SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

SOUTHERN DIVISION

1951

VOLUME I
(Part XVII)

THE GOVERNMENT PRINTER, PRETORIA

G.P.-S.5581—1951-2—500.
(Req. 2/8—3/8/51.)

CASE No. 144.

VIVIAN CELE *v.* FINCHAM CELE.

KINGWILLIAMSTOWN: 23rd July, 1951. Before J. W. Sleigh, Esq., President. Pike and Key, Members of the Court (Southern Division).

Native Appeal Case—Estate—Quitrent allotment—Cancellation for non-beneficial occupation—Defendant not responsible for wrong procedure by Resident Magistrate.

Dywili Cele the registered holder of Lot No. 416 Mbinzana location, Glen Grey district, died in 1932. His wife and his eldest son J predeceased him. J's son S absconded. W, the second son of Dywili and the father of plaintiff, lived with his family in the Transvaal. W became ill, returned with his family to Glen Grey district in 1936 and died in the mental hospital in 1947. The title deed to the lot was cancelled for non-beneficial occupation in 1936 and the land was re-allotted to defendant, the third son of Dywili, in 1937.

In the particulars of claim it was alleged that the cancellation of the title deed was illegal, that defendant who was the guardian of W's minor children and who was in full charge of the land at all relevant times, was in duty bound to protect the interest of the whole family and that notwithstanding his position of trust he allowed the lot to be cancelled and secured registration of it in his own name.

Plaintiff claimed *inter alia* transfer of the lot from defendant to himself.

Held (1): That the Resident Magistrate should have caused absconder notices to be served in terms of section 2 (*b*), Part II of Government Notice No. 2257 of 1928.

Held (2): That defendant could not have prevented the cancellation for non-beneficial occupation as this was an official act for which he is in no sense responsible.

Held (3): That there is no allegation or proof of fraud and that defendant was entitled to a land and the Native Commissioner had a discretion to grant him this land.

Appeal dismissed.

Case cited:—

Swaartbooi *v.* Swaartbaai, 1945, N.A.C. (C. & O.) 46.

Appeal from the Court of the Native Commissioner, Lady Frere.

Sleigh (President), delivering the judgment of the Court:—

The late Dywili Cele was the registered holder of Lot No. 416 in Mbinzana Location, Glen Grey district. He died in 1932. His wife and his eldest son, Jojiwe predeceased him. Siswana, the son of Jojiwe, absconded after Dywili's death. William, the second son of Dywili and the father of plaintiff, removed to the Transvaal in 1919. He was apparently subject to epileptic fits. He returned to Glen Grey district in 1936, was admitted to the mental hospital, Queenstown, in 1940, discharged in 1943, readmitted in 1944 and died in hospital in 1947.

The title to the lot in question was cancelled on 23rd March, 1936, on the ground of non-beneficial occupation with effect from 31st December, 1935, and the land was re-allotted to defendant, the third son of Dywili, on 20th December, 1937, with effect from 1st January, 1937.

The material allegations in plaintiff's summons are that after the death of Dywili, defendant was in full charge of the allotment, that during the absence of William and during his illness

and incapacity defendant was the guardian of William's minor children, including plaintiff, and that it was his bounden duty and responsibility to protect the interests of the whole family, and that notwithstanding the position of trust held by the defendant he allowed the said lot to be cancelled and secured registration of it in his own name. It is further alleged that the cancellation of the said allotment is wrongful, unlawful and illegal for the following reasons:—

(*a*) The registered owner was a deceased person (namely Dywili Cele) and it was not possible for such a person to fail beneficially to occupy the allotment;

(*b*) the persons interested in the proposed cancellation were not notified of the intention to cancel, and were not given an opportunity of curing the alleged omission;

(*c*) actually, the allotment was cultivated and beneficially occupied by the defendant as guardian to the heir, William Cele, and his family.

Plaintiff prayed—

(1) for the declaration that the cancellation of the allotment was irregular and contrary to law and also based upon the fraudulent action of the defendant;
(2) for a declaration that the re-allotment to the defendant was irregular and contrary to law;
(3) that the order of cancellation and re-allotment be rescinded;
(4) that the defendant be ordered to take whatever steps are necessary to effect transfer of allotment 416 within a time to be specified by the Court and that failing his carrying out the order within the time specified the plaintiff be given leave after notice to the Chief Native Commissioner to apply to this Court for an order directing the Registrar of Deeds to pass transfer into his name.
(5) or alternatively that in addition to the order prayed for in (3) that absconder's notices be issued to ascertain whether the aforesaid Siswana shall be held to have forfeited his right to the allotment, and in case of forfeiture that the ground be re-allotted to the plaintiff.
(6) for such alternative relief as to the Court may appear to be just and proper;
(7) that the defendant may be ordered to pay the costs of suit.

Defendant pleaded specially that the court had no jurisdiction to hear the case or grant the orders prayed for in the summons. He denied that he was the guardian of William's children, that there was a duty upon him to protect the interests of the whole family and that he allowed the lot to be cancelled. He averred that the property reverted to Government and that it was subsequently allotted to him.

The Native Commissioner dismissed the special plea and after hearing evidence entered a judgment of absolution. From this judgment plaintiff appeals on a number of grounds. At the hearing of the appeal Counsel for appellant (plaintiff) stated that he could not contend that the cancellation of the title deed of the allotment was unlawful and irregular, because the Government is not a party to the action, but he contended firstly, that the cancellation was obtained as the result of fraudulent representations made by defendant, and secondly, that there was a duty and responsibility upon defendant to protect the interests of William Cele and his family, and instead of carrying out his duty he proceeded to benefit himself at the expense of William's family.

The Glen Grey Act (No. 25 of 1894) provides for the division of Glen Grey district into locations, for the survey of the locations and for the division of arable land in the locations into allotments. Section 5 provides for the issue of title deeds to the allotment holders which title deeds shall be subject to the conditions prescribed in Schedule "A". Clause XIII of this schedule as amended by Act No. 14 of 1905, provides that the land shall further be liable to forfeiture by the Governor *inter alia* if the

registered holder has failed for a period of three years to beneficially occupy his allotment in accordance with *regulations* to be made by the Governor. In a case of non-beneficial occupation the Resident Magistrate shall, after consultation with the District Council, report such failure to the Governor who shall give three months notice to such registered holder of his intention to cancel the title deed, and should the registered holder fail to make proper use of the allotment within the period of notice, the title may be cancelled and the allotment granted to an *approved applicant*.

The regulations in force at the time of the cancellation of the title deed are contained in Government Notice No. 936 of 1919, section 99 whereof defines *beneficial occupation* as meaning " the cultivation of or the growing of crops upon an allotment or portion thereof, (*a*) personally by the registered holder of the allotment, or (*b*) under the personal supervision of the registered holder of the allotment, or (*c*) subject to the provisions of regulation No. 100 hereof by the approved representative of the registered holder." Regulation 100 allows for the appointment of a representative if the registered holder is unable to occupy the allotment himself.

In the Court below it was contended that a title deed of land registered in the name of a deceased person cannot be cancelled for non-beneficial occupation. In view of Counsel's admission we are relieved of deciding this point. But assuming that the cancellation was illegal, was defendant responsible for the illegal cancellation? He says that the Land Clerk asked him where the heirs were, that he replied that they were in Johannesburg and gave him their names but said that he did not know their addresses. It is thus clear that the Resident Magistrate knew that Dywili had died and that the heirs had absconded. He should, therefore, have caused absconder notices to be served on the heirs in terms of section 2 (*b*), Part II of Government Notice No. 2257 of 1928, and should not have reported to the Governor that the land was not beneficially occupied. But it was not for defendant to tell the Magistrate what he should do and what he should not do. It is clear that he could not have prevented the cancellation for non-beneficial occupation. This was an official act for which defendant was in no sense responsible.

It is, however, contended that defendant knew the address of William. The evidence supports this. Assuming that defendant had an ulterior motive for not disclosing William's address, this did not absolve the Resident Magistrate from causing absconder notices to be served upon Siswana whose address was unknown. Defendant cannot be held responsible for the wrong procedure adopted by the Resident Magistrate.

If defendant had falsely represented to the Resident Magistrate that Dywili was alive and that he was not using the land, and had thus induced the cancellation, he might in a proper case, have been held responsible, but it is quite clear from the evidence that no such false representation had been made.

Defendant stated in his evidence that the quitrent remained unpaid deliberately for three years, and it is contended that he should not have allowed the rent to fall in arrear. There would have been something in this contention if the land had been cancelled for non-payment of quitrent as provided in section *sixteen* of the Act, but this was not the reason for the cancellation.

The next point argued is that defendant who had a responsibility to William and his children should have applied for the re-allotment of the land to William. It is not clear when defendant applied for re-allotment of the land to himself. He says that the new title deed had already been issued when William returned to Glen Grey district. He probably means that his application had already been approved. Be that as it may, it is clear that at the time of his application he was an adult male landless resident of Mbinzana location and was therefore entitled to a land and the Native Commissioner had the discretion of granting him the land over the heads of his senior relatives.

In order to succeed plaintiff must allege and prove that defendant obtained re-allotment of the land in his name by fraudulent representations [see Swaartbooi *v.* Swaartbooi, 1945, N.A.C. (C. & O.) 46]. There is no allegation or any proof of fraud. The most that could be said against defendant is that there was a moral obligation upon him to consider the rights of his elder brother before his own and that he obtained re-allotment of the land without disclosing it to William. Defendant was never requested nor undertook to apply for re-allotment to William. In fact he says that William had told him in the Transvaal that he had no intention of returning to Glen Grey district. This evidence is supported by the fact that when William came to Mbinzana to lay a stone upon his father's grave he did not apply for re-allotment of the land to him, although he knew then or should have known that he would be entitled to the land failing Siswana. There are thus no grounds upon which the Court would be justified in making an order in terms of the 4th prayer in the summons.

The appeal is dismissed with costs.

For Appellant: Mr. Gillitt.

For Respondent: Mr. Barnes.

CASE No. 145.

ARCHIE BALFOUR *v.* TOM MANGCAYI.

KINGWILLIAMSTOWN: 24th July, 1951. Before J. W. Sleigh, Esq., President, Pike and Key, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Seduction and pregnancy—No fine payable for intercourse with pregnant spinster—Practice and Procedure—Conflict of Laws—Native Law should be applied to case brought and defended under Native Law unless custom relied on is contrary to natural justice.

Plaintiff paid defendant two cattle as fine on the allegation that defendant's daughter, A, was seduced and rendered pregnant by plaintiff's son, M. According to the evidence A was already pregnant when M had sexual intercourse with her.

The Native Commissioner entered judgment for refund of the two cattle or payment of their value.

Held (1): That no fine is payable under Native Law for having sexual intercourse with a pregnant spinster, and that if a man has been induced to pay a fine under false accusation that he had rendered the woman pregnant the fine paid must be refunded in full.

Held (2): That section *eleven* (1) of Act No. 38 of 1927 confers a discretion upon a judicial officer to decide a case according to Native Law, provided that such law is not opposed to the principles of natural justice.

Held (3): That if Native Law did prescribe a fine for having sexual intercourse with a pregnant spinster, it would not be contrary to natural justice to fine the man for the immoral conduct.

Held (4): That since the action was brought and defended under Native Law the Native Commissioner should have decided the case according to Native Law and not according to Common Law.

Appeal dismissed.

Cases cited:—

Ngxazana *v.* Halam, 1940, N.A.C. (C. & O.) 59.
Mandayi & Ano. *v.* Vananda, 1943, N.A.C. (C. & O.) 19.
Sontundu *v.* Damane & Ano. 3 N.A.C. 261.
Siboto *v.* Mondli, 1940, N.A.C. (C. & O.) 174.

Appeal from the Court of the Native Commissioner, Alice.

Sleigh (President), delivering the judgment of the Court:—

This is an appeal against a judgment for plaintiff for the return of two head of cattle or payment of their value £10.

The material allegations in the summons are—

(1) that plaintiff is the head of his kraal and is responsible for the torts of his son Matthews who is an inmate thereof;
(2) that in May, 1950, defendant alleged that Matthews had caused the pregnancy of defendant's daughter Amelia in February, 1950, and demanded five head of cattle as damages;
(3) that Matthews had been absent from the district for a considerable time returning only on 28th January, 1950, and as he was in May, 1950, undergoing circumcision, plaintiff paid defendant two cattle on condition that if the child was born before October, 1950, the two cattle would be returned; and
(4) that as Amelia gave birth to a fully developed child in August, 1950, Matthews was, in fact, not responsible for Amelia's pregnancy. Plaintiff accordingly claimed the return of the cattle or their value £10.

A number of allegations in the summons are denied in the plea, but it appears from the evidence that the only points in dispute are whether or not Matthews had full intercourse with Amelia on 29th January, 1950, whether the cattle were paid conditionally and whether the child was fully developed at birth. It is averred that Matthews is the father of Amelia's child which was born prematurely.

The first point for decision is whether Matthews had full connection with Amelia on 29th January, 1950, as she asserts. It is common cause that he was her sweetheart before he left for the mines in January, 1948, that he returned on 28th January, 1950, and met her by arrangement on 29th January. She says that he had full intercourse with her that evening. According to her evidence he raped her. He however denies this. He says that they lay down for about five mintes and that he made love to her and tried to have sexual intercourse with her, but that she refused.

In our opinion the probabilities favour Amelia's version. If she were not a virgin at the time and was in fact already pregnant—which is plaintiff's case—there was no reason why she should refuse to allow him—her lover—sexual satisfaction, especially if she intended to blame him for her condition. We therefore accept her evidence that Matthews had full sexual intercourse with her that evening.

The next question for decision is whether this intercourse resulted in the pregnancy of Amelia. The onus of proving that it did not is, in law, upon plaintiff. The evidence on which he relies is that the child was fully developed at birth.

Amelia was confined in the Victoria Hospital, Lovedale. Dr. Petcni states that he attended at her confinement, that he examined the child and weighed it and that its weight was 6 lbs. 5½ ozs. He expressed the opinion that it was a normal fully developed child. He states that a premature child is generally lean with sunken cheeks and face—like a little old man—underweight and a poor cryer and poor sucker. He says that Amelia's

child showed none of these symptoms and generally there were no signs to indicate that it was a premature child, on the contrary all the signs indicated that it was a full-grown child. He admits that a premature child might weigh more than 5½ lbs. and that weight alone is not a very reliable test, but it is a guide.

Amelia contradicts Dr. Peteni's evidence almost on every point. She states that she had never *metshaed* in her life, that Matthews was the first and only man who had carnal intercourse with her and that she menstruated regularly up to and including the month of January, 1950. She admits that she was delivered of a female child on 28th August, 1950, that is, 211 days after the intercourse, but she says that it was born prematurely. She says that it had very scanty hair and hardly any eye-brows and finger nails, that it had no strength to take the breast and had to be fed with a teaspoon and that it had a very small head, pinched appearance, sunken face and looked like a very little old man. She states further that she was conscious all the time while in labour and denies that Dr. Peteni was present. She says that only the nurse and the staff nurse were present and that she saw the doctor for the first time on the fourth day after the birth.

Lenah, the mother of Amelia, supports the latter's evidence in regard to the hair, eyebrows and fingernails. She also says that she knows that Amelia had her periods in January, 1950, because she washed her daughter's soiled underclothing. Here we have two conflicting versions. In Ngxazana *v.* Halam [1940 N.A.C. (C. & O.) at page 59] this Court rejected the medical evidence on the ground that it was inconclusive, contradictory and somewhat dogmatic, but that case is distinguishable from the present case as in that case neither of the doctors saw the child at birth. They based their opinions on deductions from observations made from one to two months after birth. The decision in Mandayi and Another *v.* Vananda [1943 N.A.C. (C. & O.) 19]—the case relied upon in the Court below—is also not in point, for in that case there was no admissible evidence that the man was absent from the district when the woman conceived.

In the present case the conflict is not that wrong deductions were made from the symptoms displayed by the child, but whether or not it showed signs of immaturity. The doctor must be regarded as entirely unbiased. We must assume that he honestly believed that it was a full-time child. If it were not and showed signs of immaturity then the doctor could not have made a very careful examination, but everything is against this. If there had been such signs then it is probable that the mother would have been questioned, the doctor would have been advised and steps would have been taken to give the child special care. Then again the child died of bronco pneumonia five days after birth. If there had been signs of immaturity the doctor would naturally have regarded this as a contributory cause of the death. There was thus every reason why the doctor's attention would have been drawn to the condition of the child if it had been born prematurely. He says definitely that all the indications were that it was fully developed and it is not likely that he would have failed to notice the signs testified to by Amelia and her mother. In our opinion the Native Commissioner was correct in accepting the medical evidence, and the conclusion is that the period of gestation had run its full course and that Matthews could not have been the father of the child.

There is further evidence to support the plaintiff's case. Amelia says that she had never *metshaed* before, that Matthews was the first man to have sexual relations with her and that he had intercourse with her forcibly. In such circumstances one would have expected some haemorrhage if she were a virgin, but she says that she did not bleed. It is probable therefore that she was not a virgin in January, 1950.

Having come to the conclusion that Amelia was already pregnant when Matthews had intercourse with her, it is unnecessary to consider whether or not the cattle were paid conditionally,

because it is clear that the payment was made under representations which, although innocent in so far as defendant is concerned, was nevertheless false, and consequently plaintiff is entitled to restitution (see Maasdorp, Vol. III, 3rd Ed. pp. 71 and 72).

One of the grounds of appeal is that the Native Commissioner erred in applying Common Law to the dispute. Counsel for appellant states that the Native Commissioner had a discretion in the matter and that he was unable to argue that this discretion had been exercised improperly. We feel, however, that we should deal with this matter if only for the future guidance of the judicial officer.

The Native Commissioner in his reasons says in effect that Sec. II (1) of Act No. 38 of 1927 confers a discretion upon him to decide a case, in which a question of Native Law and Custom is involved, according to that system of law, but only if such Native Law is not opposed to the principles of natural justice, and that he could not have administered natural justice if he had decided this case according to Native Law. I infer from this that he held the view that plaintiff would be liable for a fine even if his son had not seduced Amelia nor rendered her pregnant. The Native Commissioner has quoted no authority in support of his view, nor has he stated what the law is where a man was induced to pay a fine for seduction and pregnancy and it is subsequently discovered that the woman was seduced and rendered pregnant by someone else.

In Native Law fines are payable for seduction not followed by pregnancy and a higher fine if pregnancy ensues. If the girl had been carrying on with more than one man the higher fine is payable by the man who rendered her pregnant whether or not he originally seduced her. (See Sontundu *v.* Damane and Another 3 N.A.C. 261). There is no fine in Native Law for having connection with a pregnant spinster because the man has neither seduced her nor has he rendered her pregnant, and where, as in the present case, the man has been induced to pay a fine under the false accusation that he had cause the woman's pregnancy then the fine so paid must be refunded in full [see Siboto *v.* Mondli, 1940, N.A.C. (C. & O.) 174]. There was therefore no necessity to apply Common Law in order to do justice. Since the action was brought and defended under Native Law the Native Commissioner should, in our opinion, have applied Native Law, even if that Law did prescribe a fine for intercourse with a pregnant woman, because it would not be contrary to natural justice to fine a man for immoral conduct.

The appeal is dismissed with costs.

For Appellant: Mr. Gillitt.

For Respondent: In default.

CASE No. 146.

WILLIAM MAKAYA *v.* **NORA MANGALA.**

KINGWILLIAMSTOWN: 30th July, 1951. Before J. W. Sleigh, Esq., President. Pike and Key, Members of the Court (Southern Division).

Native Appeal Case—Damages—Bona fide *possessor has a right to claim compensation—Failing payment he can remove improvements—Elements necessary to constitute legal possession.*

Appellant erected three additional rooms on premises sold to him by N company. The sale was cancelled and the purchase price refunded. A claim for compensation for the three rooms was not paid. Later the property was sold to M but appellant continued to collect the rent for the three rooms. M sold the propety to respondent who did not know of appellant's claim. When appellant became aware of this sale he demolished the three rooms and removed the material.

In an appeal against a judgment for respondent for £100 damages the value of the three rooms:—

Held (1): That both elements necessary to constitute legal possession in appellant were present.

Held (2): That appellant remained in possession all the time and endeavoured to obtain compensation.

Held (3): That respondent did not receive transfer in the Deeds Registry and was thus not the owner.

Held (4): That respondent never acquired legal possession of the three rooms.

Held (5): That even if she did, her claim for damages must fail as her title was equal to and not stronger than appellant's.

Appeal succeeds.

Cases cited:—

Barnard *v.* Colonial Government, 5 S.C. 122.

De Beers Consolidated Mines *v.* London and South African Exploration Company, 10 S.C. 359.

Harris *v.* Buissinne's Trustee, 2 Men. 105.

Cairncross *v.* Nortje, 21 S.C. 127.

Appeal from the Court of the Native Commissioner, Port Elizabeth.

Pike (Member), delivering the judgment of the Court:—

This is an appeal in respect of a judgment against defendant (now appellant) for £100 damages being the value of 3 rooms demolished by him and removed from the property of respondent.

It appears from the evidence that Wells' Estate was the owner of a number of properties in Port Elizabeth including No. 5 Dorset Street, Korsten. In 1929 the Estate sold the property to Thomas Mateza. He did not pay the purchase price in full, with the result that the property was never transferred to him. Subsequently the Estate sold the property to NuTreads and, on application, the Supreme Court cancelled the sale to the company. Before this order was made NuTreads had in December, 1948, sold the property to defendant for £400. At that time it consisted of 6 rooms, all of which were let to natives. Up to December, 1948, Mateza collected the rent but from January, 1949, appellant received the rent. He erected three additional rooms on the site and let them to natives. Although these rooms were constructed of wood and iron it is common cause that they were intended to be permanent structures. As appellant was unable to obtain transfer, he demanded and received a refund of the £400 paid by him. This refund was made on 4th October, 1949. The sale to appellant was thus cancelled and Wells' Estate thereafter confirmed the original sale to Mateza. The latter again collected the rent in respect of the 6 rooms but appellant continued to collect the rent for the three additional rooms erected by him. Mateza demanded the rent for these three rooms from appellant, who refused to pay it to him. Mateza thereupon, to use his own words, "left him to do as he pleased. I did not make any further attempt to collect the rent". Thereafter, appellant made a claim upon NuTreads for £75 the value of the three rooms. The basis of the discussion was that NuTreads would refund the £75 or the appellant would remove the improvements. The £75 was never paid.

About April, 1950, Mateza received notice from Wells' Estate that unless the balance owing by him on the property was paid the contract of sale would be cancelled. Mateza then requested Willie Grootboom, an estate agent, to obtain a buyer. The result was that on the 27th May, 1950, respondent bought the property, as it stood, from Mateza for £350 without knowledge that 3 of the rooms had been erected by appellant. The respondent was handed over the property by the seller on the 1st June, 1950.

She has completed the necessary papers, paid the purchase price in full, but owing to some hitch in the administration of Wells' Estate, transfer has not yet been registered in her name in the Deeds Office.

When the property was sold to respondent the appellant was absent in Natal. He returned at the beginning of July, 1950, and on learning of the sale to respondent he went to see Mr. van der Merwe, the attorney, who had drawn up the deed of sale between Mateza and respondent. He told van der Merwe of his claim for his improvements and said if he were not paid he would demolish the three rooms. He was not paid, so demolished the rooms on 3rd July, 1950, removed the materials and provided other accommodation for his 3 tenants. Respondent then instituted this action.

The main ground upon which the Native Commissioner found for respondent is that appellant lost possession of the premises when he received a refund of the purchase price from NuTreads, that consequently he was a trespasser and took the law into his own hands when he demolished the 3 rooms and removed the materials.

The appeal is based on a number of grounds but I propose to refer to two of these grounds—

(1) "that on the evidence the Native Commissioner should have found that at all material times the defendant was a bona fide possessor in respect of the improvements effected by him on the property sold to him by NuTreads (viz. the 3 rooms in issue herein)";

(2) "that if plaintiff became possessed of the erf purchased by her on the 1st June, 1950, she did not become possessed of that portion on which defendant's improvements were erected because defendant was already in bona fide possession of this said land and never abandoned his rights as bona fide possessor. Defendant as bona fide possessor at all material times retained his ownership in the said improvements and had a *right in rem* to claim compensation for these said improvements. Failing payment of such compensation defendant retained at all material times the right to remove these said improvements and in fact the removal by defendant was effected in pursuance of this lawful right."

It was never in dispute that appellant was a bona fide possessor prior to receiving a refund of £400 from NuTreads. The facts disclose that, after receiving back his purchase price, the 3 tenants of the rooms in dispute remained in occupation and paid the rent to him, that at the same time he demanded compensation from NuTreads in respect of these rooms, continued to collect the rent from the 3 tenants until demolition took place and then provided the tenants with other accommodation. Were both the elements, necessary to constitute appellant a bona fide possessor, present, viz; the physical detention with the intention of holding it as his own? (*Maasdorp* Vol. II, 7th Ed. p.17).

There can be no doubt that appellant had the intention of holding these 3 rooms for himself. Mateza demanded the rent for these rooms from him but he refused to comply with this demand and thereafter Mateza admits that he allowed appellant to do as he pleased. Sometimes the physical detention is exercised by another e.g. a depositary or a lessee. People like these have merely the physical detention of the thing lent or deposited by the leave and licence of the owner and on his behalf. The real possession is in the owner who still has the intention of keeping the thing as his own and who exercises his detention through the borrower or the depositary (Maasdorp *supra*, page 17). Therefore both the elements necessary to constitute legal possession in appellant were present.

The Native Commissioner held that appellant abandoned his rights after he received the refund of the £400. There is no evidence to support this finding, on the contrary the evidence indicates that he, at all times persisted in his endeavours to obtain compensation and remained in full possession of the 3 rooms. In Barnard *v.* The Colonial Government (5 S.C. 122), de Villiers, C. J. said: "If the owner who is liable to pay compensation, refuses to pay any, the person in possession, who has effected the improvements, is not bound either to sue the owner, or to retain the land until compensation is paid, but he may elect to remove the materials if he can do so (and this is the important qualification) without altering for the worse the condition of the land, as it was before the improvements were effected".

In De Beers Consolidated Mines *v.* London and South African Exploration Company (10 S.C. 359) it was held that a *bona fide* possessor of land retains his ownership in materials affixed by him to the land until he has parted with the possession. Even after the owner has demanded possession such *bona fide* possessor may retain possession until he is compensated for his improvements to the extent of the enhanced value of the land, and failing payment of such compensation, he may remove the materials if he can do so without serious injury to the land, or he may surrender occupation and recover the compensation by action.

There is no evidence that appellant demanded compensation from respondent. It is therefore necessary to consider the question as to whether she was the owner. In Harris *v.* Buissinne's Trustee (2 Men 105) it was held that the *dominium* or *jus in re* of immovable property can only be conveyed by transfer made *coram lege loci* and that an agreement of sale of immovable property, followed by delivery of possession by the vendor to the purchaser, gives the purchaser nothing more than a *jus ad rem,* and a personal claim against the vendor to convey the *jus in re* or *dominium* to him by transfer *coram lege loci.*

Respondent did not receive transfer and was thus not the owner.

It remains to be considered whether respondent was also a *bona fide* possessor of the 3 rooms. The evidence discloses that she was pointed out the property by Mateza, or his agent and that she received rent from the end of June. In view of appellant's definite statement that he received the rent from the 3 rooms up to the time of demolition on the 3rd July, 1950, and that he thereafter provided the three tenants with other accommodation, two of them upon other property of his, it must be inferred that respondent referred to rent from the six rooms only. Applying the test as laid down by *Maasdorp* (*supra*) she could have had only the intention of holding the 3 rooms for herself after the pointing out and did not have physical detention through any one. She thus never acquired legal possession and could not be a possessor of the 3 rooms.

But assuming that when the property was pointed out to her she was placed in possession of all the rooms, and was thus a possessor, her action still must fail because her title, at most, was only equal to, and not stronger than, that of appellant (*Voet* 6.2.6).

The Native Commissioner in his reasons says that, as the improvements were immovable, the decision in Cairncross *v.* Nortje (21 S.C. 127) would seem to support his judgment. I do not agree with the Native Commissioner's view. The decision in that case awarded damages to the purchaser against the vendor in respect of the non-delivery of improvements removed by a lessee, during the currency of his lease, after the contract of sale and before transfer was passed. This case does not support the contention that the purchaser is entitled to these damages from a *bona fide* possessor, but deals only with the purchaser's right *in personam* against the seller for damages.

The appeal is allowed with costs and the judgment of the Court below is altered to one for defendant with costs.

For Appellant: Miss Adv. Egan, Port Elizabeth.

For Respondent: Mr. Thornhill-Cook, Kingwilliamstown.

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