27. E.D.L. 95 (Dist) 98.
40. O.P. 262.

MAASDORP, C.J.
August 1st, 1912.

NANNUCCI, LTD. *vs.* A. RUBINSTEIN.

Appeal.—Costs.—When appeal noted but not prosecuted. —Rule 92.

Where formal notice of appeal is given under Rule of Court 92, *but the case is never set down for trial and consequently lapses, the respondent is not entitled to recover from the appellant any costs incurred by the latter in preparing for the hearing of the appeal.*

1912. Aug. 1. — Nannucci, Ltd. vs. A. Rubinstein.

On April 23rd the applicant had obtained judgment against the respondent in a Magistrate's Court for the sum of £10 and costs. On April 27th, the respondent noted an appeal, formal notice of which was served upon the applicant under Rule of Court 92. In consequence of this the applicant incurred certain costs in copying the record, etc. The respondent never prosecuted the appeal which accordingly lapsed by effluxion of time under Rule of Court 94.

G. Brebner, for applicant: The party who sets down a case and then withdraws it is bound to pay all the costs up to the time of the withdrawal, subject to the discretion of the taxing officer. The practice was laid down in *Schmulian* vs. *Catterall* (1907, T.S. 848: See especially page 851).

E. W. Fichardt, for respondent: There was no set down notice, merely a formal noting of appeal. Had the case been set down and withdrawn the respondent would have been liable for the costs thereby incurred by the applicant. The step taken by the respondent was only a formality required by law to preserve the right to appeal. It gave the applicant no right to incur any costs, for if no further steps were taken the matter would lapse *ipso jure*. See *Rocha* vs. *Hamburg* (1898, 5 O.R.).

G. Brebner, in reply.

1912. Aug. 1. — Nannucci, Ltd. vs. A. Rubinstein.

MAASDORP, C.J.: There are no costs which the respondent can reasonably incur upon the mere noting of an appeal. If he does so it is entirely at his own expense and should the matter not be set down for hearing as was the case here, he cannot demand that the other party shall pay those costs. The application must be refused, with costs.

[Applicant's Attorney, J. H. BEYERS.
Respondent's Attorney, J. W. MACLAREN.]

[Reported by C. A. BECK, Esq., Advocate.

MAASDORP, C.J. August 1st and 15th, 1912.

MULLER *vs.* CRONIN, N.O., AND ANOTHER.

Costs.—Taxation.—Review.—Power of Supreme Court to Review Taxation in Magistrate's Court.—Ord. 10 *of* 1902, *sec.* 17.—*Costs of the day.*

Where an appeal from a magistrate is successfully prosecuted in the Supreme Court, and that Court in remitting the case to the magistrate for hearing, grants the appellant costs of the day, and subsequently the Bill of costs is taxed in the inferior court in such a way as in effect to nullify the judgment of the Supreme Court, notwithstanding Ord. 10 *of* 1902, *sec.* 17, *the Supreme Court has power to review such taxation.*

1912. Aug. 1. „ 15. — Muller vs. Cronin, N.O., and Another.

This was an application for a revision of a taxation of the Magistrate at Kroonstad. The original case had come up in the inferior court on February 13th and again on February 27th, when the case was dismissed on the ground that the Court had no jurisdiction. From this decision an appeal had been successfully prosecuted, the judgment being set aside with costs of the day against the respondent Botha. Thereafter the matter again came before the Magistrate on June 4th and June 25th, when judgment was given against the plaintiff (the present appellant) with costs. The bill of costs was then taxed and the question on review was whether certain