

NTSUTLE v. REX.

1910. *November 25.* MAASDORP, C.J., and FAWKES and WARD, JJ.

Criminal law.—Appeal.—Theft.

Where N had agreed to sell a cow and calf to K, but had not effected delivery, and five days thereafter K had gone to N and had asked him to keep them during his absence in Basutoland, and N, after promising to do so, sold them to a third party, *Held*, on appeal, that as there was some doubt as to whether it had been the intention of N and K that the property should pass to the latter, when N had undertaken to look after them in K's absence, the conviction and sentence should be quashed.

This was an appeal against a conviction of the Resident Magistrate of Thaba'Nchu. The appellant had made an agreement to sell a cow and calf to one Paul Kieklane, the complainant in the court below, but had retained possession. Five days later the complainant went to the appellant and asked him to look after the cattle for him during his absence in Basutoland. This appellant undertook to do. Prior to complainant's return, however, appellant sold the cattle to a third party. The magistrate had convicted appellant of theft on these facts.

Blaine, K.C., for the appellant: The property in the cattle had not passed to the complainant, because delivery was not effected, and consequently the appellant was wrongly convicted of theft.

De Jager, A.-G., for the Crown: This is a case of *constitutum possessorium*. It is clear from the evidence that there was an intention to pass the property, the appellant agreeing to act merely as custodian.

[MAASDORP, C.J.: Would this agreement have been held sufficient to pass the property if the appellant had been insolvent?]

There is no question here of defrauding creditors.

Blaine, K.C., in reply: In the words of DE VILLIERS, C.J., "That doctrine" (of the *constitutum possessorium*) "has often afforded a refuge to counsel when every other argument has failed." See *Queen v. Castleden* (6 S.C. 123); *Queen v. Mateta* (14 E.D.C. 19); and *Rex v. Koti* ([1908] E.D.C. 234).

MAASDORP, C.J.: The only question to be decided in this case is whether what took place in the course of the second conversation between accused and complainant amounted to delivery. At the first conversation the cow and calf were pointed out, and the parties made an agreement. On the second occasion, five days later, complainant said to accused, who was still in possession of the cattle, "Will you look after the cow and calf during my absence in Basutoland?" or words to that effect, and accused agreed to do so. That arrangement might have meant one of two things—either that the accused was to keep the cow and calf and deliver them to complainant later, or that accused intended to constitute complainant the owner while he still retained possession. I do not think the second alternative is possible. Even if that view is tenable, we must give the accused the benefit of the doubt, and hold that delivery has not been sufficiently proved. The appeal must therefore be allowed with costs, and the conviction and sentence quashed.

FAWKES and WARD, JJ., concurred.

Appellant's Attorneys: *Gordon Fraser & McHardy*.