. Buchanan) appeared for the plaintiffs.

Mr. Schreiner, Q.C. (with him Mr. Close), for the defendants.

On the suggestion of the Chief Justice it was agreed, at the outset, before calling any evidence, to argue the question as to the construction of clause 2 of the contract, namely, whether the Council were bound to supply water to any person, if not required to do so within eighteen months from the signing of the agreement.

The following clauses of the contract were referred to in argument:

"2. The said company undertakes and agrees to supply such quantity of pure and wholesome water, not exceeding three hundred thousand gallons (300,000) per diem, as the said Council and inhabitants entitled thereto may require within eighteen (18) months from the date of the signing of this agreement.

"5. The said company shall place twelve (12) hydrants at its own cost and charges, and as many more as may hereafter from time to time be required by the Council, who shall pay for the same at cost price, for the purpose of extinguishing fire at such spots within the said Municipality as the said Council shall indicate: Provided such spots are within sixty (60) feet of any main of the said company, and shall and will supply such quantity of water as the said Council may from time to time require to be supplied for the purpose of extinguishing fires or for other purposes of the said Municipality, such as watering, road flushing, &c., at the rate of two pounds for every forty thousand gallons (40,000) supplied. It being distinctly understood that this agreement by no means conveys to the said company any right the said Council may have to any springs or other sources of supply within the said Municipality.

"6. The said company shall be bound to lay down and keep in thorough repair at its own costs and charges all mains in the main road within the said Municipality, and it shall also be bound and obliged to lay down main and other pipes, exclusive of private water leadings, necessary for the efficient supply of water in all thoroughfares and streets at its own cost and charges, upon receiving a guarantee from the owners of property within the said Municipality for the sake of whom such main or other pipes are laid down that they will take a supply of water for a term of three (3) years sufficient to yield a return equal to fifteen (15) per cent. per annum on the amount expended on the main or other pipes specially laid down for the supply of water to such proprietors, and further the said company shall be obliged to lay down and supply all such minor pipes and fittings as may be required for water leadings from the mains to the properties of the owners aforesaid, and to any part of such properties if required to do so, at schedule prices for the time being charged by the company's contractor or contractors."

Mr. Graham: The contract is to last forty years. The construction is in favour of the Municipality. The company has to supply water within eighteen months. 300,000 gallons is the limit for all time. It could never have been contemplated that within eighteen months the Council is to determine what water they want for the next forty years. Clause 6 of the contract contemplates the supply of water to the inhabitants after the eighteen months.

Mr. Schreiner: The words are clear and unambiguous, and therefore the plain grammatical interpretation must be placed upon them. The company has no monopoly and it must know for financial reasons what amount it is bound to provide. Clause 5 is a significant clause in connection with clause 2. There is a parallel clause to this in the contract with the Claremont Municipality which was held to apply to Municipal purposes as distinct from private supply. *Claremont Municipality* v. *Cape District Waterworks Co.* (5 Sheil, p. 478).

[Maasdorp, J.: When do you say that the supply is to commence?]

Within a reasonable time. Clause 6 must be read with clause 2 and is governed by it. *Leake on Contracts* (p. 195); *McConnel* v. *Murphy* (L.R., 5 P.C., p. 218); *Storey on Contracts*; *Pothier* (Vol. II., p 32). The contract must be construed against the person burthened. *Leake* (p. 232); *Van der Linden* (p. 106).

[De Villiers, C.J.: Would it not be more logical to attach the time limit to the supply than to what is required? "Require" is a wider word than to "demand."]

Section 5 shows that "require' really means demand.

Mr. Graham in reply.

[De Villiers, C.J.: At the present stage it is not necessary to give a final decision upon the point; but, at all events, there is a *prima facie* reason in the opinion of the Court for accepting the view of the plaintiffs as to the construction of the particular clause, but the defendants' counsel will not be foreclosed from arguing the point again. But in my opinion the case should proceed.]

John Andrews, Mayor of Rondebosch, said he had been a member of that Municipality for well on four years. Certain ratepayers had requested the laying down of a main in Sandown-road Mr. Syfret, representing a number of ratepayers, had written making the request. The Council had written to the company to lay the main. The company had not denied their liability to lay down the mains in question until before the action was to be raised. During the last four years there had been new roads opened up and new buildings erected within the Municipality. There were four new houses erected in the Sandown-road.

Cross-examined by Mr. Schreiner: He considered that it would not be enough for the Municipality to supply the wants of Mr. Syfret's syndicate. He thought the Council should require that others applying for water, and giving the required guarantee, should be supplied. Other persons besides Mr. Syfret had applied for water there. The Council, in the first case, would see that Mr. Syfret's syndicate would be supplied first, and the others would follow, *i.e.*, those not included in the Syfret Syndicate. In April, 1896, the Municipality took over from Claremont a portion of ground. Sandown-street was in the area then added to the Rondebosch Municipality. The Syfret Syndicate's property was within the area taken over from Claremont.

Mr. Schreiner: And do you know the extent of development going on within that area?

Witness: I have no official information.

Mr. Schreiner: If you have no official information, have you as Mr. Andrews any?

Witness: I know there have been several lots sold and changed hands.

Mr. Schreiner: Do you know that roads have been made within that area?

Witness: I know of one road.

Mr. Schreiner: Would you be surprised to hear that there is a probability of from 1,700 to 1,800 houses being erected there?

Witness: I am afraid it will be some time before they are all erected.

Mr. Schreiner: Then you are suing the Water Company to force them to comply with Mr. Syfret's request?

Witness: No, there is a principle involved, and we are the guardians of the public.

Mr. Schreiner: You are the Mayor, and I wish to ask you what supply you wish them to make?

Witness: We can only ask them to go up to the 300,000 gallons per day.

Mr. Schreiner: But what supply do you want them to give? What is the basis of the action?

Witness: I cannot answer that. I don't know.

Mr. Schreiner: But you are the Mayor, and surely you can say what you have brought the company into court to do?

Witness: We require them to fulfil their undertaking, and to comply with any requests that may be sent to them, and which are in accordance with the contract

Mr. Schreiner: But all that is very general.

Witness said it had been decided that the 300,000 gallons should be divided—100,000 to Mowbray, and 200,000 to Rondebosch.

Mr. Schreiner: Is it a fact that this action is brought to protect the rights of that particular syndicate?

Witness: No. It is to protect the public generally.

Mr. Schreiner: Is that syndicate standing at your back as regards the costs?

Witness: No.

Witness, with respect to the Black River-road, said it had been put in order by the Government, and it was to be taken over by the Municipality. There was no specific resolution that he knew of agreeing to the taking of it over. The road was within the Municipality. It was not a main nor a divisional road. It was about 60 feet wide, and could be described as a public road between different properties.

Mr. Schreiner: And your contention is that so far as the Municipality extends the Water Company must follow with its mains?

Witness: So long as the 300,000 gallons per day are not exceeded.

Re-examined by Mr. Graham: The Municipality did not recognise the syndicate in any shape or form except as ratepayers, and none of the Municipality was connected with the syndicate.

Arthur George Syfret said he owned a bit of ground at Sandown-road in Rondebosch. He had seen a guarantee prepared by Mr. Oakley in conjunction with Mr. Heath. He and they had signed the agreement.

Edward R. Syfret stated that he and three others owned property at Sandown-road. The road there was an old Government road. He entered into negotiations with the Water Company for having a main laid down. The secretary told him that the terms were that the guarantors should pay 15 per cent. of the cost of laying the mains, but later the secretary asked for a payment towards the capital sum. The matter did not go through then, and it was allowed to fall into abeyance. Eventually the secretary said that the cost would be £400, and he asked for £150. Further, witness said he was prepared to give a guarantee for the full 15 per cent.

Cross-examined by Mr. Schreiner: He and others bought ground on one side of the road, but that they had sold, and they now owned ground on the other side of the road. There was a fairly rapid development going on on the area referred to, that recently taken over by the Municipality. Witness at first had dealings entirely with the company. Up to the time he went to the Municipal Council he was willing to give 15 per cent. on the cost incurred, and he had told the secretary so. This they refused to accept. This was the first time the Municipality's aid had been invoked against the Water Company.

Andries Ohlsson said he was chairman of the Waterworks Company. The company had a capital of £180,000. The Rondebosch Municipality had never attempted to force the company to lay a main where it did not consider it advisable, and they had come into court to have their rights established. He estimated laying mains to supply the area in question would cost £2,500. A guarantee of 15 per cent., or £400, would not meet the case. The company had in every case done its best to meet the wishes of the inhabitants.

Cross-examined by Mr. Graham: There was some talk about expropriation, but that had nothing to do with the refusal of the company to lay the mains. A great deal of water had been supplied on application since the expiration of the first eighteen months, and he was prepared to supply more.

Edward Henry Heath, secretary for the Waterworks Company, stated that he was secretary when the contract was made in 1890. Twelve months' work, laying mains and erecting pumping stations, had been done when the contract with Rondebosch was signed. The company had a contract with Woodstock. After the contract had been entered they laid submains in Rondebosch. In September this year for Rondebosch the daily supply was 137,800, and Mowbray 109,500, or 247,300 gallons per day, and since that time the quantity had increased. His company had agreed to lay a main for Mr. Syfret's syndicate if a cash payment was made of £150. The cost of laying the pipes would have been £2,500, and the 15 per cent. was based on an outlay of £400.

Cross-examined by Mr. Graham: The company regarded Syfret's property as outside the original boundary of the Municipality, and was a subject for a special contract. Special contracts had been made with other municipalities.

Mr. Graham: Evidence shows that a guarantee was offered but refused by the defendant. The contract was for forty years, and the parties must have contemplated the expansion of the municipality during that time. The land in question was covered by the contract between the Claremont Municipality and the defendants.

[De Villiers, C.J.: Even taking the land as being in the Rondebosch Municipality, is that a contract which the plaintiff can sue upon? *Tradesman's Benefit Society* v. *Du Preez* (5 Juta, p. 269) is an authority to the effect that a third person for whose benefit a contract was made can sue.]

The contracting party can also. If the Court holds that the inhabitants themselves should sue I apply to have them joined as co-plaintiffs, so that the matter may be decided once for all.

Mr. Schreiner was not called upon.

De Villiers, C.J.: It is not necessary to hear Mr. Schreiner. There is no provision in the contract to meet the case of an extension of the area of the Muncipality. It is clear from the preamble that what was contemplated at the date of the contract was the supply of water within a limited area. Knowing what the limits of the Municipality were the company could make its arrangements for the supply of water within a certain area. Those limits could be extended by arrangement between the Government and the Council without the company having any voice in the arrangement. In fact the area has been so enlarged, and the present action is brought by the Council on behalf of

persons owning land which was not within the original area. They cannot in my opinion, take the benefit of the stipulation. It is said that a similar stipulation was made on behalf of those owners by the Municipal Council of Claremont within whose jurisdiction the land formerly was, but the plaintiffs cannot take the benefit of that stipulation. It might have been different if the owners of the land had been the plaintiffs, but as the case stands there must be absolution from the instance with costs.

[Plaintiffs' Attorneys, Messrs. J. & H. Reid & Nephew; Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

ESTATE OF THOMAS DODD.

Mr. Close, applied for the appointment of a provisional trustee in the insolvent estate of Thomas Dodd, butcher and hotelkeeper. Queen's Town. The liabilities were £2 900, and Mr. Close appeared for creditors to the extent of £2,700.

The application was granted.

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), Hon. Mr. Justice BUCHANAN, and Hon. Mr. Justice MAASDORP.]

MURRAY AND OTHERS V. RESIDENT MAGISTRATE OF CAPE TOWN AND OTHERS. } 1897. Dec. 6th.

Registering officer—Magistrate—Voters' list—Election Law Amendment Acts.

A person whose name is omitted from the provisional list posted in terms of the 18th and 19th sections of Act 14 of 1874, and who has not lodged a written claim with the registering officer in terms of the 20th and 22nd sections of the Act has no locus standi *to have his claim to be registered as a voter adjudicated upon by the Magistrate under the 24th section, although he may have originally sent in his claim in terms of the 5th and 6th sections of the Act.*

It is the duty of the registering officer to include such original claims among the "original writings" delivered by him to the Magistrate in terms of the 24th section of the Act.

This was an application on notice calling upon the second-named respondents, the late and the present Registering Officers, to show cause why they should not be ordered to deliver to the first named the original schedules lodged with them by the applicants, and the further claim lodged by the applicant Murray; and upon the first-named respondent why he should not be ordered to adjudicate upon the applicants' claims, and those of such other persons as may appear in support of their claims contained in the original schedules, but rejected by the Registering Officers: or, alternately, calling upon all the respondents to show cause why the applicants' names should not be placed upon the list of voters for the Electoral Division of Cape Town. The affidavits of the applicants set forth their that they had filled in printed schedules in May last, and handed them to the Municipal collectors, but that their names did not appear in the provisional list posted by the Registering Officer. The applicant Murray further stated that he claimed in person before the present Registering Officer, when he was sitting to receive verbal claims, but that the latter had refused to place his name on the register on the ground that he had not a proper qualification; that he had subsequently filled in a further claim, prior to the posting of the provisional list. Neither of the applicants alleged that any claim in writing had been made by either of them since the posting of the provisional list, but they said that they had attended at the Court held by the Resident Magistrate on the 24th November, and applied to have their names placed on the register, but the latter had refused so to do on the ground that he had no written claim before him, and did not sit on appeal from the decision of the Registering Officer on the schedules.

A supporting affidavit was filed by Mr. Sinclair, the secretary of the South African Political Association, and the proceedings in the Magistrate's Court were put in, from which it appeared that the second paper filled in by Murray had been tendered to the Registering Officer, but that officer had refused to entertain it, but that it had been left with him.

The Registering Officer, Mr. Advocate Jones, filed an affidavit stating that upon his appointment he had received all the schedules from his predecessor, and had since then had the sole

charge and custody of them. That he had always been ready and willing to deliver all claims to the Magistrate if required by him, or by an order of Court; but that he had not been required by the Magistrate, nor had he considered it his duty in terms of Act 14 of 1874 to deliver to him any other claims than the writings lodged with him under sections 19 and 20 of Act 14 of 1874, after the posting of the provisional list. He said that if the applicants' schedules had been delivered to him they did not comply with the requirements of Act 14 of 1874, as amended by Act 9 of 1892 and that he had consequently, as directed, taken no notice of them. Murray had appeared at his sitting, and his claim had been refused for the reason that he had informed him that he paid no separate rental for any house or room, but paid a certain fixed sum for his board and lodging. He believed that the second claim had been handed back to one of the employés of the South African Political Association. Copies of the provisional list had been posted, and a notice giving three weeks within which claims in writing might be lodged with him, but none had been since sent in by the applicants.

The Resident Magistrate gave as reasons for his judgment the fact that he had no written claim before him upon which to adjudicate, and that he could not take any notice of claims made before the posting of the provisional list.

Mr. Ward (for the applicants): The system of registration in Cape Town differs from that of the country, that is to say, the procedure differs, but the qualifications do not. In the country the names are carried forward from list to list, but in Cape Town no names can be placed upon the list of voters except those who have made application to the registering officer. There are three distinct periods at which these applications may be made. Under Act 14 of 1874, which governs the registration in Cape Town, the first proceeding is the leaving of schedules at every house in Cape Town by a collector employed by the Municipal Corporation. The collector goes round, and at every house leaves one or more schedules, and the residents in the house entitled to vote fill up the schedules, making application to be placed on the list of voters. These schedules are afterwards handed back to the collector. Afterwards a registering officer is appointed by His Excellency the Governor, who calls upon the Municipal authorities to hand over the schedules. When this official obtains possession of the schedules he makes out a temporary or provisional list from those claims. When that has been done he issues a notice calling upon all persons who have not filled up or made the applications, to appear before him and make a verbal claim. If the officer is not satisfied he can refuse to put the names on the list. But that only applies to those who have not already signed a claim. After he has taken down the names as the result of the verbal applications, that is, added them to the provisional list, he publishes the whole of them, with a further notice calling upon those whose names do not appear on the list to apply in writing to have their names placed on the list within a certain time. When that is done the officer hands over the list to the Magistrate for final revision.

Murray complied with section 19 of Act 14 of 1874, in sending in his second claim; that was a claim in writing. Schedule E to Act 9 of 1892, is a claim to be registered as a voter. Act 14 of 1874, section 12, and Act 9 of 1892, section 29, speak of the printed papers as claims.

[De Villiers, C.J.: Has the Magistrate jurisdiction where persons do not send in their claims after the notice required by Act 14 of 1874, section 19? There is something in your favour in the words "the original writings containing all claims and objections" in section 24.]

The highest Court should have all the proceedings before it. The last clause of section 15 is in my favour because there is nothing similar referring to those who have sent in original schedules. The juxtaposition of the words "claim" and "objections" is an insufficient argument. In *North* v. *Tamplin* (51 L.J. (N.S.), Q.B., p. 177) it was held that in spite of the juxtaposition of the words in the two consecutive sections 22 and 23 of 41 and 42, Vict. c. 26, the words in the latter section should have their natural meaning.

[De Villiers, C.J.: Section 22 says that "no claim (under the 20th section) which shall omit any of the particulars required shall be attended to." Can any person whose claim is not attended to by virtue of this section appear before the Magistrate?]

Certainly. Otherwise, there is no use at all in bringing in the Magistrate. As to the right of inspection on the ground that the documents are public documents, *Lubbe and others* v. *Burton* (B. 1868, p. 7).

Mr. Sheil, for the Resident Magistrate: The Magistrate had nothing before him upon which to adjudicate. Section 25 refers only to claims sent in after the posting of the provisional list.

Mr. Schreiner, for the Registering Officer: Constitution Ordinance section 29, contains words similar to Act 14 of 1874, section 24, except that the word "such" appears there.

The "original writings" could not refer to the schedules, because there were then no schedules. The same meaning must now be attached. The schedules are called "printed papers" everywhere in the Registration Acts; "original writings" refers only to those contemplated in sections 19, 20 and 21. That is shown also by the juxtaposition of the words "claims" and "objections." The latter can not be sent in before the provisional list is posted.

Mr. Ward: The word "such" in section 29 of the Constitution Ordinance makes a material difference.

[Maasdorp, J.: If a claim is put in writing what can it matter to the Magistrate what the original claim was?]

We want inspection of the schedules in order to enable us to discover frauds.

De Villiers, C. J.: This case has been very ably and fairly argued by Mr. Ward on behalf of the applicants, but I fear that the Court is unable to give them any assistance. Mr. Sinclair, in his affidavit, states that after the provisional roll was posted he secured about 800 late claims which were adjudicated upon by the Magistrate in terms of the 25th section of Act 14 of 1874. If the applicants had done the same thing, if they had observed the provisions of the 19th and 20th sections of the Act, their claims would also have been adjudicated upon. The question now is, can they ask the Court to compel the Magistrate to consider their claims notwithstanding their omission to lodge any written claim with the registering officer after he had issued a notice in terms of the 19th section? They contend that their filling up and sending in the original papers required by the 5th and 6th sections was a sufficient compliance with the requirements of the Act, but this contention entirely ignores the express provisions of the 19th, 20th and 22nd sections of the Act. The only argument which might appear to favour the applicants' contention is that founded on the provisions of the 24th section, which includes among the papers to be delivered by the registering officer to the Magistrate "the original writings containing all claims and objections." I agree with the view that by "original writings" are meant the claims mentioned in the Schedule A to Act 9 of 1892, and I do not attach much weight to the juxtaposition of the terms "claims" and "objections." But the circumstance that the registering officer has to deliver the original claims to the Magistrate does not prove that the Legislature intended the latter to adjudicate upon such claims, even if no written claim was lodged with the registering officer in terms of the 20th section of Act 14 of 1874. More original writings would be very useful evidence to assist the Magistrate in adjudicating upon written claims filed afterwards, but without filing such later claims persons whose names have been omitted from the provisional list acquire no *locus standi* to have the omission rectified. Such written claims bear some analogy to a summons in a civil case without which the Magistrate has no jurisdiction to entertain the suit. The applicants in my opinion had no *locus standi* before the Magistrate when he held his Court in terms of the 25th section, and they cannot now obtain an order compelling the registering officer to send the original claims to the Magistrate, or compelling the Magistrate to place their names on the list of voters. For the assistance, however, of the registering officers, the Court is prepared to express the opinion that they should include the original claims among the writings to be delivered to the Magistrate.

Mr. Ward: Would the Court express an opinion as to whether the voters are entitled to see the original claims?

The Chief Justice: That is a very large question, and it opens up a wide question. I have not gone sufficiently into the Act to express an opinion now on that point.

Mr Justice Buchanan: I concur, and for the reasons stated by the Chief Justice, that the applicants ought to have sent in a written application. I also concur that the 24th section requires Registering Officers to send in all original documents.

Mr. Justice Maasdorp concurred.

[Applicants' Attorneys, Messrs. Van Zyl & Buissinné; Attorneys for the Resident Magistrate, Messrs. J. & H. Reid & Nephew; Attorney for the Registering Officer, Gus. Trollip.]

MASON V. BERNSTEIN. { 1897. Dec. 6th.

Husband and wife—Contract for household purposes—Necessaries Midwife—Expenses of confinement.

The defendant's wife, being about to be confined, engaged the plaintiff as midwife without any notification to her that the husband would not be responsible for the wages.

The circumstances of the defendant were such as to make the employment of a midwife proper and reasonable.

Held, *that it was a necessary contract for household purposes upon which the defendant as husband was liable.*

This was an appeal from a decision of the Assistant Resident Magistrate, Cape, in an action in which the respondent, Joseph Bernstein, general dealer, was summoned to appear in the Magistrate's Court, Cape Town, on October 8, to show cause why he had not paid Jessie Mason, duly assisted by her husband, Frederick Mason, the sum of £ , in terms of a contract made between the parties. Mrs. Mason contended that she was engaged to attend on Mrs. Bernstein, the defendant's wife, at her accouchement, her duties to extend from April 15 to May 15, the amount to be £7. The defendant failed to avail himself of plaintiff's services during the period agreed upon, and when sent for on June 1, she was unable to attend, owing to another engagement.

The defendant, in his pleadings, denied the debt.

Mrs. Bernstein in her evidence said that she was married by ante-nuptial contract. She produced the contract. Her husband had nothing to do with the agreement with the plaintiff.

The Assistant Magistrate gave a judgment of absolution from the instance. His reasons were as follows: In this case the evidence goes to show that Mrs. Bernstein entered into a contract on her own responsibility. She says her husband had nothing to do with the engagement and that she actually paid subsequently for her confinement, out of her own private means. I therefore in terms of section 2 of the ante-nuptial contract hold that the husband should not have been joined in the action.

Mr. Graham: The defence is entirely a technical one. The action is one for work and labour performed. *Coetzee* v. *Higgins* (E.D. 5, p. 352). The wife must be assumed to have implied authority to bind her husband for necessaries.

Mr. Schreiner: I shall not argue that this is not a necessary. The Magistrate's reason is that the wife did not purport to bind her husband, community of debt being excluded. *Lane* v. *Ironmonger* (13 M. & W., p. 868.) The engagement was the wife's, the presumption is that when a wife contracts for necessaries she contracts as agent for her husband, but this presumption may be rebutted.

[De Villiers: If it had been a contract for groceries would it have been sufficient for the husband to say he knew nothing about it?]

That would be an issue of fact and the Court would probably not take that as a defence. As to the amount due for the services, I am prepared to leave that in the hands of the Court.

De Villiers, C.J.: Mr. Schreiner, has candidly admitted that the service which the plaintiff as midwife agreed to perform for the defendant's wife was in the nature of a "necessary." This is a term which has been taken over from the English law, but the term itself fairly represents the class of household purposes for which a wife is held, by our law, to have a tacit authority to bind her husband's credit. *Van Leeuwen* refers to two cases decided by the Court of Holland as early as 1602 and 1607, in which it was held that a woman buying upon credit anything which serves for the benefit of the common household is considered thereby to bind both herself and husband. (*Van Leeuwen's Comm.* Kotze's Translation p. 44). *Voet* points out the obvious impossibility of laying down a hard and fast rule, as to what contract for domestic purposes would be binding upon the husband *Voet*. (23, 2, 46). Much, he says, must be left to the discretion of the judge, who should be guided not only by the custom of the country but by the position and circumstances of the husband, and by his practice in the past in regard to similar contracts. The circumstances of the defendant were such that the engagement of a midwife to attend his wife in her confinement cannot be regarded as otherwise than proper and reasonable. He was the author of the child about to be born, and incurred at least as much responsibility for the proper treatment of the wife and child in her confinement as the wife herself who engaged the plaintiff as midwife. The defendant's wife in her evidence said that her husband had nothing to do with the contract, but this statement does not conclude the matter. She did not tell the plaintiff that she had no authority to bind the husband, with whom she was living at the time, and that he incurred no responsibility for the engagement. She simply engaged the plaintiff to attend her in her confinement and the plaintiff was quite justified, in the absence of any clear notification to the contrary, in concluding that the husband would be liable for so purely domestic a service rendered to his wife. The plaintiff was ready and willing to fulfil her contract during the time for which she had been engaged, and having been kept out of service for the whole of the month she is entitled to the wages agreed upon. The appeal will be allowed, and judgment entered for the plaintiff for £7, with costs in this Court and in the Court below.

[Appellant's Attorney, A. P. Kenealey; Respondent's Attorney, D. Tennant.]

MEIERNHEIMER v. DIETERLE. { 1897. Dec. 6th.

Summons—Amendment.

Where a summons described the plaintiff as a "minor duly assisted

by her husband," and the Magistrate refused to allow an amendment substituting "father" for husband, an exception to his ruling was sustained.

This was an appeal from a decision of the Assistant Resident Magistrate, Cape Town, on a summons against John Dieterle, tobacconist, Shortmarket-street, for the payment of 17s. 4d. for work done and for damages for wrongful dismissal The plaintiff was described in the summons as "Katrina Meisenheimer, a minor, duly assisted by her husband." Mr. Lancaster, who appeared for the defendant, took exception to the summons in that form, when Mr. Shaw, for the plaintiff, applied to alter the word "husband" to "father." The Magistrate refused this application, and upheld the exception with costs.

Mr. Graham for the appellant.

The appeal was sustained.

The Chief Justice said: It is clear that the Magistrate should have allowed the amendment to be made. It was probably a clerical error, and the Magistrate should have allowed the necessary alteration to be made. The appeal will therefore be allowed, and the case remitted to the Magistrate to amend the summons, costs in the Supreme Court and in the Court below to be decided by the Magistrate.

[Appellant's Attorney, D. Tennant.]

CARTER V. ALIWAL NORTH MUNICIPALITY. } 1897, Dec. 6th.

Contract—Variation *Quantum meruit.*

The defendant Town Council having engaged the plaintiff's services as medical officer of health at a certain remuneration for each inspection and report, and having afterwards requested him to make certain house-to-house inspections and reports,

Held, *bound to pay him according to the scale agreed upon in the absence of proof that the terms of the contract had during the interval been varied. The fact that on one occasion the plaintiff had made lower charges for inspections during a small-pox epidemic does not constitute such proof.*

This was an appeal from a decision of Mr. Justice Lange at the Circuit Court for Aliwal North, in which the appellant was the plaintiff, and the respondent Municipality were the defendants.

The plaintiff in his summons said as follows:

1. That he was engaged by the defendants as their Medical Officer of Health on the 18th December, 1894, at a remuneration of 10s. 6d. (ten shilling, and sixpence sterling) for each inspections and reports made by the plaintiff at the request of the defendants.

2. That in terms of the said agreement the plaintiff made at the request aforesaid the inspection and report referred to under items 1 to 6 of the account hereto annexed, which at the agreed remuneration amounts to £132 16s. 6d. and which services were duly rendered to the defendants by the plaintiff.

3. That as to the further item 7 of the said account (which the plaintiff prays may be considered as inserted herein) amounting to £5 5s., the defendants owe the same to plaintiff for professional services rendered to defendants' at the special instance and request of the defendants.

Wherefore the plaintiff prays that this Honourable Court may adjudge the defendants to pay to the plaintiff the aforesaid respective sums of £132 16s. 6d. (one hundred and thirty-two pounds sixteen shillings and sixpence sterling) and £5 5s., in all the sum of £138 1s. 6d. with interest as aforesaid and costs of suit, &c.

ACCOUNT ANNEXED.

Aliwal North.
March 23rd, 1897.

The Town Council,
To Dr. W. J. B. Carter,

For professional services rendered as Medical Officer of Health, 1897.

I. Jan. 13. Letter *re* persons suffering from ophthalmia and the mineral springs	£0	10	6
II. Jan. 13. Inspection and report on the premises of the Rev. Msykinya	0	10	6
III. Jan. 14. Inspection and reports on the following premises: 1. Abattoir (White's); 2. Abattoir (Neubost's); 3. Outhouses (Capper); 4. Yard, &c. (Msykinya); 5. Yard, &c. (Van Heerden); 6. Shop and yard (White's); 7. Premises (Coetzer): 8. Premises (McNally); 9. Premises (Graham); 10. Premises (Yeld); 11. Premises (Smit); 12. Premises (Henning); 13. Public latrine; 14. Public latrine, in all at 10s. 6d. each	7	7	0

IV. Jan. 13-23. House to house inspection throughout town: 235 premises inspected and reported on—report sent in 26th January, 1897	138	7	6
V. Jan. 16. Inspection and report on building (Swats) used by Mr. Park to provide accommodation for Kafirs	0	10	6
VI. Jan. 17. Inspection of and report on Mr. L. White's yard and Kafirs provided with accomdation there	0	10	6
VII. Feb. 9. Report on the present state of the health of the town with reference to typhoid fever, by special request of the Council	5	5	0
	£138	1	6

The following plea was filed:

1. The defendants admit paragraph 1 of plaintiff's summons.

2. The defendants admit that the plaintiff made the inspections and reports in items 1, 2, 3, 5 and 6 of the account annexed to the plaintiff's summons in terms of the said agreement.

3. The defendants say further that on or about the 14th of January, 1897, they requested the plaintiff to make a house-to-house inspection, to see that all premises were in a proper sanitary state and report accordingly.

4. In accordance with the said request the plaintiff made such house-to-house inspection, being engaged therein nine days from the 14th to the 23rd of January, 1897 (exclusive of Sunday), and sent in a report on such inspection.

5. The defendants say that £5 5s. a day is a fair and reasonable amount for the said inspection and report.

6. The defendants admit the 3rd paragraph of the plaintiff's summons.

7. Save as above admitted the defendants deny all the allegations in the plaintiff's summons.

8. The defendants tendered the plaintiff the sum of £61 19s. in payment of the amount due by them to him: the plaintiff refused the said tender.

9. The defendants always have been and still are ready and willing to pay the plaintiff the said sum of £61 19s., but the plaintiff refuses to accept the same.

Wherefore the defendants claim judgment and costs.

The replication admitted the refusal of the tender and said that even if entitled only to the remuneration per diem offered it was insufficient, as the plaintiff was engaged upon the work in question for twelve days.

The evidence appears sufficiently from the judgments. The plaintiff relied upon the following letter, in pursuance of which he had made the 235 inspections referred to in item 4 of the account.

January 14th, 1897.

DEAR SIR,—Owing to typhoid fever being reported to the Council as having occurred in Town, it was resolved at the last meeting of the Council that you with the Sanitary Inspector, Sergeant Baker, make a house-to-house inspection, to see that all premises are in a proper sanitary state and report accordingly; also that you be requested to report to the Council any case that may come under your notice.

Yours faithfully,
(Sd.) G. GRIFFITHS,
Town Clerk.

The plaintiff admitted that he would have accepted 10s. 6d. for the report mentioned in item 7 of the account if the defendants had tendered that.

Mr. Justice Lange held that the tender was sufficient and gave judgment for plaintiff for that amount, plaintiff to pay costs.

Against this judgment the plaintiff appealed.

The following reasons were supplied by the judge of the Circuit Court:

I have not the opportunity of referring to my notes of evidence, which were in due course forwarded to the Registrar of the Eastern Districts Court, but as far as my memory, aided by a few rough memoranda at my disposal serves me, the facts were somewhat as follows:

The action was one upon account for services rendered by the plaintiff to the defendants at their request. The only item in dispute between the parties was for the sum of £126 odd, being the amount claimed for a house-to-house inspection of the town of Aliwal North made by the plaintiff at the special request of the defendants.

The plaintiff made a charge of 10s. 6d. for each inspection, which charge he based upon a letter addressed to him by the defendants some two years before, when they appointed him their Medical Officer. I came to the conclusion, after hearing the evidence that this house-to-house inspection was special work not covered by the letter in question and not contemplated by the parties when it was written or received. The plaintiff himself stated in evidence that subsequent to the receipt of this letter he did certain work for the defendants in connection with an outbreak of small-pox in the township, and that he made a special charge for same,

not in terms of the letter, although he contended that he might have called his visits "inspection," which would have resulted in his receiving a larger amount for that work than he did under the special charge made. Later on he made a report for the defendants upon the condition of the town as regards typhoid fever, in which case he also ignored the terms of the letter demanding and receiving a special fee.

The plaintiff admitted that if he were not entitled to charge in terms of that letter a fee of five guineas (£5 5s. 0d.) per diem, as tendered by defendants, would be fair and reasonable; but he contended that in addition to the nine days occupied in the actual inspection he was entitled to be paid for three more days' work in drafting his report.

He admitted, however, upon cross-examination that although he did work at the report at odd times during the course of three days, it did not occupy more than three or four hours of his time. It seemed to me that the report, which was merely a verbatim copy of the notes taken by plaintiff in his notebook upon his inspection of each individual premises, would not have occupied more than half-an-hour at the end of each day's inspection, if taken in hand daily; and in my opinion the fee of five guineas (£5 5s. 0d.) per diem might fairly be held to include not only the inspections made upon the particular day but also so much of the final report as referred to those inspections.

For the above reasons, I held the tender made by defendants to be sufficient, and gave judgment accordingly.

Mr. Innes Q.C. (with him Mr. Gardiner) for the appellant.

Mr. Searle, Q.C. (with him Mr. Graham) for the respondents.

Mr. Innes: The question is whether the appellant is entitled to claim 10s. 6d. for each visit; are they covered by the tariff or not? The tariff is crude, making no difference between inspections and reports allowed by the Council and those not admitted.

Mr. Searle: There is a great difference between the inspections and the general house-to-house visitation. While making the one he was also making the other. The fourteen mentioned in item 3 must be included in the 235, and so they are charged for twice over. The contract is only intended to refer to special inspections required by the Council.

Mr. Innes: I admit that the appellant is not entitled to charge five guineas for item 7.

[De Villiers, C.J.: Do you consent to a reduction of the £7 7s. 0d, for the fourteen inspections?]

I have no knowledge of what occurred, but I do not think the appellant can have intended to charge twice over for the same work.

[De Villiers, C.J.: The only other alternative is to remit the case for further evidence.]

If the Court is in any favour on the main point I will consent to the reduction.

De Villiers, C.J.: The amount charged by the plaintiff appears to be very large, but the question to be determined by the Court below was whether the charge was according to contract. On the 18th of December, 1894, the plaintiff was informed by letter that at a meeting of the defendant Town Council he had been "duly elected Medical Officer of Health to the Municipality, remuneration to be the same as paid to previous officers, viz., half-a-guinea for each inspection and report." On the 14th of January, 1897, he was informed by letter of a resolution of the Council that he with the sanitary inspector should make a house-to house inspection, to see that all premises are in a proper sanitary state and report accordingly. He proceeded to inspect about 235 premises and sent to the Council a general report which embraced a brief and detailed report, upon each of the premises so inspected. Upon his asking for payment according to the original contract the Council offered to pay him according to the number of days he had been employed, as on a *quantum meruit* and not as on a special contract. The defendants by their plea admitted the contract and they also admitted that they requested the plaintiff to make the house-to-house inspection and report accordingly, and that the plaintiff did so inspect and report, but they tendered remuneration at the rate of £5 5s. a day as being fair and reasonable. The only witnesses examined were the plaintiff and the sanitary inspector. The latter said nothing which had any bearing on the case. The plaintiff proved the performance of the work, but admitted that after his appointment as medical officer he had on one occasion, in connection with an outbreak of small-pox in the municipality, made a somewhat lower charge for visits to the infected houses than he was entitled to make under the contract. It is this admission which seems to have induced the learned Judge in the Court below to support the amount of the defendant's tender. Unless, however, the lower charges had been made under circumstances which might fairly have led the defendants to believe that the terms of the contract would be departed from in future, the plaintiff's admission cannot possibly affect the present case. Large though the amount might appear to be, the plaintiff is entitled to be paid according to the contract so long as the contract is in

force. If he made a special charge under exceptional circumstances he is not bound to continue that special charge unless the defendants had been misled into the belief that it would be continued. Of such belief there is no evidence whatever, nor is there any plea that the original contract had been varied. For the reasons pointed out during the argument the sum of £11 17s. must be deducted from the plaintiff's claim and judgment entered for the plaintiff with costs in this Court and in the Court below.

[Appellant's Attorneys, Messrs. J. & H. Reid & Nephew; Respondents' Attorneys, Messrs. Sauer & Standen.]

GENERAL MOTIONS.

MASTER V. CLOETE.
" V. GELDENHUYS. } 1897. Nov. 30th. Dec. 7th.

Contempt of Court—Executors—Failure to file accounts.

The Court ordered the personal attachment of two executors who had failed to file accounts in terms of an order of Court.

This was a motion for the personal attachment of two executors who had been ordered to file accounts and had failed to comply with the Court's order.

On the 31st August last both the defendants were summoned to shew cause why they should not be ordered to file accounts in the estates of which they were executors.

The Court ordered the defendants to file accounts supported by vouchers within a month from the date of the Court's order.

The order not having been complied with, Mr. Sheil, on the 30th November, moved for the personal attachment of the defendants.

The Court ordered the application to stand over for the production of affidavits from the Master that the order had not been complied with, and intimated that it would be unnecessary to serve fresh notices on the defendants.

Postea (December 7th).

Mr. Sheil produced the affidavits of the Master, who deposed that letters of administration were granted to the first-named defendant as executor testamentary of his deceased wife on the 31st August, 1895.

That on the 3rd August, 1896, a circular was sent to the defendant calling upon him to render a full and true account of the estate on or before 15th September, 1896.

That on the 17th August, 1896, an incomplete account was lodged by the defendant, being unsupported by the necessary vouchers and inventory, and that the account still remained incomplete.

With regard to the second-named defendant the Master alleged that letters of administration were granted to him as executor testamentary of his deceased mother on the 16th May, 1896.

That on the 3rd May, 1897, a circular was sent to the defendant calling upon him to render a full and true account of the estate on or before the 15th June, 1897, but no account was lodged.

That on 30th November, 1897, an account was tendered but was incomplete as the vouchers in support of the account were not submitted and succession duty and fees were not paid. The account was accordingly rejected and had not since been relodged.

The Court granted an order for the personal attachment of both the defendants, but, on the the suggestion of counsel for the Master, suspended the order against the second-named defendant for one month.

[Attorneys for the Master: Messrs. J. & H. Reid & Nephew.]

VAN OUDTSHOORN'S EXECUTORS V. VAN OUDTSHOORN'S ESTATE EXECUTOR DATIVE AND OTHERS. } 1897. Dec. 7th.

This was an action for a declaration of rights.

The plaintiffs' declaration was as follows:

1. The plaintiffs are farmers, residing at Hout's Bay, and they sue in this action as well individually as in their capacity as executors testamentary of their mother, the late Maria Magdalena van Rheede van Oudtshoorn. The first defendant is the secretary of the South African Association for the Administration and Settlement of Estates, and as such he is the executor dative of the late Willem Stephanus Crosier van Rheede van Oudtshoorn, the father of the plaintiffs. The second defendant is the *curator ad litem* duly appointed by this Honourable Court of the two minor children of the late Jacobus Johannes Gysbertus van Rheede van Oudtshoorn, who was a brother of the plaintiffs.

2. The late Willem Stephanus Crosier van Rheede van Oudtshoorn and the late Maria Magdalena van Rheede van Oudtshoorn (hereinafter called the testator and testatrix respectively) were married in community of property,

and had issue seven sons and one daughter, to wit, the four plaintiffs. Goert van Rheede van Oudtshoorn, Jacobus Johannes Gysbertus van Rheede van Oudtshoorn, Egbertus Brugh van Rheede van Oudtshoorn, and Matilda Meyer van Rheede van Oudtshoorn, now married to Matthys Michael Louw in community of property.

3. In or about the year 1880 a contract was entered into between the testator and seven of his sons, to wit, the plaintiffs, the said Jacobus Johannes van Rheede van Oudtshoorn and the said Goert van Rheede van Oudtshoorn, the said Egbertus Burgh van Oudtshoorn, in terms of which the testator agreed that his said six sons should have the right to take over the farm Kronendal, at that time and still registered in his name, at the death of the survivor of the two testators, for the sum of £1,000 sterling, to be paid into the joint estate, in consideration that the said six sons should during the lifetime of both their parents work and maintain the said farm and the buildings thereon in proper repair, and shall support and maintain the testator and testatrix during the term of their natural lives.

4. The testator died on the 5th day of March, 1885, leaving a mutual will, in terms of which he and the testatrix intituled the survivor of them, together with the children of the marriage, to be heirs of all the estate of the first dying; the said will further provided that the survivor should retain the usufruct of the joint estate until death or remarriage, in which latter event the portions of the major heirs were to be paid out, and the portions of the minor heirs duly secured. The said will bore date the 25th May, 1881.

5. The said Goert van Rheede van Oudtshoorn died in the year 1890, without issue, and the said Jacobus Johannes van Rheede van Oudtshoorn died on the 12th November, 1894, leaving a widow, one Elizabeth van Oudtshoorn (born Louw), and two minor children him surviving. The second defendant was, by order of this Honourable Court, bearing date the 11th day of November, 1897, duly appointed to act as *curator ad litem* to the said minors for the purposes of this action.

6. On the 16th December, 1896, the said testatrix died, leaving her last will and testament, dated 21st July, 1890, in full force and effect, and also a codicil to the said will, dated 21st July, 1893.

7. In her said last will the testatrix recited the agreement referred to in the third paragraph of this declaration, and expressly confirmed the same in favour of the five said sons then surviving; and in the said codicil she directed that her son, the said Jacobus Johannes van Rheede van Oudtshoorn, should be excluded from any interest in the said farm in terms of the said agreement, by reason of his having failed to carry out his obligations thereunder, and by reason of his having squandered and dissipated his means. The plaintiffs refer this Honourable Court to the terms of the said will and codicil when produced for the full meaning and true effect thereof.

8. The plaintiffs have in all respects carried out their part of the agreement hereinbefore referred to; they have ever since the year 1880 worked the said farm and maintained it and the buildings thereon in good condition, and they have maintained and supported their parents from and after the said year during the remaining lifetime of each of them. In faith of the said agreement they have expended large sums of money upon improving the said farm, and they estimate the value of the improvements so effected by them at the sum of £1,500.

9. The plaintiffs contend:

(*a*) That in terms of the said agreement they are entitled to transfer of the said farm upon payment of £1,000 into the said joint estate; or should this Honourable Court be of opinion that they are not so entitled,

(*b*) That by virtue of the will and codicil of their said mother they are entitled to claim transfer of one half share of the said farm upon payment of the sum of £500 into the estate, and that they are also entitled to claim the sum of £700 in respect of improvements upon the other half share.

Or should this Honourable Court decide that the whole of the said farm should be dealt with under the joint will of their parents:

(*c*) That they are entitled to be paid out of the proceeds of the said farm the sum of £1,500, being the value of the improvements effected by them as aforesaid.

10. The defendants wrongfully contend that the said farm should be sold as an asset in the joint estate of the testator and testatrix, and that the proceeds should be equally divided among all the heirs without payment to the plaintiffs of any sum of money in respect of the said improvements.

The plaintiffs claim:

(*a*) An order declaring that they are entitled to transfer of the said farm Kronendal upon payment into the said joint estate of £1,000, or else

(*b*) An order declaring that they are entitled to transfer of one half of the said farm upon payment into the estate of the testatrix of the

sum of £500, and that they are further entitled to the sum of £1,500 out of the proceeds of the other half share.

(*c*) An order directing the first defendant to do all things necessary to carry out and effect the transfer of the whole or half of the said farm, as the case may be, or else

(*d*) An order directing the first defendant to pay to them out of the proceeds of the said farm the sum of £1,500, as aforesaid.

(*e*) Alternative relief.

(*f*) Costs of suit.

The first-named defendant in his plea admitted the allegations in paragraphs 1, 2, 4, and 5, but denied those in paragraph 3. He denied the allegations in paragraphs 6 and 7, except as to the death of Mrs. Van Oudtshoorn, and did not admit the validity of the will and codicil. He admitted that the plaintiffs had lived and worked on the farm for many years, but said it was the property of their parents and is now an asset in equal shares in their respective estates; that the farm had been maintained and improved out of moneys derived from its produce and from sums amounting to £900, which the testator's widow had received from the Municipalities of Wynberg and Cape Town in respect of water-rights of the farm in 1889 and 1892; and that the plaintiffs had not effected improvements of the value of £1,500, but had been in possession for many years without paying rent, and were not entitled to anything in respect of improvements.

The second-named defendant denied the validity of the will and codicil mentioned in paragraph 6, in that the witness, J. Brink, was not present when the testatrix signed it, even when the witness McLachlan signed; the rest of the plea was similar to that of the first-named defendant. In reconvention he said that Jacobus Johannes Gysbertus van Rheede van Oudtshoorn was married in community to Elizabeth Louw, and died without leaving any will, and that his two minor children are entitled to his portions in the estate of his parents; he prayed for an order setting aside the will and codicil and the letters of administration granted to the plaintiffs.

The replications to both pleas were general except that they admitted the payment of the £900 in respect of the water-rights.

Mr. Searle, Q.C., appeared for the plaintiffs, the brothers Van Oudtshoorn.

Mr. Schreiner, Q.C., appeared for Mr. H. Gibson, secretary of the South African Association, the executor dative of Mr. Van Oudtshoorn's estate; and Mr. Advocate Graham as the *curator ad litem* for the two minor children of J. J. G. van Oudtshoorn.

Gabriel Jacobus de Kok van Oudtshoorn one of the plaintiffs, said he was the eldest son of the late Mr. and Mrs. Van Oudtshoorn. He was one of the executors in the estate of Mrs. Van Oudtshoorn. Under her will all the children were made executors. He had lived twenty-eight years on the farm Kronendal. In November, 1880, he was on the farm. His father then was not very well off. Physically he was weak and low spirited. At that time the old man entered into an agreement with the seven sons, all of whom were on the farm. The agreement was that the seven sons should work the farm, pay the rates, pay the debts, maintain their father and mother until their deaths, and then should have the farm for £1,000. Mr. De Kok, his uncle, had lent his father money at that time. The parents were to live in the dwelling-house. The agreement was verbal. They at once took over the farm and began operations. Egbert, the fourth son, shortly after that left, and got employment elsewhere. He did not come back to the farm. The next brother to him was William, then Goert, and then Egbert. Witness improved the farm, and put up five or six different houses on the farm. Jacob Meyer, another brother, also built a very good house on the farm. Witness also erected a stable and various small offices, pigeon-houses, &c. Roughly speaking, witness considered that he had spent on these buildings a large sum of money, although he would leave it to experts to decide. There were two sums paid to his mother, one from Wynberg Municipality for £690, and the other from Cape Town Municipality for £392. His mother endorsed the cheques and gave them to De Kok, who had really bought the farm. Witness had been twice married, and with each wife he got money, about £100 with the first and £185 with the second. On the farm witness had planted 14,000 to 16,000 vines, which were now in full bearing. He thought his father planted about 12,000 vines, which were still there. In his father's time witness made five leaguers of wine; now he made forty leaguers. For preparing the ground to receive the vines witness paid about £80. He had also fenced the vineyards, made a water sluit, and laid piping for the water. Witness had worked hard with his own hands all the time he had been on the farm. Witness thought the farm was worth, at the utmost, £3,000. The extent of his farm was 23 morgen. The agreement made between his brothers and his father was carried out. The four brothers who remained on the farm were: Witness, William, Jacob, and Theodore. Two, Jacobus Johannes and Goert, had died, and another, Egbert, had

entered the service of the Divisional Council. His mother made her will in July, 1890, and a codicil in July, 1893, and in the will stated that Jacobus had not carried out the agreement. Witness was present when the will was executed. After the death of his mother arrangements were proposed for a compromise, and at first £150 was offered. His sister agreed to the £150, but afterwards she and the others claimed £250. Witness had advanced £?0 to her on the £150. The matter was allowed to hang up, and no agreement could be come to on the matter. Bonds were passed on the property in 1892 and 1893. They were passed to Mr. De Kok. In 1883 there was a bond on De Hiddingh paid off, and in 1889 a bond of £250 was paid off. Mr. De Kok paid these off.

Mr. Searle: There were bonds at one time of £1,150 on the farm, and now the bonds were for £850, so that £300 had been paid off.

By the Court: Mr. De Kok is the brother of his mother. He is ill, and unable to be present. He could not even give any information.

Witness could say of his own knowledge that De Kok advanced his father money to buy the farm. He often assisted to pay the interest. Witness had, in addition to the farm, a fishery.

Cross-examined by Mr. Schreiner: After 1880 his father had nothing to do with the farm. In 1882 his father passed a fresh bond on the farm, but witness could not say why he did that. Witness owed his father no rent. In 1884 witness became insolvent.

Mr. Schreiner: When you became insolvent your father proved a debt for rent of £126—three and a half years.

Witness: That was for a portion of the farm leased by me before 1880.

Mr. Schreiner: But here is the claim: Three and a half years' rent of the farm Kronendal, at the rate of £3 per month, commencing 1st July, 1880. How do you explain that?

Witness made no answer.

The Chief Justice: That is a very clear statement against what you have said, Mr. Van Oudtshoorn.

The £600 from Wynberg and the £300 from Cape Town witness never touched. His mother had no banking account. Witness took charge of the working of the farm, but did not interfere with money matters. Witness sold the produce, and got the money for that into his hands. Witness got a portion of the money that came in for produce. He had a fishery of his own. His brother Jacobus had his father's boat at Kalk Bay, and witness believed that he had in an inventory stated that that boat was part of the estate. Witness had not been rehabilitated since his insolvency.

The Chief Justice: I see the value of your assets at your insolvency was £35.

Witness had no writing to show the transfer of the farm, and he paid no transfer duty.

Mr. Schreiner: Would you take £4,000 for the farm?

Witness: I cannot sell the farm under any circumstances, as I have no place to go to. When the agreement was made all the sons were present. His sister (Mrs. Louw) was not there.

Mr. Schreiner: You say the agreement was made in 1880. Yet your father made a will in 1881, saying nothing about the agreement, but leaving everything to his wife, and in case of remarriage there were provisions for the children. Further, in 1882 he passed a fresh bond on the farm. Can you explain those things?

Witness said he could not. Witness could not say the old house had been given back. It had been repaired since his father died. All his surviving brothers got a share of the profits yearly.

Cross-examined by Mr. Graham: Mr. Du Preez had his mother's will prepared. Witness arranged through his mother what was to go into the will. Witness took the will to Houts Bay, where it was seen by his mother and his brothers Jacob, William, and Theodore. Witness had the will in his possession for about a fortnight before it was signed. He kept it until he could get outside witnesses, those who were not personally interested in their affairs, to attend and sign as witnesses. The whole household was present at the signing. One witness was Brink, but he and Brink were not on good terms. Brink and McLauchlin were present. He had heard that Brink had made an affidavit to the effect that he was not present at the signing, but that was not correct. In March witness and Brink had a Court case, and Brink lost the day, so since then he had not been pleased. The will was taken back to Mr. Du Preez in about eight days, and after that witness retained the document. Witness also took out the codicil, and saw it executed. Jacobus left the farm a good while before he got married, when he went to the gold-fields. Witness only wished he had gone to the gold-fields too. All his life he had worked hard on the farm. His brother Jacobus lived on the farm, and worked at the hotel. His brother's wife left him two or three years before his death. His wife imprisoned her husband for assault.

Re-examined by Mr. Searle: Witness shot Brink's pig for trespassing, and unpleasantness

had arisen between the two. It was necessary to bond the property in 1882. Witness knew about the bond, and did not object to it. Witness and his brothers paid his mother a small sum yearly, each from £9 to £12, more in the form of a Christmas-box. Witness bought her clothes and all she wanted. His father was about sixty-eight when he died. The vineyard made a difference of about £500 to the farm. If witness had not the vineyard he did not know what he would do. He could not do without it.

By the Chief Justice: Witness could not explain how it was that the claim his father made against him in 1884 was for rent from 1881 and for the next three and a half years.

The Chief Justice said if witness paid the minors £250, Mrs. Louw (the sister) £250, and Egbert £250 witness and his brother would have the farm for £750 with the bond of £850, or for £1,600. He asked witness if he could not give more than £250.

Witness said his idea was for Mr. Gibson, the minors, and himself to have valuators go to the farm, and he would pay whatever they said, if he were satisfied with their valuation.

Mr. Graham: I hope your lordships will observe that witness says he would only accept the valuation were he satisfied with it.

The Chief Justice suggested that the brothers should pay £350, instead of £250. He asked for how much a bond could be got on the farm.

Witness doubted if he could get £2,000.

The Chief Justice: Oh! you could get a great deal more than that.

Mr. Schreiner stated that Mr. Gibson would give a bond on first mortgage for £3,000.

Mr. Graham said he had information that the farm could be sold for £5,000.

The Chief Justice, in adjourning the Court for luncheon, hoped the parties would be able to come to an agreement when the Court re-assembled.

After luncheon,

Mr. Searle said the parties had arrived at an arrangement. The plaintiffs were willing to take over the bond and pay for it, pay to each on the basis of £350, and pay the legal costs of the action. He thought it was a very fair arrangement.

Mr. Schreiner said he was in a position, so far as the executor dative was concerned, to say that he was quite prepared to accept, and Mrs. Louw, he was informed, assented to the proposal.

Mr. Graham, for the minors, stated that he was prepared to accept the proposal.

Egbert van Oudtshoorn, a brother, called by the Chief Justice, accepted the terms named.

The Chief Justice gave judgment in the following terms: That the farm in question be transferred to the plaintiffs on condition that they pay to the secretary of the South African Association the sum of £950, to be distributed as follows: £250 to Egbert van Oudtshoorn, the brother; £350 to Matilda, married to Marthinus Louw; £87 10s. to the widow of Jacobus Johannes van Oudtshoorn; and £262 10s. to the widow of J. J. van Oudtshoorn, as the mother and natural guardian of the minor children of the late Jacobus; further, that the plaintiffs pay all the cost of administering the estate, and pay the costs of the action.

[Plaintiffs' Attorney, H. P. du Prees. Defendants' Attorneys, Messrs. Sauer and Standen.]

MIJIET'S EXECUTORS DATIVE AND ANOTHER v. AVA. 1897, Dec. 7th. Dec. 13th.

Will—*Fidei-commissum*—Fiduciary heirs—Testator.

A testator by his will appointed his wife and children as his heirs and by a codicil directed that "should his wife come to die the whole estate shall divert to his children I. *and* A. *in trust only to receive the rents and profits accruing to his said estate and after their death the whole estate shall be equally divided amongst the children procreated or hereafter to be procreated of the said* I. *and* A."

The testator died first and after his his wife's death I. *and* A. *received the rents and profits in equal shares until* 1893, *when* I. *died leaving one son.*

Held, *that upon* I.'*s death his share of the fiduciary inheritance did not accrue to* A., *but that* I.'*s son and heir became entitled to one-half share of the rents and profits until the final distribution of te fidei-commissary inheritance takes place on the death of* A.

This was a special case stated for the decision of the Court in the following terms:

1. The plaintiffs are Samuel Tonkin, of Cape Town, and Omaar Sedick, of Claremont in the Cape Division, who sue in their capacity of executors dative to the estate of the late Ebrahim Achmat Mijiet, *alias* Ibrahim Mahed, and Moonah, residing in Cape Town, who sues in her capacity of mother and natural guardian of her minor son Achmat.

2. The defendant is Ava, residing in Cape Town, who is sued both personally and in her capacity of executrix testamentary in the estate of the late Achmat Mahed.

3. On or about July 30, 1867, the said Achmat Mahed and one Gavifva to whom he was married in this colony according to Malay rites, made a joint will.

4. Under the said will it was provided that the survivor and the testator's children should be the sole and universal heirs of the whole estate as it existed at the death of the first dying; that the survivor and the children of the testators should enjoy the usufruct or interest of the whole joint estate during the survivor's lifetime; that the estate should remain in possession of the survivor to be administered, and that after the survivor's death it should remain in possession of the said children; that the estate should be valued, and that half should devolve upon the children of testator's children, and the other half upon the relations of the testator who might then be living, and certain other provisions were therein made not now necessary to specify; under the said will the survivor, together with the testator's children Ibrahim (namely, the said Ebrahim Achmat Mijiet) and Ava (the defendant) were appointed executors. A copy of the said wil is hereunto annexed, marked "A."

5. Thereafter on or about June 3, 1875, the testators executed codicil to the said will.

6. Under the aid codicil it was provided that if the testatrix was the survivor she should remain in possession of the whole of the testator's estate left at his decease, and should receive the rents and profits thereof, but that in case she should remarry the said rents and profits should be receivable by the testator's children, the said Ibrahim and Ava, and should after their death devolve upon their children. And that in case the testatrix should die, the whole estate should divert to the said Ibrahim and Ava in trust only to receive the rents and profits accruing to the testator's said estate, and after their death the whole estate should be equally divided amongst the children of the said Ibrahim and Ava. A copy of the said codicil is hereunto annexed, marked "B."

7. Thereafter on or about February 5, 1876, the testator died, leaving the testatrix and two children, to wit, the said Ibrahim and Ava, him surviving and without having revoked the said will and codicil, and the testatrix took out letters of administration under the said will together with the said Ibrahim and Ava, and adiated under the said will and codicil, and conformed to the provisions thereof.

8. On or about December 28, 1893, the said Ibrahim was lawfully married in community of property to the plaintiff Moonah. There is one child of the marriage named Achmat, who is a minor, at about the age of twenty years.

9. The defendant is married by Malay rites to one Magmoet Effendi is of the age of about fifty-four years, and has no children.

10. On or about 13th June, 1880, the testatrix died without having remarried.

11. Thereafter the said Ibrahim and Ava received the rents and profits of the testator's estate in equal shares.

12. Thereafter on or about 29th December 1893, the said Ibrahim died intestate, and the plaintiffs were on or about September 17, 1896, appointed executors dative to his estate.

The plaintiffs claim: (*a*) That upon the death of the said Ibrahim, his son Achmat became entitled to the use and benefit of the half-share of the rents and profits of the testator's estate enjoyed by the said Ibrahim up to his death.

(*b*) That it is the duty of the defendant Ava to pay over to the first-named plaintiff or to the second-named plaintiff the said half-share, for and on behalf of the minor.

The defendant contends: (*a*) That upon the death of the said Ibrahim she became entitled to the whole of the rents and profits of the testator's estate during the term of her natural life.

(*b*) That upon her death the whole estate, including such rents and profits as may then be available must be divided in equal shares amongst the children of the said Ibrahim and the defendant.

Mr. Searle, Q.C., for the plaintiff: The question is whether the *jus accrescendi* obtained in favour of Ava or whether upon the death of Ibrahim his children succeeded to his share. The usufruct only is given by the will to Ibrahim and Ava. *Steenkamp* v. *De Villiers* (10 Juta, pp. 60, 61): *Voet* (30-32, McGregor's translation and authorities mentioned there); *Potgieter* v. *Van der Heever's Executor* (S.C. 11, p. 40); *Rahl* v. *De Jager* (1 Juta, p. 38); *De Jager* v. *Scheepers* (1875, p. 86). In all these cases the Court has held that express language must be used before the *jus accrescendi* will be allowed to apply. *Grotius* (2, 24, 19). On the death of Ava, if there are children the division should be *per stirpes*. *Voet* (30-32, sections 59-61).

Mr. Joubert for the defendant: (*Voet* 7, 2, 1) lays down clearly that the *jus accrescendi* has place amongst usufructuaries. See also *Voet* (7, 4, 1); *Van Leeuwen Censura Forensis* (2, 15, 21); *Steenkamp* v. *De Villiers* (10 Juta, p. 56); *Stegman* v. *Board of Executors* (S.C. 11, p. 421). Ibrahim and Ava are joined *re et verbis*.

Re Mutery's Will (5 Juta, p. 39); *Wentzel* v. *Brink's Executor* (9 Juta, p. 328), as to inheritance *per capita Utrechtse Consultation* (3, 143).

Mr. Searle in reply.

Postea (December 13th.)

The Court gave judgment.

De Villiers, C.J.: By his will the testator in effect appointed his wife and two children as his heirs. By a codicil to his will the testator "desired that should his wife come to die the whole estate shall divert to his said children Ibrahim and Ava in trust only to receive the rents and profits accruing to his estate, and after their death the whole estate shall be equally divided amongst the children procreated or hereafter to be procreated of the said Ibrahim and Ava." The testator died in 1876, and his wife in 1880. Thereafter Ibrahim and Ava received the rents and profits in equal shares until 1893, when Ibrahim died leaving a son Achmat, on whose behalf the present action is brought. The plaintiff contends that Achmat is entitled, until the final distribution of the estate on Ava's death, to one-half share of the rents and profits at least. The defendant Ava contends, firstly, that upon Ibrahim's death she became entitled to the whole of the rents and profits during her life, and, secondly, that on her death the estate must be divided in equal shares among her children and the children of Ibrahim. As she is 54 years of age and, although married for many years, has no children, there seems no likelihood of her ever having any, and the second part of the defendant's contention need not be seriously considered. The present case differs from the many cases in which the application of the *jus accrescendi* has been considered by the Court in the fact that the persons to whom this right of accrual is sought to be applied are fiduciary heirs who have entered on their inheirtance. They are burthened with a *fidei-Commissum* in favour of their children upon the death of the survivor of the two heirs. The question is, who is to enjoy the share of the first-dying heir until the death of the survivor? Even under the Roman law, which favoured the application of the *jus accrescendi* to an extent unknown in the Dutch law, it would appear that accrual of the deceased's share to that of the survivor would not have taken place under similar circumstances. According to *Julianus* (*Digest* 7, 2, 1, section 4) if a testator, having instituted two heirs, bequeath the ownership, after deduction of the usufruct, to another, the heirs do not enjoy the *jus accrescendi*. *Voet* (7, 2, 5), commenting upon this passage, states the reason of the rule to be that the usufruct was regarded as having been originally constituted in favour of each heir in proportion to his share of the inheritance. When once, therefore, the fiduciary heirs have entered upon their respective shares of inheritance the separation of interests has taken place which, differing in this respect from the effect of a mere usufruct, prevents the operation of the *jus accrescendi* in favour of the survivor. In the case of *Steenkamp* v. *De Villiers* (10 Juta, 56) the question of accrual arose in regard to the bequest of a farm to the testator's two sons, subject to a usufurt in favour of his wife. The Court held that the right to the legacy had vested before the death of one of the two sons, and that, therefore, even if the will were in such a form that the *jus accrescendi* would have applied in the absence of such vesting, the heirs of the deceased son were entitled to the share which had so vested in him. But the Court went further and held that, inasmuch as the will indicated a desire to give the sons separate although equal shares in the farm, the fact that the sons were joined *re et verbis* did not raise a conclusive presumption in favour of accrual. The present case must be decided on somewhat different grounds. The defendant and Ibrahim were fiduciary heirs in respect of the whole inheritance. Upon the death of their mother each of them became entitled to his or her share of the rents and profits and if there had been no other administrators of the estate, each would have been bound to restore one half share of the inheritance on his or her death to the fidei-commissary heirs. But the fidei-commissary heirs can only take under the codicil after the death of both the fiduciary heirs. What then is to become of the rents and profits in the interval? For the reasons already given there is no right of accrual in favour of Ava, and the only person who can legally claim the enjoyment of Ibrahim's share of the inheritance until Ava's death is Ibrahim's only son and heir. The judgment of the Court must therefore be in favour of the plaintiff's contention and the costs must come out of the estate.

[Plaintiff's Attorney, J. Ayliff; Defendant's Attorney, C. Herold]

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS) the Hon. Mr. Justice BUCHANAN, and the Hon. Mr. Justice MAASDORP.]

PROVISIONAL ROLL.

SERRIER V. WEINER. { 1897, Dec. 13th.

This was an application for the confirmation of a writ of arrest for debt.

Mr. Buchanan appeared for applicant; Mr. Jones for the respondent.

Mr. Buchanan stated that respondent had been arrested under a writ granted under the 8th rule of Court.

Mr. Jones said respondent was willing to pay the sum claimed, together with costs of the application, into the hands of the Sheriff. He, however, did not admit that the debt was due, but he was willing to pay the amount into the hands of the Sheriff pending an action, and on these grounds he would be entitled to his discharge.

Mr. Buchanan explained that the respondent was arrested on board the steamer on Wednesday leaving for England. If the course suggested were pursued it would simply mean that the applicant would have to incur more costs, for they had no security that the respondent would not leave. He submitted that the ordinary rule should be followed—that respondent admit the debt, and if he did not he must take the consequences of the arrest. The amount of the debt was £19, and the expenses incurred £10, making in all £29.

Mr. Jones said he was now instructed that the respondent was willing to pay the whole amount, and he would therefore confess judgment, and pay the debt and costs.

Judgment was entered for plaintiff, and the writ discharged.

DAVIS V. MADHLIVA.

Mr. Buchanan asked for provisional sentence on a mortgage bond for £100, with interest at the rate of 6 per cent. to 31st December, 1896, and that the property hypothecated might be declared executable.

The application was granted, and the property declared executable.

SOUTH AFRICAN MUTUAL SOCIETY V. DE WAAL.

Mr. Gardiner asked for provisional sentence for £1,150 on a mortgage bond, with interest from 1st January, 1896, at the rate of 6 per cent., less £15 paid on account.

The application was granted.

SOUTH AFRICAN MUTUAL SOCIETY V. VIVIERS.

Mr. Gardiner applied for provisional sentence for £81, being interest at the rate of 6 per cent. on a mortgage bond.

The application was granted.

FISHER V. CUTLER.

Mr. Buchanan asked for judgment under Rule 329 (*d*) for £127, being money lent and advanced, with interest thereon to 30th September, 1896, and with costs of suit.

The application was granted.

WILL V. SCHMOL AND CO.

Mr. Buchanan asked for judgment under Rule 329 (*d*) for £2 10s., the balance of a claim against the defendant, with costs.

The application was granted.

DUSSEAU AND CO. V. PERIOT.

Mr. Ward applied for judgment under Rule 329 (*d*) for £95 18s. 2d., being the balance of an account.

The application was granted.

REHABILITATION.

ESTATE OF EDWARD JOHN EVANS.

Mr. Close applied for the rehabilitation of the estate of Edward John Evans. The estate he stated, was voluntarily surrendered on 12th, September, 1893, and the final deficiency was £402 3s. 2d.

The application was granted.

GENERAL MOTIONS.

IN THE INSOLVENT ESTATE OF WILLIAM JOHNSTONE.

Mr. Buchanan applied for the appointment of a provisional trustee in this estate to carry on the insolvent's business as hotelkeeper.

The application was granted, and Mr. E. V. Cotterill appointed the trustee.

FORTUIN'S TRUSTEE V. FORTUIN; *Ex parte* FORTUIN.

Mr. McGregor applied on behalf of the defendant in the original suit for an order compelling the respondent, the trustee, to accept payment of £283 10s. 0d. and costs, the amount of a judgment obtained against the applicant on the 12th October, and for the discharge of an interdict granted on the same date restraining him from "transferring or mortgaging a certain piece of ground with three houses situate there-

on at Claremont transferred to him by the insolvent," pending the result of actions instituted against the applicant and one James Brennan. The applicant stated that these judgments had resulted in favour of the respondent for £283 10s. 0d. and costs against himself, and for £156 0s. 0d. and costs against Brennan. He further prayed for the removal of an attachment made on his property by the trustee on the 9th November, and said that the discharge and removal of the interdict and attachment was necessary in order to enable him to pass a first mortgage bond in order to secure advances made to him for the purpose of satisfying the judgment. The trustee refused to release the property unless Brennan's debt was paid. He filed an affidavit in which he said that the reason why he refused to release the property from attachment was that he believed that the moneys paid by the insolvent to applicant and Brennan shortly before the insolvency and which they had been ordered to refund were gratuitous alienatons and were used to pay portion of the purchase price of the property sought to be released, and that the moneys were so used by collusion between the insolvent, the applicant and the said Brennan with the object of defeating the insolvent's creditors; that a writ of execution against Brennan had been issued, but his movables were insufficient to cover the cost of the sale; that a commission had been appointed to take evidence in connection with the insolvent estate, and that it was in the interests of justice that the applicant's property should not be released until the creditors had had an opportunity of taking action.

Mr. McGregor for the applicant: There was an irregularity in the interdict proceedings. The interdict was granted provisionally for a certain purpose pending the result of actions instituted. The actions are no longer pending. We are willing to pay the amount.

Mr. Graham for the trustees: The insolvent surrendered in August. In May he received £500 and made payments to applicant and to Brennan. Brennan has nothing. In June applicant bought a house for £450. We say there has been fraud and collusion. If Court extends the interdict we propose to bring an action against applicant for £156.

De Villiers, C.J.: It is a question whether that would not be *res judicata*.]

Mr. McGregor in reply.

The application was granted with costs.

Re LETTERSTEDT'S ESTATE.

This was an application for the confirmation of the sale of certain land known as Old Wynberg Woodland, belonging to the estate of of J. Letterstedt, deceased, for £6,000.

The executor stated that by the will of the deceased, who died leaving one child only, a daughter, certain land, which included Old Wynberg Woodland, was described as "reserved estates," and made certain provision for the administration of the same until his daughter or other child or children should attain the age of 25 years. The residue of his estate was bequeathed to his daughter when she should reach the age of 25 or marry subject to a *fidei-commissum* in favour of her issue, and in default of such issue, in favour of testator's heirs *ab intestato*. The daughter attained the age of 25 May, 1878, and was now married and had two in children, both of whom were under twenty-one years of age. That he had received instructions from the said daughter approving of the proposed sale and authorising it. He further gave reasons why the proposed sale for £6,000 was a most advantageous one for all the parties entitled to the property. The Master reported that it was in the interest of the minors that the property should be sold at the price offered.

Mr. Innes, Q.C., for the applicant.

The application was granted.

THE COLONIAL GOVERNMENT V. ELLIOTT.

Mr. Buchanan applied for an award of arbitrators to be made a rule of Court.

Mr. Sheil, for the Crown, consented to the award being made.

The application was granted.

IN THE MATTER OF THE GRAHAM'S TOWN AND PORT ALFRED RAILWAY COMPANY, LIMITED, IN LIQUIDATION.

Mr. Molteno applied on behalf of the liquidator for leave to correct certain errors in the names recorded in a list of debenture-holders enumerated in a bond executed in terms of Act of 1895, section 4, and filed in the Deeds Office.

The application was granted.

THE PETITION OF JOHN ELLMAN.

Mr. Graham applied for a rule *nisi*, under the Derelict Lands Act, to be made absolute.

The application was granted.

POTGIETER AND OTHERS V. POTGIETER AND OTHERS.

This was an application for an award of arbitrators to be made a rule of Court.

Mr. Schreiner, Q.C., appeared for the applicant; Mr. Searle, Q.C., for Mr. Arderne, the *curator ad litem* of the minors; Mr. Innes, Q.C., for thirteen respondents.

Mr. Innes consented to the application being granted.

Mr. Searle said Mr. Arderne had no information on the matter, although he had written for it. The arrangements had been privately arrived at, not through attorneys.

The Chief Justice said Mr. Arderne had been appointed *curator ad litem* by the Court, and he must exercise his judgment.

Mr. Searle suggested that the order should be granted, subject to Mr. Arderne's consent being obtained.

The order was granted, subject to the written consent of Mr. Arderne being filed.

PETITION OF WILLIAM HENRY TENNANT.

Mr. Buchanan applied for the cancellation of a mortgage bond upon payment to the Master of capital and interest, the holder of the bond, one Marks Levy, being absent from the Colony.

The application was granted, and the Master appointed to receive payment.

THE COLONIAL GOVERNMENT V. VAN DER WALT.

Mr. Sheil (Acting Attorney-General) applied for the attachment of certain landed property to found jurisdiction, and for leave to sue by edictal citation. The debts were for quitrent on two farms in the Vryburg district.

The application was granted.

IN THE MATTER OF THE CAPE COMMERCIAL BANK, IN LIQUIDATION.

Mr. Schreiner, Q.C., applied for a list of compromises in this estate to be confirmed.

The application was granted.

DE MARILLAC V. RIECHELMANN AND OTHERS.

Mr. Innes, Q.C., applied for leave to attach certain rights in certain farms to found jurisdiction.

The Chief Justice held that the application was premature, and that there was not sufficient information before the Court to justify the Court granting the order. Their lordships did not know what was to be attached, and they did not know the nature of the arrangements made with the owners of the farm in question. The application must therefore be refused.

IN THE ESTATE OF THE LATE PETRUS JOHANNES JOOSTE.

Mr. McGregor applied for consent to the partition of a certain farm in which minors were interested.

The application was granted.

ESTATE OF THE LATE KLOFF MARTHINUS BERG.

Mr. Buchanan applied for a rule *nisi* under the Derelict Lands Act to be made absolute.

The application was granted.

FAURE V. FAURE.

Mr. Close applied on behalf of Mrs. Faure for leave to sue *in forma pauperis* in an action for divorce against her husband.

The application was referred to counsel for certificate of probable cause.

SUPREME COURT.

[Before the Right Hon. the Chief Justice (Sir J. H. DE VILLIERS), the Hon. Mr. Justice BUCHANAN and the Hon. Mr. Justice MAASDORP.

ALLEN V. TOMPKINS. } 1897, Dec. 15th.

Sale—Ownership—Attachment.

At a sale in insolvency A. *bought certain furniture.* B., *almost immediately afterwards paid the purchase price to the auctioneers and took over the furniture from them.*

This was done without A.*'s knowledge but the amount paid by* B. *was credited to* A. *in the vendue roll.*

The furniture was then lent by B *to the insolvent, who kept possession of it for eight months, when it was again attached in execution of a judgment obtained by* A. *against the insolvent.* B. *claimed the property and interpleaded, but the Magistrate decided that the property was executable.*

Held, *on appeal that* B. *had bought on behalf of the insolvent and that the Magistrate's decision should be sustained.*

This was an appeal from a decision of the Resident Magistrate of the Paarl in an interpleader suit heard before him on the 18th October last.

The question in dispute between the parties was the ownership of certain furniture which was attached on the 5th October, 1897, in execution of a judgment for £13 5s., obtained by the respondent against one Du Toit. The furniture was in Du Toit's house when attached, but was afterwards claimed by the appellant on the ground that he had bought it at the sale in Du Toit's insolvent estate held on January 25, 1897. It appeared that at this sale the furniture was sold for £20 to the respondent, who also bough: other movables, being debited in the vendue roll of the auctioneers, Faure, Neethling & Co., with £105 17s. 6d. The appellant the same or the following day bought the furniture from the auctioneers, paying £20, which was credited in the vendue roll to the respondent, who only paid the balance of his account, viz., £85 17s. 6d. The appellant then lent all the furniture, with the exception of a piano, to Du Toit, who had had possession of it ever since, and had paid no rent. The appellant said he had agreed to buy the furniture out and out, but Du Toit had not been able to pay.

The respondent deposed that he knew nothing about the sale to appellant until a week later, when the auctioneers told him that appellant and Du Toit had been to the office and deposited £20 on his account; that appellant had told him that he had taken possession of the piano as security; that he had never given his consent to the transfer of the debt from himself to appellant. He also said that there was an understanding that Du Toit and he were to go together: Du Toit was to work for him, so he bought the furniture, but the next morning they had a split, and Du Toit refused to work for him. Subsequently he obtained judgment for £13 5s., and this furniture was attached in execution.

The Magistrate held that the furniture was executable on the ground that the respondent purchased it originally for Du Toit's benefit; that Du Toit had had possession of it ever since; that the appellant could not purchase without respondent's consent, and that not having obtained this he could not set up his ownership.

Mr. Searle, Q.C., for the appellant.

Tompkins could not claim the goods after Allen had paid; Faure, Neethling & Co. could be Tompkins's agent if Tompkins had afterwards ratified the transaction. There is no evidence that this was a loan to Du Toit. *Hofmeyr* v. *Gous* (10 J., p. 115) is not in point, because here the judgment creditor was cognisant of the whole transaction and was not misled.

Mr. Graham for the respondent was called upon.

The appeal was dismissed with costs.

The Chief Justice said: The appeal must be dismissed, although not entirely, for the reasons given by the Magistrate. I do not think it is quite clear that Tompkins bought the furniture for himself. It is quite clear that this was a device. The piano itself was worth a great deal more than £20, at which price it was knocked down to Tompkins. Afterwards Allen took over the furniture, and it is clear that it must have been bought by Allen on behalf of Du Toit. It was an advance on loan to Du Toit, and Du Toit remained in possession, but Allen retains the most valuable portion of the furniture, which is his security. The onus of proof of ownership lies upon the claimant. The claimant said, "That property is mine," and that he must prove. The whole of the evidence shows that it was not. The appeal will be dismissed, and the judgment affirmed with costs.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, V. A. van der Byl.]

DIGEST OF CASES.