THE STATE *vs.* NELLMAPIUS.

Theft by means of Embezzlement—Deposition at Preliminary Examination—Proof of—Powers of Attorney-General—Re-examination—Conviction Quashed.

Evidence of a person, since deceased, taken at a preliminary examination by the Landdrost of Pretoria, who at the same time acted as Public Prosecutor, held inadmissible.

Where it is sought to put in the deposition, with annexures, taken at a preliminary examination of a person since deceased, as evidence at the trial, such deposition and annexures must be duly proved before they can be admitted.

The presiding judge at a criminal trial has the right to refuse to admit as evidence any documents which have no bearing on the case.

When a criminal charge has been laid before the Attorney-General, the power of prosecuting or refusing to prosecute is vested solely in him.

Counsel calling a witness in a criminal trial has the right of re-examining him. Where counsel for the accused, after the jury had retired to consider their verdict, requests that the documents handed in during the trial shall be sent in to the jury, the judge is not bound to comply with such request.

Theft by means of embezzlement is a crime under the Roman-Dutch law.

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A. H. Nellmapius was indicted for the crime of *theft by means of embezzlement*, and was found guilty and sentenced to eighteen months' imprisonment with hard labour. The presiding judge, Brand, J., reserved six points for the decision of the full Court, at the request of counsel for the accused. These points appear fully from the arguments of counsel and the judgment of the Court.

Ford, with him *Keet*, for Nellmapius: The first point is whether the deposition of the late James Robertson, taken by the Landdrost of Pretoria at the preliminary examination, could be admitted as evidence, inasmuch as such

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deposition was taken by the Landdrost, who at the same time also acted as Public Prosecutor. It is clear that it could not. Vide *Enslin* vs. *Truter*, 1 Searle, p. 207; *Criminal Procedure Ordinance*, §§ 44, 47; *Roscoe*, 8th ed., p. 69. There is also under point (1) the further question whether the said deposition, with annexures, could be admitted as evidence without being *proved* to be the identical deposition made at the preliminary examination. It is clear that the deposition ought to have been proved. Vide *Stephen's Digest of the Law of Evidence*, p. 80, art. 74; *Best on Evidence*, § 216; *Taylor on Evidence*, § 1033 and § 1570 in fine. Also §§ 23 and 664.

The second point is whether the presiding judge acted rightly in refusing to admit certain written documents in favour of the accused. The accused was prejudiced by such refusal and therefore the judge was wrong. Vide *Taylor*, § 338.

The third point is whether the State Attorney has the right of re-examination in a criminal trial. He has not. Vide *Criminal Procedure*, § 82.

The fourth point is that the judge misdirected the jury. Vide *Van Noorden* vs. *Wiese*, 2 J., p. 43.

The fifth point is that the judge refused to allow the jury to see certain documents after they had retired.

The sixth point is that *theft by means of embezzlement* is not a crime known to the Roman-Dutch Law. Vide 4 *Russell*, pp. 401–3; *Carpzovius de Crim.*, vol. 1, ch. 78, § 11, p. 736; *Schorer ad Grot.*, bk. 3, ch. 6, § 9, p. 465; *Erskine's Institutes*, vol. 2, bk. 4, tit. 4, § 58, *n.* (*d*).

Keet, on the same side: Vide *Justinian*, bk. 2.

KOTZÉ, C.J.: The Court wishes to hear the Attorney-General on points 1 and 5 only.

Leyds, A.-G.: With regard to point 5, the judge was not bound to give the documents asked for to the jury after they had retired. As to the first point, the objection that the Landdrost acted also as Public Prosecutor applies only to the first part of Robertson's evidence. Moreover the same person may sometimes act in two capacities. *Vide* § 49 of the *Crim. Procedure*. But even if Robertson's evidence is

left out entirely, there is still sufficient evidence left to justify the conviction of the accused.

With regard to the proof of the deposition and annexures, the mere handing in of these documents by the State Attorney is sufficient *primâ facie* proof of their identity. The onus of disproving their identity lies on the accused. Vide *Crim. Procedure*, § 128, also §§ 30 and 73; *Ordinance* 72 (*Cape Colony*) *of* 1830, § 41; *Best*, § 105, p. 96; *Archbold*, 19th ed., p. 274; *Russell*, 5th ed., p. 512; *Roscoe*, 10th ed., p. 69.

Ford, in reply: Vide *Russell*, 5th ed., vol. 2, pp. 371 and 4.

Cur. adv. vult.

Posteà (November 23rd, 1886).

KOTZÉ, C.J.: We have come to the conclusion that the second, third, fourth, fifth, and sixth points must be decided against the appellant, Nellmapius, but that the first point must be decided in his favour. The conviction must, therefore, be set aside. A written judgment will be given later.

Posteà (December 24th, 1886).

KOTZÉ, C.J.: In this case A. H. Nellmapius was indicted for the crime of *theft, by means of embezzlement*, in that he, as director of the South African Pioneer Powder Factory (Limited), and member of the managing committee of the said company in this country, did unlawfully and maliciously take, appropriate, and apply to his own use different sums of money, amounting in all to £3039 13*s*., the property of the said company, and which money was in the care and custody of the managing committee of the company. The jury found Nellmapius guilty of the crime laid to his charge, and he was sentenced to eighteen months' imprisonment with hard labour. At the request of his counsel, the following six points were reserved by the presiding judge for the decision of the full Court in appeal: 1st, that the evidence of the late James Robertson, taken by the Landdrost of

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Pretoria at the preliminary examination, could not be admitted, inasmuch as such evidence was taken by the Landdrost, who at the same time also acted as Public Prosecutor, and, further, inasmuch as neither the Landdrost nor any other witness was called to prove that the documents put in with the deposition of James Robertson are the same as those handed in before the Landdrost; 2nd, that during the trial the presiding judge refused to admit certain written documents in favour of the accused, whereby he was prejudiced in his defence, viz., a resolution of the Executive Council, taken upon an official report by Mr. Raymond of the books of the Powder Factory, and, secondly, certain letters of the 29th May, 1886, addressed by Mr. Lewis to the President and Executive Council; 3rd, that the State Attorney has not the right, in a criminal case, of re-examining his witnesses under § 82 of the *Criminal Procedure Ordinance*; 4th, that the presiding judge misdirected the jury by telling them that the only point for them to consider was whether the accused appropriated the money to his own use or not, as laid in the indictment; 5th, that when the jury, after having retired, requested through the sheriff to be furnished with a certain telegram, the judge refused the request of counsel for the accused that all documents should be placed in the hands of the jury; 6th, that there can be no question of theft by means of embezzlement where the accused has used money, received by him on behalf of his principal, for his own purposes, there being nothing to show that the money ever at any time came into the actual or constructive possession or ownership of the principal. As we are of opinion that the conviction ought to be set aside on point 1, we shall begin by first disposing of the other points reserved, and shall then fully consider point 1. It is objected by the second point raised that the presiding judge refused to admit as evidence in the case a certain resolution of the Executive Council, and a letter written by Mr. Lewis. The resolution in question, dated the 15th April, 1885, reads as follows: "The Executive Council, after having heard the report of the book-keeper of the Treasurer-General, Mr. Raymond, expresses its satisfaction at the favourable condition of the company, in accordance with the said report." This resolution had

nothing whatever to do with the charge against Nellmapius, and might, if put in, have misguided the jury. Consequently the judge properly refused to allow the admission of the re tion. And this remark also applies to the letter of Mr. Lewis, in which he, as representing the directors of the Powder Factory, on the 29th May, 1886, not merely informs the Government that it is the desire of the directors that the prosecution against Nellmapius shall be withdrawn, but also protests against the continuance of criminal proceedings against Nellmapius. The matter was at the time in the hands of the State Attorney, who is entrusted with the power of the public prosecution, and that officer, and not the directors or the Government, could alone decide whether the complaint preferred against Nellmapius should, in the interests of the public and the country, be prosecuted or not. The third point is that the State Attorney at the trial re-examined witnesses, to which, by § 82 of the *Criminal Procedure*, he is not entitled. That article of the *Criminal Procedure* merely provides that the State Attorney shall, at the trial, call his witnesses and examine them on oath, and that thereupon the accused shall have the right of cross-examination. There is no prohibition in this section, therefore, against the re-examination of his witnesses by the State Attorney. It has, moreover, always been the settled practice of the Court to allow the re-examination of witnesses by the party calling them, and *cursus curiae lex curiae*. The fourth point is that Mr. Justice Brand misrepresented the case to the jury, and did not direct them properly in the matter. What happened at the trial was this: after the judge had summed up and the jury had retired, they returned again into court, and, in answer to the question of the Registrar whether they were all agreed and found the prisoner guilty or not guilty, replied, *guilty of fraud*. Thereupon the judge observed that it was not a question of fraud, but that the point for the consideration of the jury was whether the accused had used the money for his own purposes as stated in the indictment. We must take it that in the first instance the judge properly summed up the case, and clearly and distinctly put the various questions which the jury had to decide upon. No objection has been made as to this; and

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how can it now be maintained that, when the jury upon their return into court were under the erroneous impression that Nellmapius was guilty of fraud, a crime for which he was not indicted, there was a misdirection on the part of the judge when he said that the question for the jury was whether the money had been appropriated by Nellmapius to his own use as laid in the indictment? Under the circumstances this was no misdirection, but rather a helping right of the jury, who were evidently under the impression that Nellmapius was guilty of fraud. The fifth point is that the judge refused to have the documents which had been put in handed to the jury. After the jury had retired they sent the sheriff to ask the judge for a certain telegram, in which the directors in London requested the Government to withdraw the prosecution. As no telegram of the kind had been put in, the judge could not act otherwise than he had done. His answer was simply that such a telegram did not exist; and the judge was not bound to comply with the request of counsel for the accused that the jury, after they had withdrawn, should be placed in possession of all the documents. The case might have been different had the jury themselves made the request. The sixth point amounts to this: that a person who receives money entrusted to him by his principal, and appropriates and embezzles the same, is not guilty of theft. To maintain this contention, reference was made to the English law, by which a distinction is drawn between theft and embezzlement. But this distinction does not exist in the Roman-Dutch law, which is of general application in South Africa. Just as one may by our law and customs commit *theft by means of false pretences*, so likewise may he commit *theft by means of embezzlement*. We consider it sufficient to cite but one authority on this point, viz., the *State* vs. *De Villiers*, decided by the Supreme Court of the Free State in 1884. There the facts were similar to those of the present case. De Villiers was indicted for the crime of theft, in that he had appropriated to his own use certain moneys belonging to the minor children of the late W. Meintjes and his deceased spouse. These moneys De Villiers had received in his capacity of executor of the said estate. The Court was unanimously of opinion that these facts constitute the crime of theft. In

a well-written judgment by Mr. Justice Gregorowski the matter is fully discussed, and it is enough to say that we concur in that judgment (vide *Gregorowski's Rep.* 14 *et seq.*). We come now to the consideration of the first point reserved. At the commencement of the preliminary examination, held on the 7th October, 1885, the following note by the Landdrost appears: "The Public Prosecutor being absent, the Landdrost also acts as Public Prosecutor." The Landdrost acted in both capacities on the 7th and 8th October, when the deceased, Mr. Robertson, made his deposition. When this deposition was put in at the trial, counsel for the accused objected thereto, and now it is argued in his behalf that the evidence given by the deceased gentleman ought not, under the circumstances, to have been admitted as evidence against the accused, inasmuch as the deposition was taken by an officer who acted at one and the same time both as Landdrost and prosecutor. The Attorney-General replied to this that the objection could only affect a portion of Robertson's evidence, for he continued his evidence on the 9th October, when the Public Prosecutor was present; and even if the evidence of Robertson were entirely put aside, there would still be more than sufficient evidence to justify the conviction of the jury. He maintained that the law indeed allows the officer holding a preliminary examination to act in two capacities, and in support of this contention he referred to § 49 of the *Criminal Procedure.* It is clear that the conduct of public prosecutions vests in the Attorney-General, and, under his guidance, in the public prosecutors of the different districts (vide *Crim. Procedure*, § 10 *et seq.*; and *Bijlage No.* 3 *to the Grondwet*, 1881). A preliminary examination must be instituted by the State Attorney (or the Public Prosecutor in the district in which the alleged crime was committed) before the Landdrost, or, in his absence, before a justice of the peace, within whose jurisdiction the prosecutor is authorised to act (§ 24 et seq., *Crim. Procedure*). Here the relative function of Landdrost and Public Prosecutor is clearly defined, and if we turn to § 52 of the *Crim. Procedure* it is beyond all doubt that the Landdrost is regarded in the position of a judge while holding a preliminary examination, and is as such quite distinct from the Public

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Prosecutor, or representative of the State Attorney. In § 49, however, there occurs an exception to this rule. By that section provision is made for the case where the criminal law may be defeated if the deposition of a witness be not immediately taken, or otherwise the evidence of such witness would be entirely lost. Hence the Legislature prescribes: "Whenever any danger exists that through delay the object of the law may be defeated, it shall be lawful for any justice of the peace to hold a preliminary examination, and he shall be bound, with all possible speed, to forward the depositions to the persons entrusted with the prosecution of crime." It appears to us that § 56 of the *Crim. Procedure*, which was, however, not referred to during the argument, must likewise be understood in this sense, for the simple reason that to give any other interpretation to it would be equivalent to saying that the Legislature had contradicted itself. There is nothing whatever to show that any danger or apprehension existed that the evidence of Mr. Robertson would have been lost if the Landdrost had not immediately taken his deposition, and consequently §§ 49 and 56 of the *Crim. Procedure* are of no application. The rule must prevail here, and that is, that the Public Prosecutor of the district where the offence was committed, and not the Landdrost, must appear against the accused. If this is not observed in the holding of a preliminary examination, and the Landdrost were on such an occasion to take the evidence of a witness who subsequently dies, then objection may successfully be made against a deposition taken in this manner being put in as evidence before the jury at the trial. In such a case the question is not whether, independently of the deposition improperly taken, there was sufficient evidence against the accused to justify the conviction, for it is impossible to say what influence the deposition exercised upon the jury; nor have we a statute, as in the Cape Colony, whereby power is given to the Court of Appeal of confirming the conviction, where it appears that no substantial injustice was done to the accused by the admission of improper evidence. We must therefore, apart from the facts of the case, consider the objection which has been taken as a matter of principle, and can come to no other conclusion than to declare the objection well founded.

Where the law, treating on the subject of public prosecution, prescribes a certain form of procedure in the interest of the State, the public, and the accused, such mode must be strictly observed. The remarks of the judges in *Enslin* vs. *Truter* (Searle's Rep. p. 212 *et seq.*) are applicable here. A single illustration will sufficiently show the desirability and justice of this principle. Suppose a child of four or five years is called as a witness, at a preliminary examination, against a person accused of murder, and that the latter objects thereto. If now the Landdrost is at the same time acting also as Public Prosecutor, he will have to decide whether the child is sufficiently acquainted with the nature and obligation of an oath, and is therefore a competent witness or not. Should the Landdrost disallow the objection and admit the evidence, then he is sitting as judge of his own act and conduct as Public Prosecutor; and if the child happen to die, then, according to the contention of the Attorney-General, the deposition of the child can be put in at the trial before the jury. But it would be contrary to every principle of fairness and justice to admit the deposition under the circumstances supposed. Other instances of the danger of admitting such proceedings will be found in the judgment of Mr. Justice Bell in *Enslin* vs. *Truter*. The fountain of justice must remain pure and unpolluted, and this can alone be ensured by a strict observance of the provisions of the law. It has also been objected that documents annexed to the deposition of the late James Robertson were merely handed in with the deposition, without any proof that they were the same documents produced and sworn to by Robertson at the preliminary examination. These documents constitute in reality a portion of the deposition, and, like the deposition, ought to have been properly proved. According to the argument of the Attorney-General it was not necessary to prove the deposition and the signature of the official who took it. It must be assumed that the documents put in and the signature of the Landdrost were genuine until the contrary appeared. For this position *Best on Evidence*, § 105; *Archbold*, p. 274, 17th ed.; and 3 *Russell*, 5th ed., p. 512, were cited. These writers treat of the Statute 11 and 12 Vict. c. 12, § 17, under which the deposition made before a

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magistrate can be used at the trial, after it is *proved* that the witness is dead, or so ill that he cannot travel, and after it has been *proved*, first, that the deposition was made in the presence of the accused, and, secondly, that he or his attorney had full opportunity of cross-examining the witness. If all this has been *proved*, and the deposition purports to be signed by the magistrate before whom it was made, such deposition may be read at the trial without further proof of its having been signed by the magistrate, unless it is shown that the deposition is not signed by the magistrate by whom it purports to have been signed. From this it appears that although it is not necessary to prove the signature of the magistrate who took the deposition, *proof* must be given, firstly, of the fact that the witness is dead; secondly, that the deposition was made in the presence of the accused; and, thirdly, that the accused or his attorney had full opportunity of cross-examining the witness. The simple production at the trial of the deposition with the annexures without the required proof is not sufficient; and prior to the Act 11 and 12 Vict. c. 42, the signature of the magistrate or justice who took the deposition had to be proved as well (vide *Russell*, vol. 3, 4th ed., p. 493–4). According to our *Criminal Procedure*, § 128, any deposition made at any preliminary examination shall serve as legal evidence in any court, provided it can be proved that the witness is dead, etc. Upon this the Attorney-General contends that the only proof required in such a case is that the person who made the deposition is dead; and he referred to Ordinance 72 of 1830, § 41, in force in the Cape Colony, by which it is also required that proof must be produced to show that the deposition attempted to be put in is the same as that made before the magistrate. As this requisite is not mentioned in § 128 of our *Criminal Procedure*, he maintains that proof of the identity of the deposition is not necessary. We cannot accept that view. The general rule is that all documents and writings which it is desired to put in at the trial must be duly *proved*, and by the provisions of § 128 the Legislature did not intend to introduce an exception to this rule. The section merely enacts that, whenever it can be shown that the witness is dead, his deposition may be tendered as evidence at the subsequent trial. In other

words, such a deposition may be used as evidence; but this does not dispense with the necessity of tendering and proving such evidence in the *proper* manner. The Legislature has said nothing on that point, and we cannot assume that the intention was to depart from the rule in this instance. Even in the Cape Colony, if the proviso as to the necessity of proving the identity of the deposition did not exist, proof of such identity would nevertheless have been insisted on. The point now under consideration has already been decided by the High Court of the Transvaal in February, 1880, in the case of *The Queen* vs. *Sipana*. In that case the Attorney-General wished to put in the deposition of an absent witness, who was too ill to travel and be present at the trial. The Court ruled that the deposition must be properly proved before it could be admitted. And in the case of *The State* vs. *Fluks and Katjaan*, which came in September last before the Circuit Court at Ermelo, the deposition of a witness who had fled to Swaziland was admitted against the accused, after it had been proved that the deposition was made under oath in the presence of the prisoners, and taken down by the local Landdrost. It would be most dangerous to admit the deposition of a deceased witness upon its mere production, without due proof that it is the same deposition originally made before the Landdrost, and the same observation applies to documents annexed to the deposition. If no proof of the identity of these documents be required, the greatest injustice may be perpetrated thereby. The fact that the deposition of the late Mr. Robertson was produced at the trial by the Attorney-General in person cannot alter the case, for the provisions of § 30 of the *Criminal Procedure*, to which reference has been made, and which provides that the notes of the Attorney-General made with reference to his acts *ex officio* shall serve as legal evidence of such acts, are of no application to the point under consideration. In like manner, the practice of putting in a prisoner's statement without further proof is no reason for dispensing with proof of a deposition made by a deceased witness. Since the establishment of the High Court in 1877 it has been the uninterrupted practice to put in the prisoner's statement, and there is a material difference between the two cases. The accused, after having been duly cautioned, makes a

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statement which he knows may be used as evidence against him at the trial. This statement is not merely put in, but also read at the trial, and the accused has the opportunity of making any objection against the contents of the statement, or disproving what is read to be his statement. But it cannot be supposed or expected that he can remember everything which appears in one or more, often very lengthy, depositions made against him at the preliminary examination. He is therefore not in the same position when these depositions are read to the jury as he would be in with reference to his own statement. The conviction of the jury must accordingly be set aside upon the legal grounds above mentioned. It must not be understood that we are of opinion that no crime was committed by the convicted man, and that the verdict of the jury was not well founded. We express no opinion on this point. The verdict is simply set aside because of irregularities which occurred in taking down the depositions of the late Mr. Robertson at the preliminary examination, and in the subsequent admission thereof with the documents annexed at the trial as already observed. We desire also to point out that the remarks made by the Bench, when the decision of the full Court on the points reserved was announced, with regard to a portion of the press, have been misinterpreted. We made no observation upon the discussion by the press of the grant of a pardon to Nellmapius, and what subsequently ensued. We merely expressed our disapprobation of certain comments, in which certain newspapers indulged, upon the manner in which the proceedings were conducted in Court during the trial. These papers, while the case was still pending, accused the presiding judge of partiality and incompetency. Not a single word of such an accusation was even whispered during the argument in appeal. These comments were an improper expression of opinion and a contempt of Court. Not merely the presiding judge, but the administration of justice in this Republic, was affected thereby, and consequently we felt ourselves called upon to express our disapprobation and at the same time to give a warning for the future. In the matter of *In re Phelan* (Kotzé's Reports, 1877-1881, p. 4) the High Court nine years ago pointed out what amounts to contempt of Court. We have not the slightest desire of

interfering with the privileges of the press. The liberty of the press is guaranteed by the law, and is sometimes the only sufficient safeguard of public liberty; but whenever its liberty changes into licence, the press oversteps the boundary of its right, and that cannot be tolerated. Against this alone the Court expressed its disapproval.

ESSELEN and S. JORISSEN, JJ., concurred.

NOTE.—On the 29th September, 1886, the jury found the late Mr Nellmapius guilty, when sentence was passed upon him. On the 30th September an application was made on behalf of Mr. Nellmapius to stay execution of this sentence and release him on bail, pending the decision of the full Court on the points reserved by the presiding judge at the trial. Brand, J., before whom this application was made, held that he had no power to grant it. A petition was thereupon drawn up and signed by Mr. Nellmapius, and another by some inhabitants of Pretoria, and forwarded to the President and Executive Council, praying for the release of Mr. Nellmapius. The State Secretary, Mr. Bok, without forwarding the petition to Mr. Justice Brand, merely acquainted him by Minute of 1 October of the fact that such a petition had been received, and asking the judge for his advice and report thereon under terms of Art. 83 of the Grondwet. On the 2nd October Mr. Justice Brand replied, expressing his surprise that the petition itself had not, as was customary and necessary, been forwarded to him, and pointing out that Mr. Nellmapius' case was pending in appeal before the full Court, and that the matter was now in the hands of that Court. On the same day Mr. Bok acknowledged the receipt of Mr. Justice Brand's communication, at the same time enclosing the petition and intimating that the Executive expected his *immediate* advice thereon, and would meet again *that afternoon* to consider such advice. Mr. Justice Brand took umbrage at this tone of the State Secretary's letter, and proceeded to the President's house, where, in the course of conversation, the President desired him to release Mr. Nellmapius on bail pending the decision of the full Court on the points reserved. Mr. Justice Brand replied that such was not possible. This took place on the 3rd October. On the 4th October Mr. Justice Brand wrote to the State Secretary, returning the petition, and adding that he must again remind the Executive that the matter was no longer in his hands, but in those of the full Court in appeal. On the afternoon of the same day the State Secretary, Mr. Bok, informed Mr. Justice Brand by Minute, enclosing a letter from the attorney of Mr. Nellmapius, that the reserved points had been withdrawn, and added that the Executive had since ten o'clock that morning awaited his advice, and asked that this might at once be sent by the bearer of the Minute. Whereupon Mr. Justice Brand replied upon the following day, warning the Executive that it was not competent to interfere with the legal procedure of the country. On the same day the State Secretary wrote to Mr. Justice Brand intimating that the Executive had decided to grant a pardon to Mr. Nellmapius, who was forthwith set at liberty. On the afternoon of this day (5th October) Mr. Justice Brand

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acknowledged the receipt of this letter, and at the same time sent in his resignation, stating that, in his view, no other honourable course of action was open to him. This resignation was at once accepted.

While these proceedings had been going on, Kotzé, C.J., and Esselen, J., were absent on circuit. The Chief Justice returned to Pretoria on the 6th October, and, after having had an interview with Brand, J., and seen the documents and correspondence above referred to, decided upon the immediate re-arrest of Mr. Nellmapius, on the ground that, until the full Court had decided upon the points reserved, the President, with the advice of the Executive Council, could not exercise his prerogative of pardon, for there can be no pardon until the Court had first confirmed the conviction, and this was still an open question pending the decision on the points reserved. The intention of Art. 83 of the Grondwet is that a pardon shall only be granted where it can *legally* operate as such. A warrant for the re-arrest of Mr. Nellmapius was consequently issued by the Chief Justice and duly executed, a letter being also sent by the Chief Justice to the head of the State, explaining the circumstances under which he was compelled to act. A few days later Esselen, J., returned from circuit and expressed his concurrence in the steps taken by the Chief Justice. The conviction having subsequently been quashed, as stated in the above Report, Mr. Nellmapius was set at liberty by order of the full Court.

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Title to Land—Ejectment.

Where the defendant was in possession of a farm and the plaintiff, in an action for ejectment, proved a primâ facie good title to it, while the defendant failed to prove any right: Held, *that the plaintiff was entitled to possession of the farm as against the defendant.*

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The plaintiff alleged that on January 16th, 1885, he bought the farm O'Donovan's Land, in the district of Bloemhof, and that about a year before the issue of summons, the defendant went and lived on the farm without his consent and against his wish. He asked that the defendant might be ejected.

The defendant pleaded that he became the owner of a portion of O'Donovan's Land called Goudplaats on October 11th, 1884; that the said portion had been granted to William Wright by G. J. Van Niekerk, the Administrator of Stellaland, on February 27th, 1883, in accordance with