tremely doubtful whether this section was intended to create a criminal offence, for under a subsequent section (sec. 56) the larger offence of travelling without a ticket only carries a civil liability. A criminal liability is imposed by sec. 55, but only in cases where the element of fraud is present. But whatever the intention may have been, no penalty is affixed to a breach of sec. 23, and I do not see, therefore, how any penalty can be inflicted for such breach. The conviction must therefore be quashed.

51 Q.S.D. 424.
56 C. 369. 376.
56 C. 377 (A)
60 C. 928 (SC)
68 (4) .. 711. 714 (A)

SOLOMON v. REX.

1905. *November* 6. INNES, C.J., and MASON and CURLEWIS, J.J.

Criminal procedure.—New trial.—Perjury of witness.—Remittal of record.—Ordinance 12 *of* 1904, *sec.* 5.

Applicant, who had been convicted in a magistrate's court of theft, applied for a new trial or that the case might be remitted for further evidence, and relied upon an affidavit by an accomplice confessing that he had committed the crime and had given false evidence against the applicant at the trial. There was also an appeal on the merits. *Held*, that even if the Court had power to order a new trial, the circumstances of the case did not entitle the applicant to such an order.

Held, further, that sec. 5 of Ordinance 12 of 1904 did not empower the Court to remit the case on a ground outside the record.

Application for a new trial of a case tried by the Assistant Resident Magistrate of Johannesburg, or for an order remitting the case for further evidence. The applicant also appealed against the decision in the court below.

The facts appear from the judgments.

Krause, for the applicant, referred to Ordinance 12 of 1904, sec. 5; *Kaleel* v. *Rex* ([1903] T.S. 137); *Thompson* v. *Rex* ([1902]

T.S. 806); *Jorgensen* v. *Rex* ([1903] T.S. 580); Archbold, p. 264; Kenny's *Outlines of Criminal Law*, p. 490.

Barber, for the Crown: The Ordinance does not empower the Court to remit in a case of this nature. A new trial should not be granted where the evidence is that of a man who admits that he is a perjurer.

The Court intimated that it would hear the appeal before deciding the application, and counsel were then heard on the merits.

INNES, C.J.: Two men, Solomon and Berkman, were charged with the theft of a bicycle. Solomon was convicted of the theft, and Berkman was convicted of having received the bicycle knowing it to have been stolen. Both accused gave evidence before the magistrate, and it is clear that the evidence of Berkman tended to incriminate Solomon. Solomon now appeals; Berkman does not.

But before urging his appeal Solomon petitions the Court for a new trial, or in the alternative for the remission of the case to the magistrate to take the evidence again. The reasons for the application are contained in a rather remarkable affidavit made by Berkman, to the effect that he stole the bicycle, that Solomon had nothing to do with it, and that what he said in the court below was not true. On those grounds Solomon asks that the Court "may be pleased to grant your petitioner a retrial of the case, or to order that the same be reopened for the purpose of adducing the said fresh facts in evidence, or to remit the said case to the resident magistrate's court with such instructions as your lordships may in the circumstances hereof think fit. . . ."

The prayer is in the alternative for a new trial or for the remission of the case to the magistrate. Now so far as the application to remit the case is concerned, it is clear that under the common law we have not that right. If there is any power in this Court, when a magistrate has finally decided a matter over which he has jurisdiction, to order him to take further evidence, it can only arise because of statutory authority con-

ferred on us as a court of appeal. The provisions of sec. 5 of Ordinance 12 of 1904, so far as they relate to appeals, have been quoted and relied upon by Dr. *Krause*. That section empowers the Court, when any criminal appeal comes before it, to remit the case with such instructions relative to any further proceedings to be had or taken as it may think fit. That power is conferred upon the Court to be exercised in respect of appeal proceedings; but we are asked to exercise it on grounds quite outside of, and unconnected with, the merits of the appeal. We have laid down over and over again that when a matter comes before us on appeal the parties must stand upon the record. If they are not satisfied with the record, and allege that irregularities have been committed or that evidence taken has not been recorded, they may move the Court to have the record amended; but when it comes to arguing the case on appeal, that must be done within the four corners of the record. And we would only be justified in exercising that power when an appeal came before us upon grounds appearing within the four corners of the record. This is not such a case. We are asked to remit the case to the magistrate to be reopened on grounds entirely outside the record—on the allegation that perjury was committed by one of the witnesses in the case. Nor is this a review matter; if it were, none of the grounds for review could be present. We have therefore no power to accede to the application for remission.

But we are asked alternatively to make an order for a new trial. That would involve quashing the proceedings in the court below. Now under the common law, if a judgment is obtained by corrupting the tribunal it is null and void; if it is obtained by fraud it may be possible to set it aside by way of proceedings for *restitutio in integrum*. The authorities are clear that if one of the parties to a judgment, civil or criminal, has obtained it by means of fraud, the Court may be asked for *restitutio*. I pass over the question whether such an application may be made on motion, and the further question whether it would be granted on the mere allegation that perjury has been committed at the trial I am not aware of any authority for making such an order on such a ground. But assuming that it could be done, it is clear that the Court would have to be satisfied, first, that the evidence

was false, and, second, that it was upon such false evidence that the judgment had been obtained. I am not satisfied on either of these points. I am not satisfied that what Berkman says as to his evidence in the court below is correct, and that his evidence was false; and after reading the magistrate's reasons I am not at all satisfied that he came to his decision on Berkman's testimony. Therefore I do not see how we could possibly grant *restitutio in integrum* and allow a new trial. From a reference to English authorities it appears that on certain grounds a new trial may be ordered in a case of misdemeanour, but not in a case of felony. That is a technical point; but I do not know of any rule which would justify us in overruling our own practice; and that being so, the application must be refused.

[His lordship then dealt with the merits of the appeal, and came to the conclusion that it must be dismissed and the conviction confirmed.]

MASON, J.: I concur. There is sufficient evidence on the record to support the magistrate in his conclusion. With reference to the petition for a new trial or to remit to the magistrate on the ground that one of the prisoners admits that the evidence which he gave in the lower court was perjured evidence, and he is now prepared to swear that the appellant is innocent, that of course raises a different question. It appears to me that a case of that kind certainly cannot be said to be a ground of appeal, and it does not seem to me to come within the limits of the ordinary proceedings in respect of which there is an appeal. It is not raised by the record, and is not in connection with any error of any kind in the record. If we are to order a new trial because one witness wishes to change his evidence, I do not know where the formality of legal proceedings will be. With reference to the power of review given by Proclamation 14 of 1902, it certainly does not cover such a case as this; and assuming, as I am not prepared without great consideration to assume, that there is power to set aside a judgment in a trial, this case is not covered by that principle, because the authorities show that, if that is to be done on any ground, it must be clearly proved that the ground exists.

Now in this case, so far as I am concerned, the affidavit which Berkman now makes to the effect that his previous evidence was perjured does not weigh with me a bit. I do not think there is anything in the record to lead us to suppose that this man is conscience stricken, and now desires to repair an injury which he has done to a fellow-man and take his punishment for perjury. I have no doubt that the whole of his statement is a concoction —that as the one man has to suffer he thinks he will try and make his own penalty serve for him and his confederate. Even if we had the power to remit the case or set aside the judgment and order a new trial, I do not think these circumstances would justify us in doing so. The circumstances ought, I think, to be such, if we had such power, as to arouse the very gravest doubts in the mind of the Court as to the correctness of the judgment. The circumstances in this case do not arouse in my mind any doubt at all. I do not attach any importance whatever to this affidavit of Berkman. If we had the power I should not accede to the application on such flimsy ground as is advanced by this affidavit. I have also come to the conclusion that the appeal must be dismissed, and we must refuse the petition.

BRISTOWE, J.: So far as the appeal is concerned, leaving out of consideration for the moment the preliminary application, I am quite satisfied on the record of the case as tried before the magistrate that there is no ground whatever for allowing the appeal. It seems to me the evidence before the magistrate was quite sufficient to justify him in coming to the conclusion to which he did come—that Solomon was the man who stole the bicycle, and that Berkman afterwards received it from Solomon.

The preliminary question is one which is, perhaps, not quite so clear. There are apparently two, or possibly three, grounds on which an application of this kind can be made to the Court. One is the fact of the remedy under sec. 5 of Ordinance 12 of 1904, and another may possibly be the power to direct a new trial under the common law. Now as regards the remedy under sec. 5, that is a statutory proceeding and it is a proceeding on an

appeal, and I am disposed to agree—in fact, I think it has been laid down by this Court before—that such proceedings before the Court are confined within the four corners of the record. The only way in which you can go outside the record is on an application under the common law to order a new trial. As to whether such an application for a new trial under the common law might be granted if perjury on the part of an important witness is made out, I should like to reserve my opinion, because it is a serious matter for a man to be convicted on perjured evidence; but whether that is so or not, I agree with the CHIEF JUSTICE and my learned brother MASON in thinking that the evidence before the Court in this case is not sufficient to justify us in assuming that there is a *primâ facie* case of perjury on the part of Berkman. In the first place, Berkman himself gave evidence in the court below. He has been convicted, and is now undergoing imprisonment. He has also been convicted on a previous occasion. Those are not reasons which make one disposed to attach overmuch weight to his evidence. It is quite possible, as my brother MASON suggests, that the reason of his making his affidavit is not that he desires to do tardy justice to a person to whom he has done great wrong, but that he has been convicted already, and thinks that he might just as well suffer for the other also. Apart from that, it seems to me that the evidence on the record in the case before the magistrate rather goes to show that Berkman's present affidavit is not true. I was rather impressed by some remarks of Mr. *Barber* on the facts of the case; that is to say, that when Solomon took this bicycle to the Abrahams to be repaired on the 14th or 15th September it had not been repainted, and therefore Freddie's evidence, if it is to be believed, must refer to a later date than when the bicycle went to the Abrahams' shop. Now it seems to me that if Berkman did steal the bicycle, the first thing he would do would be to file off the numbers upon it and do anything else he could to render it unrecognisable by its owner, and the fact that the numbers were taken off, if Freddie's evidence is correct, only after the bicycle had been repaired by Abrahams, goes to show that that time to which Freddie refers was the first time the bicycle got into Berkman's possession; and if that is so, that certainly agrees

with the magistrate's opinion that Solomon stole the bicycle. That forms another disinclination to attach too much importance to Berkman's affidavit. I concur that the appeal should be dismissed.

Appellant's Attorney: *L. Levy.*

47 (1) SA. 535 (Ae.)
49 (1)- 344.
53 (1)- 605.
58 (3). 850 (1)
60 (4). 433 (1)
58(4) .. 846(A)

WATERVAL ESTATE AND GOLD MINING CO., LTD., v. NEW BULLION GOLD MINING CO., LTD.

1905. *September* 20, *November* 13. INNES, C.J., and WESSELS and CURLEWIS, J.J.

Gold Law.—Mynpacht.—Beacons.—Pegging on mynpacht.—Innocent purchasers.—Ejectment.—Estoppel.—Receipt of owner's share of license-moneys.

Prior to the proclamation of a certain farm under the Gold Law a mynpacht had been reserved, surveyed and beaconed off, but claims were pegged on the reserved ground by persons ignorant of the existence of the mynpacht. The owner of the mynpacht protested to the Minister of Mines against this pegging, and against the issue of licenses in respect of such claims. A number of the claims were subsequently allowed to lapse, and some were bought at public auction under the provisions of the Gold Law, by one Thorburn, who sold them to the defendant company; the remainder were thrown open as lapsed claims, and a number of them were repegged. The Minister of Mines thereafter informed the holders of claims situated on the mynpacht of the true facts, and all the claimholders save the defendant company vacated the ground. The owner of the mynpacht continued to receive the owner's share of the license-moneys paid in respect of the company's claims. In an action by the owner of the mynpacht against the company for ejectment, *Held*, that the existence of the beacons was con-