especially as it seems to me that similar arguments to those which have been used by Mr. *Jeppe* in the present case might equally be used in the case of an application by a woman to be admitted as an advocate—a change which would mean an enormous difference in the practice of the courts in this country and in any other country where such a change was made. There will, therefore, be no order on the present application, and as costs are asked for the applicant must pay them.

Applicant's Attorney: *M. Lichtenstein*. Attorney for Incorporated Law Society: *F. Kleyn*.

68 (4) 600 (N)

LEO v. LOOTS.

1909. *March* 1, *April* 26. INNES, C.J., and BRISTOWE, J.

Purchase and sale.—Suspensive condition.—Right of purchaser to let articles.

In terms of a suspensive condition annexed to a contract of sale the *dominium* in certain oxen which formed the subject of the contract was to remain in the seller until the purchase-price, payable in instalments, should be fully satisfied. A number of the oxen so sold were, with the seller's knowledge, let for a short term to the respondent. The seller took possession of four of these oxen while they were being used by the respondent. There were no instalments of purchase-price in arrear at the time. *Held*, on appeal, affirming the decision of the magistrate, that although the oxen, until paid for, remained the property of the seller and could under certain circumstances be reclaimed, the purchasers were entitled to let the oxen to the respondent, provided the seller's rights were not thereby prejudiced.

Quirk's Trustees v. *Liddle's Assignees* (3 S.C. 322) followed.

Appeal from the decision of the Second Civil Magistrate of Johannesburg.

In June, 1907, the appellant Leo sold a number of oxen to certain C and M. By the terms of the contract of sale a portion of the purchase-price was to be paid in August, the remainder by monthly instalments varying according to certain circumstances. The purchasers undertook to pledge a certain number of their own cattle to Leo as security for payment. It was further agreed that the *dominium* in the oxen sold should remain vested in the appellant until the purchase-price was paid, and that the latter could reclaim the oxen on a breach of one of the terms of the contract.

In June, 1908, a certain B was substituted for one of the purchasers, and it was further agreed that the instalments should be paid on a different basis, and that Leo was to have access at all times to the oxen.

The purchasers in September, 1908, let fourteen of these oxen to the respondent Loots for three months, with the knowledge of the appellant The oxen were let for the purposes of transport. The purchasers had at that time provided for the instalments up to December, 1908. In October of that year the appellant Leo took possession of four of the oxen hired, under circumstances which fully appear from the judgment.

In an action by Loots for the return of the four oxen and damages the magistrate gave judgment in favour of the plaintiff. Leo appealed.

M. Nathan, for the appellant.

Gregorowski, for the respondent.

Cur. adv. vult

Postea (April 26):—

INNES, C.J., delivered the following judgment of the Court:—

During the month of June, 1907, the appellant disposed of a number of oxen to Messrs. Coughlin and Maree. The animals were sold in two lots, and the conditions of sale were embodied in two contracts, to the terms of which further reference will be necessary. A year later, namely, in June, 1908, one Bouwer was, with the consent of all parties concerned, substituted for Coughlin as one of the purchasers;

and the matter may be regarded as if Bouwer and not Coughlin had executed the original documents. The relevant provisions of these documents may be thus summarised. The purchase-price of the oxen—forty-eight in number—was fixed at £11, 7s. 6d. per head. Portion of this amount (£125) was to be paid in August by the Witbank Colliery, for which company the purchasers were at the time doing certain transport work. If the buyers continued to transport coal for the company after August, then monthly payments of £35 were to be made by the company to Leo on account of the purchase-price. In case the transport arrangements between the buyers and the company terminated, then the former agreed to pay direct to the seller monthly instalments of £25 until the purchase-price should be liquidated.

The purchasers undertook to pledge sixteen other oxen of their own to Leo as security for the payment of the purchase-price. And finally it was stipulated that the *dominium* in the animals sold should remain vested in Leo until they had been fully paid for; and that he should be entitled to claim them back should the terms of the contract not be strictly observed.

When Bouwer was substituted for Coughlin as one of the buyers a further agreement was executed, which varied the terms of the original contract in two material respects. The purchase-price was to be paid in quarterly, instead of monthly, instalments, on a minimum basis of £30, and Leo was in the meanwhile to have access to the cattle at all times.

It will be observed that no express provision was made for the delivery of the oxen to the buyers; but the contract clearly contemplated that such delivery should take place, and it is common cause that it did.

On the 16th September, 1908, Bouwer and Maree let fourteen of these oxen to the respondent Loots for three months, at £10 per month. The evidence does not show what exact proportion of the price had at that time been paid; but it seems clear that all the instalments had been provided for up to the end of December. Bouwer states that before this agreement was come to he reported it to Leo, and I find no contradiction of that statement in Leo's evidence. Loots intended to use the animals

for transport purposes, in executing a contract which he had made for carting lime and coal to and from Krugersdorp. He was to start work on the 15th October, and in the meantime he used the oxen for taking loads of grass into Johannesburg, and for similar minor purposes. On the 15th October four of the oxen, which he had thus hired had been sent with a wagon to Johannesburg in charge of a lad, named Vincent, aged about sixteen years. On his way back Vincent was stopped by Coughlin, who, as representing Leo, informed him that the oxen belonged to the latter, and then went to the Booysens police station for a constable. It was suggested that Vincent should make an affidavit: but there being no justice of the peace immediately available, the boy was taken to the office of Leo's solicitor. He was there asked if he would give up the oxen. There was no evidence that actual threats were employed: but Vincent says that he was afraid that if he did not give them up he would be sent to gaol. He inquired what would become of the wagon and its contents: but ultimately acquiesced in the vehicle and the oxen being left at Coughlin's house, and went home carrying a receipt for the four oxen signed by Leo.

Under these circumstances Loots brought his action for redelivery of the animals and for £60 as damages. Leo not only resisted the demand, but counter-claimed for the remaining ten oxen which the plaintiff had in his possession, or for the payment of £100, being their value. The magistrate found for the plaintiff and dismissed the claim in reconvention. He directed Leo to return the oxen, and awarded the sum of £25 as damages. The present appeal by Leo is against that decision.

Exception was initially taken to the magistrate's jurisdiction: but no reliance was placed upon that point as a ground of appeal, and as there are no merits in the exception it may conveniently be disregarded. The real question is whether under the circumstances, there was any right in Loots to retain the cattle as against the appellant, in whom the legal *dominium* was vested at the time. Any such right must of course have been acquired from Bouwer and Maree, and its validity would depend upon their title to confer it. So that the inquiry narrows

itself into an investigation of the question whether, under the agreements already referred to, Bouwer and Maree could legally lease the cattle to Loots notwithstanding the fact that, until paid for, they remained the property of Leo and could under certain circumstances be reclaimed by him

As in so many of these cases, considerable discussion arose with reference to the true nature of the stipulation safeguarding the rights of Leo, and as to its legal effect. Was it a resolutive condition, attached to a concluded contract of sale, and merely conferring upon the seller the right to put an end to the contract and reclaim his cattle in case of the non-payment of the purchase-price? Or was it a suspensive condition, having the effect of keeping the matter open, so that there could be no concluded contract of sale unless and until the buyer had carried out his obligation? This is a question upon which there was much controversy among the commentators. Some maintained that a commissorial pact (and the stipulation in the present agreements is of that nature) should always be considered as resolutive, and never suspensive; while others contended that it was quite possible so to word such a pact that its effect would be to entirely suspend the operation of the contract of sale until the condition had been complied with. Glück (*Pandecten*, vol. 16, bk. 18, 2, sec. 1006) discusses the whole matter, and after noting the names of the contending jurists and referring to the *leges* of the *Digest* upon which they respectively relied, he states his own view to be that there is nothing to prevent a commissorial pact from being so worded as to have a suspensive operation. But he adds that, in case of doubt, it should be construed as resolutive rather than suspensive. This also was the opinion of Voet (*ad Pand.* 18, 3, 1).

In *Quirk's Trustees* v. *Liddle's Assignees* (3 S.C. 322) the Cape Supreme Court held that a condition inserted in a so-called contract of sale, to the effect that the ownership of the articles sold and delivered should remain in the seller until the payment of the price, was a suspensive and not a resolutive condition; in other words, that there was no concluded contract of sale between the parties pending such payment. This decision was based upon the principle that such a condition was repugnant

to the very nature of a sale: that it could therefore not be attached to a contract of sale: and that the result of the parties inserting it in their undertaking could only be to suspend the contract of sale until the condition had been disposed of. This is a view supported by authority (see Voet, 18, 1, 24): it has found general acceptance in South Africa, and we shall be well advised to adopt it.

It follows that there was no concluded contract of sale in this case, but that does not by any means dispose of the present dispute. Because there was a very real and definite contractual relationship between the parties, as a result of the agreements which they signed, even though the effect of those documents was not there and then to establish a contract of sale. Bouwer and Maree in return for the instalments which they undertook to pay, and did pay, and in return for the pledge of sixteen of their own cattle, received delivery from Leo of the forty-eight oxen, and had the right to keep and use them. Nor could Leo claim back the animals or dispose of them in any way so long as the instalments of the purchase-price continued to be duly paid and the other terms of the contract continued to be observed. The so-called buyers were entitled to use the oxen for their profit, as if they belonged to them; indeed, the contract contemplated that they should do so. They could not, of course, sell them, nor could they pledge them: that would be to treat them as their own property, in fraud of Leo's rights. But they could, for purposes of earning money by transport work, and in other similar respects, make use of the animals as if they belonged to them. And the more instalments they paid the nearer they approached the line which separated their position from that of true owners.

It is not necessary to inquire whether juristically Bouwer and Maree were the possessors of these oxen. A civilian commentator would probably say that they were not—for the reason that *usucapio* would not run in their favour, and that they could not take advantage of the possessory interdicts. But for practical purposes they were in many respects in the same position as possessors. And upon general principles I can see no reason why they could not allow Loots or any other suitable

person the use of the cattle for a short period in return for a money payment. They could clearly have placed them in charge of Loots to carry on the general transport work which the contract contemplated, taking the profits and paying him a salary. And there is very little difference in principle between such an arrangement and the lease of the animals to him for similar purposes for a short period. It is not necessary to go further and say that the rights of Bouwer and Maree to grant a lease of these oxen was unlimited. They might possibly have entered into arrangements incompatible with the enjoyment by Leo of the rights expressly or tacitly reserved to him by the main contract. There is no need to pronounce any decision upon that aspect of the matter, because it does not arise here. The only respect in which it was suggested during the argument that the contract had been broken (assuming that the letting does not in itself constitute a breach) was that Bouwer and Maree could not fulfil their agreement that Leo should always have free access to the oxen. But there is nothing to show that in regard to the cattle leased to Loots, such access was denied to him. Loots lives on the same farm as Bouwer, and the latter states that he wrote to Leo informing him of the contract with Loots before the cattle were handed over. Nor does Leo say that he cannot have access to these fourteen oxen: the case he makes is that they were pledged (on which point the evidence is decisively against him), and that Bouwer and Maree had no right to part with the custody of them.

The result is that in my opinion an intending buyer who obtains the rights in respect of the subject matter of his contract, which Bouwer and Maree obtained in regard to these oxen, is not necessarily bound to retain the physical control of them himself. He may allow others to exercise that control provided that he does not thereby prejudice the seller in regard to the enforcement of his rights. There is nothing to prove any such prejudice here. The owner knows where the animals are, and, if the buyers make default in the payment of the instalments, he will be able to vindicate his property in the hands of Loots. In such a case rights, which the latter had obtained from Bouwer and Maree, would be no answer to the claim of the owner. But while the

contract is being performed by the buyers, the respondent is entitled to set up those rights as a defence to a claim like the present. There is no direct authority upon the point, but if a seller sees fit to part with the possession of the thing sold, to give the intending buyer the right and control and use of it for his own benefit, then it seems to me, in the absence of express stipulation to the contrary, the buyer may assign to others the right of user which he enjoys - at any rate under the circumstances shown to exist in the present case.

A special defence was raised to the effect that Vincent, in whose charge the four oxen were, voluntarily gave them up, and that the respondent cannot go back upon the act of his agent. Now, the magistrate's view of the facts affecting this part of the case seems to me the correct one. No actual threats were used to induce Vincent to part with the cattle; but the lad handed them over because he felt himself helpless to do anything else. We know that a policeman had appeared upon the scene, he was taken to a solicitor, he became nervous and agitated, and he consented to give up the animals because he saw no other course open to him. It is not necessary to decide whether this amounted to spoliation: because it is clear that the boy, who had no one to advise him, simply did what it was suggested that he should do. The point is that he had no authority to part with the oxen: he was not the agent of Loots to that extent. They were placed in his charge to be used for a certain purpose and then to be brought back. He had no power to dispose of them so as to bind his principal: so that the special defence fails. The magistrate was right in holding that Leo was not entitled to claim the four oxen from Loots, and it follows that he was also right in dismissing the claim in reconvention.

The damages awarded were somewhat high under the circumstances. At the same time Loots was deprived of the use of these oxen for a considerable period, and must have been put to expense in sending for his wagon, which with its contents was also taken to Coughlin's house. It is not possible upon the evidence to reduce the award by any definite amount: nor was this aspect of the case much pressed during the argument. On the whole, the Court would not be justified in interfering with the

magistrate's discretion on this point. It follows that the appeal must be dismissed with costs.

Appellant's Attorney: *M. Cohen*; Respondents' Attorneys: *Weavind & Weavind.*

68 (4) SA 291 (T)
68 (1) 304 305 (R)

KROON v. ENSCHEDE AND OTHERS.

1909. *April* 19, 26. WESSELS and CURLEWIS, JJ.

Principal and surety.—Co-sureties.—Same contract.—Payment of debt. Claim for contribution from co-sureties. Cession of action.

One of several sureties whose obligations arise from the same instrument may, upon payment of the debt, claim a contribution from his co-sureties without cession of action from the creditor.

Appeal from the Assistant Resident Magistrate of Pretoria.

In May, 1905, the Transvaalsche Bank advanced to the Transvaalsche Onderlinge Kolonisatie en Landbouw Maatschappij (Ltd.), the sum of £300, bearing interest at 8 per cent. per annum. The directors of the company (among whom were the appellant and the respondents) in their individual capacity and in one and the same instrument guaranteed as co-principal debtors the payment of the debt. The directors were called upon as guarantors to pay the sum of £329. 0s. 6d. in terms of their guarantee, and, with the exception of the appellant, they jointly paid that amount.

Certain of the directors then jointly sued the appellant for his due contribution, joining as co-defendants those directors who were unwilling to join as plaintiffs. The appellant excepted to the summons on the grounds that:—

(*a*) It disclosed no cause of action inasmuch as no cession of action by the principal creditor in favour of the plaintiffs was alleged.