DE VILLIERS, A.J.A.: I agree with the judgment which has been prepared by my brother SOLOMON, except that I [illegible]

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dist: Meyer v Hessling 92/3/862/NmS
cons: Meyer v Hessling 92/4/286/NmS

no reason to [illegible] v. *The Treas*[illegible] no discretion under sec. 9 (1) of Act 39 of 1916 to refuse the order asked for once it has been established that the appellant is an enemy subject. From the wording of the Act I come to the conclusion that it was not intended that the Minister should give his reasons for the action contemplated by him and that the Court should have the right to override the Minister. The latter is the sole judge as to whether it is or is not expedient in the public interest. Nor is the order dependant upon the character, conduct or circumstances of the enemy subject. If for reasons of State the Minister decides to take the steps authorised by the section, his action becomes an act of State which cannot be scrutinised by the Court, if the Court is satisfied that the petition relates to an enemy or enemy subject. That this is so follows I think also from the general provision in sec. 9 (1) that subject to exceptions which need not be referred to the Custodian has to hold the property of such enemy subject vested in him under the Act until the termination of the present war, " and shall thereafter deal with the same in such manner as His Majesty may by Order-in-Council direct." No doubt the words " the Court may make such order on the application as it thinks fit " would seem to give the Court the right to refuse the application under certain circumstances, but looking at the rest of the section that impression proves to be illusory. There is no room for the exercise of a discretion by the Court. Unless the Court wishes to lay itself open to the charge of acting capriciously or arbitrarily, I cannot conceive of circumstances under which, where the Minister has followed the Act, the Court would refuse the application. No matter what case for consideration the enemy subject may be able to put up, the Minister in my opinion is not bound to disclose to the Court the considerations which have led him to make the application. The only reason why the Minister has to come to Court at all is to establish that the person against whom he contemplates taking action under the Act is an enemy subject. And no imputation of negligence or default can be made if the Minister does not choose to reveal his reasons to the Court or meet the case for differential treatment put up by an enemy subject. I think we may take judicial cognisance of the fact that legislation on similar lines has been passed in other parts of the British Em-



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pire, and sec. 9 (1) rather points to the inference that the action taken by a Minister here might be in concert with Ministers elsewhere as part of a pre-arranged Imperial scheme. We may or may not like legislation of this kind, but whether we do or not in my opinion the Court has no power to refuse to make the order asked for in the case of an enemy subject. I would like to add that if the Court had a discretion the present seems to me a case where it might have been exercised in favour of the appellant.

*Appeal accordingly dismissed.*

Appellants' Attorneys: *J. C. Daniels & Co.*, Bloemfontein; Respondent's Attorneys: *Marais & de Villiers*, Bloemfontein.

24 OPD. 304. 71(1)SA 617 (A)
24 ND. 24.
61(2)SA. 435(W)

MAPENDUKA, *Appellant*, v. ASHINGTON, *Respondent.*

(BLOEMFONTEIN.)

[1919. *March* 11, *June* 27. C. G. MAASDORP, J.A., DE VILLIERS, A.J.A., and WESSELS, A.A.J.A.]

*Pledge.*—Pactum commissorium.—*Rights of pledgor.*—*Value of property pledged.*—*Guarantee against eviction.*

A *pactum commissorium* is illegal in a contract of pledge as being unduly oppressive to debtors.

If, however, when the time for payment arrives the debtor is willing that the creditor should retain the pledge as his own the creditor may so retain it provided a fair price is given (*per* DE VILLIERS, A.J.A., and WESSELS, A.A.J.A.).

In 1916 M signed a number of promissory notes in favour of A and agreed that if the notes were not paid on the due dates certain stock placed with A as security should become the property of A. M failed to pay the notes on the due dates and A with the knowledge and consent of M retained the stock and dealt with it as his own.

In 1918 M sued A for the return of the stock or payment of its value, tendering the amount of the debt. At this time A had only one ox remaining in his possession, some of the stock having died or been disposed of and one ox having been claimed and taken by a third party Z. A, after notice to M, had unsuccessfully sued Z for the return of the ox so taken. At the time when the notes fell due the value of the stock was equal to the amount of M's debt to A.

*Held*, on appeal (*per* DE VILLIERS, A.J.A., and WESSELS, A.A.J.A.), that though the agreement between M and A was a *pactum commissorium*, M. having stood by and seen A deal with the property pledged as his own could not now claim such property.

*Per* C. G. MAASDORP, J.A. : That M was entitled to the return of the ox in the possession of A on payment of its value.

*Held*, further, (*per* DE VILLIERS, A.J.A., and WESSELS, A.A.J.A.), that if at the time when the notes fell due the value of the stock had exceeded the amount of M's debt to A, M would have been entitled to receive from A the difference but would have been bound to pay in the deficiency if at that date the value of the stock had been less than the amount of the debt.

*Held*, further (*per* C. G. MAASDORP, J.A., DE VILLIERS, A.J.A., and WESSELS, A.A.J.A.), that M was liable to A for the value of the ox taken by Z and for the costs of the action against Z of which M had had notice.

The decision of the Port St. John's and Umtata Circuit Local Division in *Mapenduka* v. *Ashington*, confirmed, but reasons varied.

Appeal from a decision of the Port St. John's and Umtata Circuit Local Division (HUTTON, J.)

Plaintiff Mapenduka sued defendant Ashington in the Circuit Court for the return of certain stock or payment of their value £160 tendering payment of the sum of £112 10s. due by plaintiff to defendant. Defendant denied liability and claimed in reconvention the value of a certain ox seized by one Zibi and payment of the costs of an action brought by him against Zibi for the return of the ox.

The Trial Court gave judgment for the defendant both on the claim in convention and in reconvention and plaintiff appealed.

The facts are stated in the judgment of DE VILLIERS, A.J.A.

*F. G. Reynolds*, for the appellant: Taking the value of the stock at £109, and the cost of the mealies £109, the *pactum commissorium* set up by defendant is in law not valid. The court below held that the contract set up by defendant did constitute a *pactum commissorium* but that the law on this point was inapplicable on the ground that the value of the pledged articles and the debt due were the same. There is no authority for whittling away this doctrine. In the court below it was contended for defendant that this was a form of parate executie. I submit, however, that the contract was clearly *pactum commissorium.*

As to *pactum commissorium* see *Van Rensburg* v. *Weiblen* (1916, O.P.D. 247). In that case the case of *ex parte Mabunya* (20 S.C. 165) was criticised. See *John* v. *Trimble and Others* (1902, T.H. 146). This case is applicable because though it was the parate executie that was being dealt with I submit that a fortiori the decision would have applied to the *pactum commissorium.*

[WESSELS, A.A.J.A.: The law in prohibiting parate executie strove to prevent the creditor from arranging the sale at such place and time as to ensure weak bidding. But this reason would not apply to *pactum commissarium.*]



No authorities in Roman-Dutch law are in favour of the *pactum*, whereas some are in favour of the parate executie. See *National Bank of South Africa* v. *Cohen's Trustee* (1911, A.D. 235, at p. 242); *S.A. Law Journal*, Vol. 27, p. 527; *Voet*, 20.1.25. The other authorities are to the same effect. See Groenewegen's *De Legibus Abrogatis De Inst.*, 2.8.1. As to the right price this point seems to have been introduced by *Digest*, 20.1.16.19. *Codc* 8.35.3 abolishes the *pactum commissorium* in general terms.

The *Digest* allowed a pact of sale to be attached to a pledge to the effect that when the default occurred the pledgee should have the right to sell at a price to be estimated, not when the contract was entered into, but when the debtor failed to pay timeously. I submit that the passage of the *Digest* is not our law. Even if it is it is not applicable, because the price was not estimated at the proper time. In the present case the price was estimated at the time when the contract was entered into.

The modification in the *Digest* is taken over by *Voet*, 20.1.21.

The words, *Tunc aestimandum* are the keynote of the passage, and are put in to prevent the debtor from being forced to agree to the sale when he is in the hands of the creditor, and, therefore, the law required the price to be estimated at the time when he and the creditor were at arm's length. The principle of the modification is that of a sale and not of a taking over of a pledge.

The other authorities accepting the modification are all based on the passage in the *Digest.*

The case of *ex parte Mabunya* (20 C.S.C. 165) is distinguishable, as the creditor had been in possession of the land for seventeen years. It was a case under the Derelict Lands Act. Moreover, the decision could have been based on estoppel.

See Domat's *Civil Law* 1.3.1.3.11.

I submit that the law only gives the debtor the option to allow the creditor to sell the pledged article. None of the authorities say that the reasonableness of the price of the article makes any difference. It was reprobated in Roman-Dutch law because the authorities considered that the Court should intervene before the sale of the article. The *pactum* would utterly change the whole nature of the contract of pledge because in default of payment the debtor has no prospect of getting the article back. Things may be valuable to the debtor over and above the market price.

The above arguments show the reason why the reasonableness of the price should not be taken into consideration.

The new principle engrafted on to the Roman law in *Digest*, 20.1.16 *ad fin* does not apply.

The reason for reprobating the *pactum commissorium* still exists.

The tender in the alternative plea is conditional, as it depends on the failure of the original plea.

The pledge was only made for the capital, consequently it cannot be claimed to be held in respect of interest *a tempore morae*. See *Voet*, 13.7.6 The interest in respect of which the pledge is retained must be interest contemplated at the time of the contract.

[WESSELS, A.J.A.: Has the creditor not a *jus retentionis* over the property for the interest *a tempore morae*, apart from the contract of pledge?]

I submit that there is no *jus retentionis* in respect of interest not contemplated in the pledge.

There were four separate transactions in the four notes, and the cattle referred to on two of them are valued at less than £12 a head.

Interest was, as a matter of fact, tendered by the plaintiff. Consequently the defendant has no right of retention. The defendant clearly waived the tender. See *Fraustaeder* v. *Sauer* (9 S.C. 512).

A condition of sale at the time the debt became due was not pleaded, though it came out in the evidence in cross-examination. This Court would not, I submit, amend the pleadings without an opportunity of adducing further evidence on this point. As to amendments, see *Cole* v. *Union Government* (1910 A.D. at p. 273). In any case, respondent should not have his costs if the Court decide on this ground.

*H. G. Lewis*, for the respondent: As to the reason for the reprobation of *pactum commissorium*, see Sohm's *Institutes of Roman Law* (3rd edition), p. 353, *in notis*. The *pactum commissorium* was prohibited by Constantine as purely penal because it did not release the debtor from the debt. In Roman-Dutch law it was not of such a penal nature. See *Voet*, 20, 1, 25. It appears the reason it was reprobated in later times was because it tended to oppression. The intention in the present contract was that the debt should be wiped out. See *Digest* 20, 1, 16, 9, and *Voet*, 20, 1, 21. In that passage of Voet the words "*tunc aestimandum*" do not occur. If the Court holds that the price should be estimated at the time the debt became due the agreement was made at that time.

If necessary I shall ask for an amendment of the pleadings to



that effect. I submit no further evidence could be led on this point. The learned Judge in the court below accepted respondent's evidence on this point.

As to further authorities on the *pactum commissorium*, see Van Leeuwen's *Censura Forensis*, 1.4.8.7. Nothing is said in that passage as to the necessity of a subsequent agreement. Where there is no oppression and the value is reasonable, the reason for reprobation ceases.

[WESSELS, A.A.J.A. : See *Leyser*, Vol. III, Spec. 158, who also holds that if the value is reasonable the *pactum* should hold good.]

I would submit that *Leyser* and *Van Leeuwen* should be followed. The sole point to be decided is whether there has been oppression.

See Van Leeuwen's *Roman-Dutch Law* (Kotzé's translation), Vol. II, p. 86 (Decker's *Note*). See Schorer's *Note* to Grotius' *Introduction*, No. 266. Matthaeus' *De Auctionibus* in the passage quoted does not, I admit, support this view. *Ex parte Mabunya* (*supra*) is the only case in which the matter was crisply before the Court. In the other cases the point was parate executie or in case the *pactum commissorium* was before the Court the price was held not to be reasonable.

The only criticism of this case is by MCGREGOR, J., in *Van Rensburg* v. *Weiblen* (*supra*), on the following grounds:—

1. That it was the same Judge who gave utterance to the *dictum* in *National Bank of S.A.* v. *Cohen's Trustee* (*supra*). I submit that *dictum* cannot be taken to outweigh the decision. I take it that the criticism meant that the learned Judge had changed his mind. I submit that the *dictum* is in accordance with the law.

2. That the decision must be taken in conjunction with the special facts of the case.

In the present case there are also special facts. The debtor waited for a year to redeem his property and there is also the evidence of the agreement arrived at after the due date of the debt.

The case has now been argued on the hypothesis of four separate transactions. This was not raised in the court below, and on the pleadings defendant said there was one transaction.

As the stock represented in one of the notes was dead there could not have been a claim for return, but only their value. See *Stephens* v. *Whitford* (1903, T.H. 231). If the *pactum* is invalid the promissory note states and interest must be paid on it. If it is valid, the stock belonged to the creditor. I don't admit the transactions are separable.

*John* v. *Trimble* (*supra*) was purely a case of parate executie. The case was, I take it, decided on the authority of *Guldenpennings* v. *De Villiers* (not reported). But *Van Wyk's Executors* v. *Joubert* (1897, 4 O.R. 360) decided in favour of parate executie. *Van Wyk's* case was not quoted in *John* v. *Trimble*, nor was *Guldenpenning's* case quoted in *Van Wyk's* case.

As to *National Bank* v. *Cohen's Trustee* (*supra*), the statement was *obiter dictum*. In *Dawson* v. *Ekstein* (10 H.C.G. 15), the point in the present case was expressly left over, namely, the relation of the value of the pledge to the debt.

In *Van Rensburg* v. *Weiblen* (*supra*), the value of the pledge was greater than the debt, and the agreement constituted a forfeiture, and the point was not decided.

*Van Wyk's* case has been followed in *Evans' Trustee* v. *S.A. Breweries* (22 N.L.R. 115) and *Ranuga* v. *Love and Hobson* (1912, E.D.L. 144).

A tendency seems to have been creeping into the old law against the strict rule that the Court should necessarily intervene before disposal of pledged property.

*Voet*, 13, 7, 6, as to the pledge not being retained for interest after capital has been paid is not borne out by the authorities he cites, namely *Code*, 8, 27, 2 (or 8, 26, 2, in other editions), which enables a pledge to be retained for an unsecured loan subsequently incurred. This is also our law. See *Smith* v. *Farrelly's Trustee* (1904 T.S. 949 at p. 962). Even if *Voet*, 13, 7, 6, is taken literally, it is inapplicable, as it refers to a special agreement where the pledge is expressly in respect of the capital alone.

See *Digest*, 13.7.11.3, and Van der Linden's *Institutes* (Juta's translation), p. 132.

When the claim in convention and claim in reconvention fail the plaintiff is liable for all costs except those specially due to the claim in reconvention. See *Saucr* v. *Bilton* (11 Ch. D. 416) and *Mason* v. *Brentini* (15 Ch. D. 287).

Counsel formally moved for leave to amend the plea by alleging an agreement to take over the cattle after the last of the promissory notes had become due for a just and reasonable price.

MAASDORP, J. A., said he thought it was rather late to make the amendment now. The learned Judge of the court below had said: "Before however discussing the evidence on this point, I might refer to an incident of some significance disclosed in the defendant's evidence, but of which he has not taken advantage. The defendant states—and I see no reason to disbelieve the statement— that when



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the date for payment of the last promissory note had expired, namely, the 9th January, 1917, he sent for the plaintiff and informed him of this fact. Plaintiff expressed his inability to pay, whereupon defendant said, "I will take the stock over and credit you with the amount." To this the plaintiff agreed, and the defendant thereupon credited plaintiff's account in his ledger with the sum of £109, the amount of the promissory notes. It seems to me that, quite apart from the agreement originally come to, the legality of which has been questioned, the defendant might well have availed himself of the agreement arrived at on the occasion here referred to, as an additional ground of defence to the main claim. Defendant, however, has not relied, in his plea, upon this settlement, and I do not therefore propose to pursue the subject farther."

The amendment might have been moved for in the court below. It might have been allowed on conditions such as permission for further evidence to be adduced.

But it was merely a statement by the plaintiff, which was denied. An opportunity of having further evidence called would have been given. It was a most important point and might have disposed of the whole case, but it was too late to have the amendment made now without having the case reopened.

*Reynolds*, in reply: The authorities are collected in De Bruyn's *Opinions of Grotius*, p. 520.

It is too late to raise the question of acquiescence and waiver now.

As to *Van Wyk's* case, see the opinion of the Judge who decided that case in his translation of Van Leeuwen's *Roman-Dutch Law*.

*Cur. adv. vult.*

*Postea* (June 27th).

DE VILLIERS, A. J. A.: In the months of August, September, October and November, 1916, the defendant, respondent in this Court, a trader, sold to the plaintiff, appellant, a native, on credit in all 152 bags of grain for various sums amounting to £109. Four promissory notes were given by plaintiff more or less of the same tenour and all maturing about the same time. The first which will suffice as an example, reads as follows:—

Due 24th December, 1916.
August 30th, 1916.

On the 24th day of December next I promise to pay to Wal. A.

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Ashington or order at Kohlo Station, Port St. John's, the sum of Thirty Five Pounds Sterling for grain received. I do hereby place two black and white oxen and one red ox as security. If the above amount is not paid to date the above stock becomes Wal. A. Ashington's property.

£35 : 0 : 0

Witness:

his mark Mrawomlungu Makalana — his mark Mapenduka Mvinjelwa.

As security for the various debts in all 6 oxen, a cow, a calf and a horse were pledged to the defendant and duly delivered to him. The plaintiff did not pay upon the due dates, and the defendant thereupon considering himself owner of the animals pledged dealt with them as such. He continued to use the stock and during the years 1917 and 1918 alienated 4 of the cattle and the horse. For the cattle he obtained £40 and for the horse £16. During that time two of the oxen died and one was claimed as his property and taken by one Zibi, leaving one ox in the possession of the defendant. Although it would appear from the defendant's evidence that the plaintiff took legal proceedings against him in the beginning of 1918, it was not until September, 1918, that he brought the present action against the defendant in the Circuit Court at Umtata, claiming (1) delivery of the cattle and the horse, or their value £160 and tendering £112 10s. and (without admitting liability) interest at 6 per cent. a tempore morae, and (2) a statement showing what sum was due to the plaintiff in respect of the working by defendant of the stock pledged, and payment of any sum found to be due to him in that respect. The pleadings are both voluminous and highly confusing, owing to the amendments made by the defendant from time to time in which he repeatedly shifted his ground. But the main issues between the parties centre round the ownership of the stock pledged and their value. The defendant claims to have become the owner of the stock by virtue of the *pactum commissorium* embodied in each note viz: that in the event of the amount not being paid on the due date the stock pledged as security becomes his property, that being moreover according to the defendant a fair and reasonable price. The plaintiff denies the validity of such a pact in our law, and contends that the fair value of each ox is £17 10s. and of the horse £20, in all £160. The Court upheld the contention of



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the plaintiff that the *pactum commissorium* was reprobated in our law, but was of opinion that it has no application where as here the amount of the debt was the fair and reasonable value of the property pledged. The learned Judge also preferred the evidence of the defendant on the second claim and on the claim in convention judgment was accordingly entered for the defendant with costs. By way of claim in reconvention the defendant claimed: (a) £12 the value of the ox seized by Zibi, (b) £10 costs and expenses in an action brought by him against Zibi for recovery of the ox, (c) £20 loss and damages by reason of plaintiff's delay in replacing the ox as agreed by him, (d) £2 4s. value of the stamps affixed by defendant on the notes. The £2 4s. was tendered by plaintiff without however admitting liability, and in the result the Court gave judgment for defendant on his claim in reconvention for £19 6s. with costs, being £12 value of the ox seized by Zibi, £5 2s. costs in the action against Zibi and £2 4s. value of the stamps. From the order both in convention and in reconvention the plaintiff now appeals.

The first question that arises is as to the validity of the *pactum commissorium*. Now the authorities are unanimous that while this species of pact is allowed in sale, it is illegal in pledge as being unduly oppressive to debtors. This has been the law ever since the time of the Emperor Constantine (*C.8.35. L. ult.*). *Voet (20.1.25)* expresses the view which has prevailed since then with clearness and force. After stating that such a pact in the contract of pledge and hypothec was reprobated by Constantine as being harsh and replete with injustice, he proceeds to say (Berwick's translation): "Inasmuch as if it might be agreed that when a debt is not paid within a certain time the creditor is to retain (as his own) the thing pledged for the debt, things of the greatest importance and value would often be ceded in payment of a very trifling debt; the debtor, needy and pressed by the straitened condition of his pecuniary circumstances, readily submitting to the insertion of hard and inhuman conditions (in the bond) and holding out to himself the promise of better times and fortune before the arrival of the day fixed by the *pactum commissorium*, and hoping that the asperity of the pact will be averted from him by payment; a slippery and fallacious hope, however, to which the event not rarely fails to respond. Nor does it matter whether such a pact has been interposed at the very time that the pledge or hypothec was created, or after an interval; because, so long as the same straitened circum-

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stances of the debtor continue, a creditor can easily extort this hard condition from the untimely or at least grave difficulties of the unfortunate debtor, whatever may have been the reason for delaying and avoiding the exaction of the debt; so that therefore the reason of inequity argues just as strongly for the nullity of this pact when made after an interval." But while the authorities are in substantial accord on this, they are not agreed under what circumstances a creditor may obtain the ownership of the pledge. *Voet (20.1.21)* treats the following as a legal pact: "that if the debt be not paid the creditor may possess the thing by right of purchase for a just price, for this is considered to be in a manner a conditional sale." Such a pact in his view is something distinct from the *pactum commissorium* and is quite valid. The authority for this is a rescript of the Emperors Severus and Antoninus probably as altered by Tribonian: "*Potest ita fieri pignoris datio, hypothecaeve, ut. si intra certum tempus non sit soluta pecunia, jure emptoris possideat rem, justo, pretio tunc aestimandam: hoc enim casu videtur quodammodo conditionalis esse venditio:* " (Marcianus D. 20.1.16ult.). It will be noticed that there is an important difference between the rescript and the language of *Voet*. Whereas *Voet* does not say at what time the value of the pledged property has to be determined, the rescript deals with the case where it is agreed that the value should be ascertained when the debt falls due. But as *Voet* quotes the rescript and also relies on *Faber* (C. 8. tit.23 def. 1), and the latter agrees that the time to be looked to is the date when the debt falls due, we cannot assume that *Voet* intended to depart from the text of the Digest. Indeed all the most eminent authorities lay stress upon the words *tunc aestimandum* (Cf. Pothier, Nantissement Ch. 1, Art. III No. 19; Huber-Eunomia Romana ad Lib. 20.1.16 par. ult.) and rightly so, for if the fair value of the pledge at that date is given, the debtor will have no just cause for complaint. We may therefore conclude that it is the value of the pledge not at the date when it was given, but at the date when the debt became due which has to be ascertained. *Voet* says such a pact is to be considered in a manner a conditional sale, which agrees with the view expressed in the *Digest*: *vidctur quodammodo conditionalis esse venditio*. The language of the *Digest* is designedly indefinite. It is not a real sale, for the transaction does not lose the character of a pledge, and the debtor retains the right to claim his property against payment of the debt. But if when the time for payment



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arrives the debtor is willing that the creditor should retain the pledge as his own, there can be no objection to this provided a fair price is given. This view of the law is in accordance with the decision in Mabunya's case (20 S.C. 165), although the reasoning in that case cannot be entirely supported. The Court will however carefully scrutinise every transaction with a view to seeing that the full value is allowed, for as long as the relationship of debtor and creditor exists, the danger of oppression remains. van Leeuwen (C.F. Part I, 4.8.7) goes even a step further. According to him the prohibition has no application where the price agreed upon is a fair one. This view was adopted by the learned Judge, who, finding that the price was a fair one came to the conclusion that the agreement embodied in the promissory notes was a valid and binding agreement. But this view loses sight of the nature of the agreement, under which the debtor has the right to redeem. In the present case, however, it is quite clear that the plaintiff was agreeable that the defendant should retain the stock. Although the last debt fell due on the 9th January, 1917, the plaintiff did not take legal proceedings against the defendant till a year afterwards. This delay is not satisfactorily explained by him. But viewed by the light of the findings of the learned Judge his conduct becomes clear According to the defendant's evidence which the Court accepted the plaintiff told the defendant when the last note expired that he had no money to pay, to which the defendant replied: "I will take the stock over and credit you with the amount." To this the defendant states the plaintiff agreed. The learned Judge looks upon this as an agreement between the parties which might have afforded an additional ground of defence, but as it had not been pleaded he dismissed it from further consideration. This can hardly be regarded as an agreement between the parties separate and distinct from the previous agreement and pledge. But it goes to show that the plaintiff had decided not to claim his property. At the hearing of the appeal the Court refused an application for an amendment to plead the additional ground of defence suggested by the learned Judge. But that does not preclude me from giving due weight to evidence which is properly before the Court. And that he was satisfied to abandon his right to the stock and that the defendant should take the stock further appears from the fact found by the Court below that he promised to replace the ox which Zibi had claimed as his own and taken from the defendant's span. This he

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did on no less than three separate occasions. There is the further fact that after the defendant had obtained provisional judgment against him in connection with Zibi's ox, his attorney wrote to the defendant advising him to withdraw his action against the plaintiff and to proceed against Zibi, which the defendant did. There is no direct evidence that the attorney in so doing acted upon the instructions of the plaintiff, but in the light of all the facts there can hardly be any doubt that that was the case. It may be that the plaintiff having agreed that the cattle should become the property of the defendant if the debt be not paid was under the impression that he was bound by it. There is no evidence to this effect. But even if this be so, having stood by and seeing defendant deal with the property as his own it is now too late for him to claim the property pledged. Moreover, there is only one ox in defendant's possession now and in view of the fact that two had died and five of the animals only realised £56, it may be doubted whether it would be to the interest of plaintiff to get an order for the return of the cattle. As a matter of fact his object in coming to Court was not so much the return of the stock as to obtain its value which he placed at £160. And if he had succeeded in proving that that was the value at the date when the debt became due, he would have been entitled to receive the difference, just as he would have been bound to pay in the deficiency if at that date the value had been less. But he has failed to establish this. On the contrary the learned Judge found that £109 was the fair and reasonable value of the stock, and in view of the evidence and plaintiff's admission as to how he came to claim £17 10s. for each ox there is no ground for disturbing his finding. He did not specifically find that his was the value at the time when the debt became due, but the evidence is that the value of this kind of cattle varied very slightly during that time, and it was admitted by Counsel for plaintiff that if £109 was a fair price for the stock when the contract was entered into, it was a fair price at the date when the notes fell due. A point was sought to be made that there were four separate transactions and that as regards two of them the value of the stock in each was clearly in excess of the amount due on the note. But that circumstance will not avail the plaintiff. For as the Court found that the value of the stock was equivalent to the amount of the debt on all four transactions the excess on two of the transactions must go to wipe out the deficiency on the other two. On the main portion the appeal must fail.



[DE VILLIERS, A.J.A.]

Coming now to the claim for the use of the animals. The plaintiff bases his claim on an alleged agreement that he should be credited with the hire of the stock. But he admits no rate was agreed upon, and states that it was left to defendant to say what reduction he would make. This would hardly amount to a contract. Besides the Court preferred the evidence of the defendant who denied such an agreement and said that on the first occasion it was agreed that he could use the animals in consideration of not charging herding fees. And if that was a fair arrangement to make on the first occasion there is no injustice to plaintiff in assuming that the herding fees for the rest of the cattle would be a fair equivalent for their use. There is therefore no reason for differing from the finding of the Court on this part of the case.

There remains the claim in reconvention. As the plaintiff has sold an ox to the defendant which was claimed by a third party, he was bound to guarantee the defendant against eviction. He is therefore liable for the value of the ox, and for the costs of the action against Zibi of which due notice had been given to him. That plaintiff was not called as a witness is not sufficient to deprive the defendant of his costs. The plaintiff had knowledge of the suit. He should have offered his assistance and established his title (*Voet, 21.2.20*).

The appeal fails both on the claim in convention and on the claim in reconvention and must be dismissed with costs.

WESSELS, A. A. J. A., concurred.

C. G. MAASDORP, J.A.: On the 30th day of August, 1916, the plaintiff, who had bought from the defendant a quantity of grain, passed a promissory note in the following terms: "On the 24th day of December next I promise to pay to Wal. A. Ashington or order at Kohlo Station, Port St. Johns, the sum of thirty five pounds sterling for grain received. I do hereby place two black and white oxen and one red ox as security. If the above amount is not paid to date the above stock becomes Wal A. Ashington's property." Thereafter three other similar transactions took place, and similar promissory notes were given, the last of which fell due on the 9th January, 1917. None of the four notes were paid on their due dates. The cattle remained in the possession of the defendant. Some of them have died, and others were disposed of by him in virtue of his supposed ownership until only one remained in his possession.

[MAASDORP, J.A.]
In October, 1918, the plaintiff instituted an action against the defendant in the Circuit Court at Umtata for the recovery of the cattle or payment of their value. To this claim the defendant filed a plea alleging that the grain in question was sold to the plaintiff on condition that the plaintiff placed with the defendant certain stock upon the undertaking that should the plaintiff fail to fulfil his undertaking as set out in the promissory notes, the defendant would become the owner of the stock as purchaser for the monetary consideration specified. That the plaintiff failed to pay the price of the grain on the due date, and the defendant pursuant to the terms of the agreement became the purchaser and owner of the said stock at the price set out in the said promissory notes, which is a fair and reasonable price. I think it will be convenient to dispose of the case made upon this part of the pleadings before considering the other issues raised between the parties. In the court below the Judge went fully into the law bearing upon the questions raised in these pleadings. He found that the agreement that the ownership in the cattle should pass to the defendant upon the plaintiff failing to pay the debt on the due date, is undoubtedly what is called in our law the *pactum commissorium* pure and simple, which is invalid under the general rule of the Roman-Dutch law. He accepted this general rule of law as firmly established, but in his opinion the question remained whether the general rule should be made applicable to a case like the present, where the amount of the debt represented the fair value of the pledged property. This question can best be answered by a statement of the law as it appears in our leading authorities, and by going back to the very source of the rule of law which invalidates the *lex commissoria* in contracts of pledge. That source we find in the following passage of the Code of Justinian (8.35.3.): "Since among other objections to the *lex commissoria* in the case of pledges, there is its increasing harshness, we declare it invalid, and wipe out all memory of it in future. If any person, therefore, is subject to such an agreement, he shall find relief in this decree which rejects such existing contracts, and prohibits them in future. For we decree that creditors shall give up the thing pledged and recover what they have given." This law was passed by Constantine, and many of the commentators are of opinion that up to that time the *lex commissoria* was permissible in contracts of pledge. As bearing upon this question I may refer to *Digest 20.1.16*, where we find that an agreement of



[MAASDORP, J.A.]
pledge can be made subject to the condition that "if the debt be not paid on the due date the creditor may keep the thing pledged as purchaser for a just price then to be estimated for this seems in a way to be a conditional sale." *Voet* (20.1.25.) says: "The *Digest* is in this matter not opposed to the *Code*, for either the law there laid down has been amended by the *Code* according to the opinion of those who consider that the *lex commissoria* was formerly sanctioned in mortgages; or it does not treat of the *pactum commissorium* but of the convention whereby it is agreed that the pledge may be purchased by the surety for a just price." It seems strange that the passage in the *Digest* (20.1.16.) should restrict the acquisition of the pledged article to cases where the just price is to be ascertained at the time the debt becomes payable, seeing that at the time *Marcianus* laid down the law contained in the *Digest* the *lex commissoria* was allowed in contracts of pledge. That is to say in the time of *Marcianus* the price for which the pledge could be taken over could be fixed before the date when the debt became payable. Some of our authorities are of opinion that the words "then to be estimated" which appear in this passage of the *Digest* were not in the original law, but were introduced by *Tribonian* to make the passage in the *Digest* square with that in the *Code*. However that may be, we may take it that these two laws existed side by side, and that while the *lex commissoria* was invalid in pledges, the parties could still agree that if the debt was not paid on the due date, the pledgees could take over as purchaser the subject of the pledge at a price to be fixed at the time the debt became due. To that extent *Constantine's* strict law in the *Code* condemning the *lex commissoria* is relaxed. Both the passages above-mentioned have been received as law into the jurisprudence of Holland. This was also done in the case of Germany and France. I mention this because reference to the jurists of those countries may be of assistance in the present enquiry. A study of the authorities on this subject shows how jealous they were that the law of the *Code* shall be preserved intact and that no infraction of it should be allowed to creep in. The objectionable agreement aimed at by the *Code* is said by *Voet* (20.1.25.) to be an agreement "that if the debt be not paid within a certain time, the creditor can retain as his own the thing pledged for the debt." *Schorer* in his note 266 says: "*Grotius* disapproves of an agreement between a debtor and creditor (*pactum commissorium*) to the effect

[MAASDORP, J.A.]
that, if the debt be not paid at the proper time, the mortgaged property is to become the property of the creditor in full ownership for the amount of the debt, even as it was disapproved by the Emperor Constantine in order to restrain the harshness of creditors and assist the frailty of debtors." *Carpzovius* who treats of the laws of Saxony (5.2.12.) lays down the law in similar terms. This law *van Gluck* (13.7.869) says is beyond doubt still in force in Germany, and he defines the *lex commissoria* as an agreement by which the debtor binds himself to the creditor by a condition that if the debt be not paid when it falls due, the thing without any further sale shall remain the property of the creditor. *Pothier* (Vol. 5, page 307, Ch. 1, Art. 3) states that Constantine prohibits in a contract of pledge the clause called the *lex commissoria*, which is a condition by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the whole debt, the thing will be acquired irrevocably in full ownership by the creditor in satisfaction of the debt, and he adds that this law has been adopted into the jurisprudence of France. This is clear law, and my object in repeating it here at length is to show how whole-heartedly and without stint this rule of law as laid down by Constantine has been received into the jurisprudence of Holland, France and Germany. There is no suggestion in any of the authorities that the law has become antiquated and should be modernised. It has in fact been embodied in the codes of France and Germany. The reasons on which this law is grounded are as sound to-day as they were in the times of Constantine. The law of the *Digest* providing that the parties may agree that if the debt is not paid on the due date, the creditor may acquire the pledge for a just price then to be estimated is also adopted in modern jurisprudence, but the authorities take great pains to explain that it is not really an infringement of the rule of the Code of Justinian, but that it is a conditional sale not open to any of the objections which led to the reprobation of the *lex commissoria* in pledges. *Voet* (20.1.5 & 26; *Schorer* Note 266; *Decker's* note to *van Leeuwen* 4.12.14; *Carpzovius* 5.2.12; *Pothier* on Pledges 1.3.19). I may refer to two authorities which go somewhat beyond the law laid down in the *Digest* and yet do not go so far as the judgment in the court below in the present case: *Carpzovius* (5.2.12) is of opinion that the condition is valid where it is agreed that the pledge shall be ceded for a just price, or for a price to be fixed when the debt falls due, or for a price fixed at the time



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of the contract provided the price agreed upon is a just price. The second authority is *Leyser*, who writes in a note to his Meditations on the Pandects, Vol. 3, page 135: "Would the following conditions hold good that if the debtor does not pay on the due date, the creditor may keep the pledge for a price fixed at the time the contract of pledge is entered into? *Thomasius* is of opinion that it would. *Huber* is of a different opinion. I think the pact would hold good if the price fixed is not below the value of the thing." These two writers are German jurists. But in any case they have in contemplation a sale for a price fixed, not merely a forfeiture of the property for the amount of the debt. Whether they have in mind the value of the thing at the time of the contract, or when the debt falls due, is also not clear. *Huber*, who is referred to by *Leyser*, says: (*Praelectiones Juris Civilis*, 20.1.15) an agreement for the sale of the pledge to the pledgee if the debtor does not pay within a certain time is valid for a price to be then fixed, not for a price fixed when the contract is made. In the present case it was agreed that if the debt be not paid on the due date, the stock should become the property of the defendant. The parties intended that the stock shall become the property of the defendant for the amount of the debt. To say that this agreement shall hold good only if the amount of the debt represents the fair value of the property is to add a condition to the contract which the parties never intended. The defendant clearly meant to take advantage of any increased value, and the plaintiff clearly intended to escape any further liability in case there was a fall in value. To introduce the condition that this agreement shall only hold good if the price happens in the end to be a fair price is to make a new contract for the parties. The condition as it stands is, as was said by the Judge in the trial Court, the *pactum commissorium* pure and simple, and as such it is in my opinion invalid. When the debt fell due the debtor could, notwithstanding this condition, have claimed his cattle upon paying his debt.

This brings us to the other issues outstanding between the parties. These issues are not very clearly stated, but having regard to what is alleged in defendant's plea and alternative plea, it would appear that defendant sets up the case that if he has to account for the cattle he is entitled to payment of the debt due on the promissory notes. The defendant puts the value of the stock at £109, which was the capital amount of the debt, whereas the plaintiff values the

[MAASDORP, J.A.]
cattle at £160. The plaintiff claims the difference between £160 and £112, which he fixes as the full amount of the debt; whereas the defendant sets off the debt against the value of the cattle and prays that the plaintiff's claim may be dismissed. In order to do justice between the parties it is necessary to go into the occurrences which took place after the debt fell due on the promissory notes. As I have said the plaintiff was at that time entitled to pay the debt and claim back the cattle, but he did not do so. What was actually done was done under the *bona fide* belief, as it seems to me, which was entertained by both parties that in terms of their agreement, the property in the cattle had passed to the defendant. Ashington says he accepted the cattle as security on condition that in the event of the amount not being paid on the due dates of the promissory notes the cattle would become his property, and the debt was to be wiped off the account at the price of the stock. Ashington explained this to the plaintiff and he fully understood and agreed. In Ashington's books the whole transaction is treated accordingly. From January, 1917, when the last promissory note fell due, until January, 1918, no claim was made by the plaintiff in respect of the cattle. In January, 1917, when the last promissory note fell due, Ashington told the defendant that the time had expired. Plaintiff said he had no money to pay and defendant said: "I will take over the stock and credit you with the amount," and the plaintiff agreed to it. This does not appear to me to be a fresh contract, but an enforcement, as both parties imagined it to be, of the condition contained in the promissory notes, and is evidence of the conduct of the parties after the debt fell due. An application was made to this Court during the argument for leave to amend the pleadings by setting up what occurred in January as a fresh contract in bar of the plaintiff's claim. But it was ruled that it was too late to make the application seeing that it would necessitate the hearing of further evidence upon this point. I do not now treat the incident as a new contract under which the property in the cattle passed to the defendant. In my opinion the property did not pass to the defendant, but until recently both the defendant and the plaintiff were under the impression that the cattle had passed. Later advice has evidently made it appear to the plaintiff that the condition in question contained in the promissory notes is invalid and that he can reclaim the cattle notwithstanding that condition. In the meanwhile with the knowledge of the plaintiff the defendant dealt with the cattle in the *bona*



[MAASDORP, J.A.]
*fide* belief that they had become his property. The position therefore is this, that the cattle did not pass to the defendant as his property when the debt fell due nor at any time since. He must therefore account for them to the plaintiff by restoring them or paying their value. He has disposed of some, and others have died, and he is at present in possession of only one of the oxen. The court below has found as a fact that the value of the cattle was equal to the amount of the debt, and if the one is set off against the other, nothing remains due from the defendant to the plaintiff and the plaintiff must fail upon his claim for the payment of the value of the cattle. What the Court actually found was that the value of the stock amounted to £110, which is less than the amount of the debt with interest from the due date of the notes.

But certain other questions remain open between the parties. It appears that one of the oxen pledged to the defendant was claimed by one Zibi as his property, and was taken possession of by him. The defendant thereupon claimed that the plaintiff should replace this ox by another, and actually instituted an action against the plaintiff to enforce that claim. While the action was pending, the plaintiff's agent advised the defendant to drop the proceedings against the plaintiff and to sue Zibi. This was done with the knowledge and acquiescence of the plaintiff, but the action against Zibi proved unsuccessful. In my opinion the court below rightly held that the plaintiff who delivered to the defendant an ox to which Zibi has successfully asserted his ownership, is liable not only to replace the ox but also to pay the defendant the costs incurred by him in the unsuccessful action against Zibi, which amounted to £5 2s. In the court below the ox was valued at £12. This ox was included in the valuation made of the cattle for the purpose of ascertaining the sum due from the defendant to the plaintiff which would go in extinguishment of the plaintiff's debt, and the plaintiff must make good to the defendant the value of the ox. This adjustment is necessary for the purpose of such set-off. I see no reason for interfering with the finding of the trial Court in respect of the plaintiff's claim for the use of the cattle by the defendant. If we carry the above reasoning to its logical conclusion we must bear in mind that the defendant still has in his possession one ox belonging to the plaintiff, which the plaintiff is entitled to recover. But here again the value of the ox has been set off against part of the defendant's claim on the promissory notes, and if the plaintiff recovers the ox he will to that extent remain indebted to the defendant.

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The order for the restoration of the ox must therefore be made, subject to the payment by plaintiff to defendant of the sum of £12, and such order will not affect the question of costs. Defendant will therefore be ordered to deliver the ox to the plaintiff upon payment by the plaintiff to the defendant of the sum of £12. In other respects the judgment of the court below must stand and the appeal must be dismissed with costs.

*Appeal accordingly dismissed.*

Appellant's Attorneys: *Bell & Hutton*, Grahamstown; *Fraser & Scott*, Bloemfontein. Respondent's Attorneys: *Hemming & Hemming*, Umtata; *F. S. Webber*, Bloemfontein.

REX, *Respondent* v. LAKATULA AND OTHERS, *Appellants*.

(BLOEMFONTEIN.)

[1919. *June* 26, 27. SOLOMON, A.C.J., C. G. MAASDORP, J.A., and DE VILLIERS, A.J.A.]

*Criminal procedure. — Evidence. — Accomplice. — Corroborating evidence.—Withdrawal of case from jury.—Act* 31 *of* 1917, *secs.* 221 (3), 285 *and* 372.

If in the course of a criminal trial at the close of the case for the prosecution the presiding Judge refuses to exercise the discretion given him by sec. 221 (3) of Act 31 of 1917 and withdraw the case from the jury such refusal is not a point of law which can be reserved under sec. 372 of the Act. If, however, at the close of the trial there is no legal evidence upon which the jury were entitled to convict that is a point of law which may be raised under sec. 372.

Under sec. 285 of Act 31 of 1917 the evidence of an accomplice may be corroborated by other material evidence even though such corroborating evidence does not directly implicate the accused.

Argument on a point reserved under section 372 of Act 31 of 1917 by WARD J sitting with a Jury in the Witwatersrand Local Division.

The facts are stated in the judgment of *Solomon, A. C. J.*



[SOLOMON, A.C.J.]

*J. T. Barry* for the accused: I admit that there is sufficient corroboration in respect of the first accused, but not in the case of the others. The corroboration must be such as to implicate the particular accused. There has been no proof that the crime was actually committed. The evidence is consistent with the deceased's having been knocked down by one train and run over by another.

*C. W. de Villiers* (Transvaal), for the Crown: It is not necessary to prove *aliunde* that the crime was actually committed, as there is ample corroboration of the story of the accomplice. Such corroboration need not directly implicate particular accused. See *R.* v. *Muka* (1913, A.D. 290).

The point reserved in this case is not a question of law which can be reserved under section 372; the point reserved should have been that at the close of the trial there was no legal evidence on which the jury were entitled to convict. I raise the point in order to have the practice settled for the future. See *R.* v. *Morris Khan* (1912 T.P.D. 712).

19/A/362 R v LAKATULA

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| appl: S v Cambell | 91/1/CR/444/Nm |
| dist: A-G Venda v Molepo | 92/2/CR/536/V |
| cons: Magmoed v Janse van Rensburg | 93/1/CR/98/A |
| cons: Magmoed v Janse van Rensburg | 93/1/812/A |
| appl: S v Morlinger | 93/2/CR/272/W |
| appl: S v Moringer | 93/4/455/W |
| appl: S v Wana | 94/1/CR/34/Tk |
| ref: S v Khumalo (p.679) | 98/1/CR/672/N |

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on the application of their counsel the Judge under section 372 of the Criminal Procedure Code of 1917 reserved for the consideration of the Court of Appeal the following question: "Whether the Judge at the trial should not have withdrawn the case from the jury on the ground that there was no corroboration of the evidence of Notje who was an accomplice in the crime." The Attorney General has raised the point whether this is strictly a question of law which can be reserved under section 372, and whether the point reserved should not not have been that at the close of the trial there was no legal evidence on which the jury were entitled to convict. I agree with him that if at the close of the case for the prosecution the Judge refuses to withdraw the case from the jury because in his opinion there is evidence which would justify them in convicting, the exercise of