of success in the principal case. See Van Zyl's *Judicial Practice of South Africa* (1st ed.), pp. 71 and 81.

P. U. Fischer, for the defendant: See p. 76 of the second edition of that work. The question of negligence is not pertinent as between the maker and the payee of a note, but only when a third party is concerned.

[FAWKES, J.: See *Bernhardi* v. *du Toit and Tullekin* (2 S.C. 359).]

H. F. Blaine, K.C. was not called upon to reply.

FAWKES, J.: In this case we think provisional sentence should be granted, as there is nothing on the face of the note to lead one to suspect that there was any forgery.

WARD, J., concurred.

Plaintiff's Attorney: *G. A. Hill*; Defendant's Attorney: *C. J. Reitz.*

MODIAKGOTLA v. MAROKA.

1914. *March* 5. FAWKES and WARD, JJ.

Appeal.—Costs.

Where a magistrate had dismissed a summons on the ground that the counterclaim was beyond his jurisdiction without taking evidence as to the *bona fides* of the counterclaim. *Held*, on appeal, that the appellant should be allowed costs of appeal, and that the costs in the Court below should be left in the discretion of the magistrate.

Kruger v. *Du Pisani* (15 C.T.R. 574) followed.

This was an appeal from a decision of the resident magistrate of Thaba 'Nchu.

The appellant had sued the respondent for £50, damages in the court below. According to the record the respondent had counterclaimed for £125. It appeared from a letter put in by the appellant which he had received from the respondent's attorney that £87 of the counterclaim was in respect of building material belonging to

respondent alleged to have been "surreptitiously appropriated" by the appellant.

No evidence was taken, but after hearing the attorneys in argument, the magistrate dismissed the summons, being apparently under the impression that the argument constituted an enquiry into the *bona fides* of the counterclaim.

C. L. Botha, for the appellant: The magistrate was clearly wrong in omitting to hear evidence on the question of *bona fides*.

H. F. Blaine, K.C.: I admit that the magistrate was wrong, but the appellant is not entitled to costs. The magistrate was under the impression that appellant had admitted the existence of the counterclaim and its *bona fides*.

C. L. Botha, in reply: On the question of costs, see *Kruger* v. *du Pisani* (15 C.T.R. 574).

The Court, acting on the authority of *Kruger* v. *du Pisani* (supra) allowed the appeal with costs of appeal, and remitted the case to the magistrate, the costs in the court below to be left in his discretion.

Appellant's Attorneys: *McIntyre & Watkeys*; Respondent's Attorneys: *Fraser & Scott*.

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33. Ch. 43.
42. " 140.
43. " 192. 197.

McCAMLEY v. McCAMLEY.

1914. *March* 14. MAASDORP, C.J., and FAWKES and WARD, JJ.

Husband and wife.—Prayers for cancellation of decree of judicial separation and restitution of conjugal rights in same action.

Where W sued H in the same action for cancellation of a decree of judicial separation and for restitution of conjugal rights, *Held*, that no order could be granted on the second prayer.

This was an action for cancellation of a decree of judicial separation and for restitution of conjugal rights. There was no appearance for the defendant

P. U. Fischer, for the plaintiff: I submit that though technically there is no cause of action on the second prayer, on the ground of