1911. Dec. 4. „ 14. Rautenbach *vs.* Groenewald.

this is that there is no averment to that effect and no proof tendered. To found a case on ratification, there must be an allegation that after the death of her husband she made a fresh promise to pay, and there is no such averment.

Hence the appeal succeeds on every point and must be upheld, with costs.

[Attorney for Appellant, C. PODLASHUC.
Attorney for Respondent, C. F. BEYERS.]

[Reported by ADOLF DAVIS, Esq., Advocate.]

DE VILLIERS, J.P., BRISTOWE & CURLEWIS, JJ. Nov. 20th, 21st, Dec. 28th, 1911.

CLARKE *vs.* BETHAL CO-OPERATIVE SOCIETY.

Appeal.—Peremption.—Costs.—Several Issues.—Apportionment.—Appeal from Magistrate's Decision.

The peremption of a right to appeal only takes place when the appellant has so conducted himself as to induce the Court and the opposing party to believe that he has no intention of appealing and to act upon that supposition. To establish such peremption the circumstances must be such that the opposite party can reasonably have believed that the appellant acted with the intention of abandoning the appeal.

When costs can be apportioned on divisible issues and a magistrate has not apportioned them, the Court on appeal will interfere with the magistrate's decision and apportion the costs according to the result of each issue.

1911. Nov. 20. „ 21. Dec. 28. Clarke *vs.* Bethal Co-operative Society.

Appeal from a decision of the A.R.M., Bethal.

The respondent Co-operative Society, plaintiffs in the Court below, sued the appellant for two amounts of £1 5s. and £4 5s. The £1 5s. was made up of two entrance fees of 10s. each, plus 5s. for a yearly subscription, it being alleged that the defendant had been elected a member of the society, had resigned, and had been re-elected. The item of £4 5s. was claimed as damages for loss of

commission by reason of the defendant's breach of the rules of the society by having sold 200 bags of mealies otherwise than through the society. The magistrate gave judgment for the plaintiffs for £1 5s.; but he came to the conclusion that the mealies which formed the subject of the second claim belonged to one Roberts, and the plaintiffs, therefore, failed on that issue. The magistrate held, however, that the plaintiffs were entitled to all the costs of the proceedings, on the ground that the two issues were closely involved and the plaintiffs had succeeded in regard to a substantial amount of their claim. Against this judgment the defendant appealed.

On appeal, the respondents raised a preliminary objection that the appeal had been perempted by the defendant; affidavits were put in by the respondents setting out the facts relied upon, and counter-affidavits by the appellant were also handed in. The facts contained in such affidavits appear in the judgments.

R. Gregorowski (with him *T. J. Roos*) for the respondents: I raise the preliminary point that the appeal has been perempted by the appellant. Plaintiffs' attorney accepted the cheque, and, therefore, the judgment both as to judgment and costs was settled. It was an unconditional payment of the judgment and costs. Notice of taxation was given, and the notice was accepted by the defendant. Defendant acquiesced in the taxation, as he brought it in review; see *Bongers* vs. *Ekstein* (1908, T.S. 910). If the opposite party does not note an appeal, then the winning party can issue a writ, even before the lapse of the time of appeal. If the notice of the taxation was too short, the defendant should have appeared and objected to the taxation. The cheque could not have been withdrawn or the payment stopped. See *Michaelis* vs. *Weston & Co.* (4, E.D.C. 306); *Loughnan* vs. *Haji Joosub Bhulladma* (*The Hydroos case*) (5, Moo. Ind. P. 137; 18, Eng. Rep. P.C. 847); *The Ship Clifton* (12, Eng. Rep. 695). These cases show how strictly the doctrine of peremption is applied, and the same view was taken in *Bongers'* case (*supra*). Noting of an appeal suspends taxation.

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[DE VILLIERS, J.P.: On whom is the onus to prove peremption?]

The onus is on the other side to disprove it, as we have been paid. A payment made under protest is not an involuntary payment.

B. A. Tindall, for the appellant: The principle is whether an appellant has done an act inconsistent with his intention to appeal, and whether he communicated this to the other side; see *Bongers'* case at p. 921. Before a man can elect, he must know his rights; if he does not know them he cannot waive them. As to election see *Bigellow* on Estoppel, p. 679. In *Voet,* 49, 1, 2 the word used is *comprobaverint,* see *Meiklereid* vs. *Bank of Africa, Ltd.* (1905, T.S. 749). A payment under protest does protect the person making it; see *Bongers'* case (*supra*) in judgment of BRISTOWE, J. If a man pays and says "I am going to appeal" that protects him. The proper person to convey the protest to is to the messenger, and he is the agent of the plaintiff. Bergh is bound by the knowledge of the messenger. Before the cheque was handed over to Bergh, he knew that the defendant would appeal. There is no proof that the cheque was cashed before the appeal was noted.

Appellant is entitled to a reasonable notice of taxation; a successful party cannot take out his writ, until the time for appeal has lapsed, see Rule 37 of the Magistrates' Court Rules, and *Benning* vs. *Thomas* (1878, Buch. 47), decided under a similar Cape rule; see also *Perelson* vs. *Druain* (1910, T.P. 458 at p. 462).

Defendant's conduct as to the taxation is not inconsistent with his intention to appeal, and that is the test. It is not clear that the noting of an appeal suspends taxation, see *Voet,* 49, 7, 1. The onus of proof is still on the other side, notwithstanding the fact that they have received payment; there is no presumption that the cheque was cashed before the appeal was noted. The English cases can be distinguished.

R. Gregorowski, in reply: No time is fixed within which a judgment must be satisfied. See *Perelson's* case

(*supra*); *Barrett* vs. *Potgieter* (1908, T.S. 13). The eight days within which to appeal is really not a privilege given to the appellant, but a restriction, see *Meiklereid* vs. *Bank of Africa, Ltd.* (1905, T.S. 749 at p. 752).

The Court reserved judgment on the preliminary point, and called upon counsel to argue on the merits.

B. A. Tindall, for the appellant: The main point of appeal is the question of costs. There were two distinct issues, and the magistrate did not divide the costs. Eight out of the eleven witnesses deal with the claim of the £4 5s. Where there are distinct issues the costs must be divided; see *Herzfelder* vs. *McArthur. Atkins & Co.* (1908, T.S. 332 at p. 360); *Scheepers & Nolte* vs. *Pate* (1909, T.S. 353 at p. 359); *Natal Bank* vs. *Rood's Heirs* (1909, T.S. 243 at p. 261).

If the preliminary objection is dismissed, appellant would also be entitled to these costs; they are separate.

R. Gregorowski (with him *T. J. Roos*) for the respondents: The magistrate exercised a wise discretion in awarding the costs in the manner he did.

B. A. Tindall replied.

Cur. adv. vult.

Postea (December 28th).

DE VILLIERS, J.P. [After stating the facts as set out above proceeded:]

Mr. *Gregorowski,* on behalf of the respondent, raised the preliminary objection that the appeal has been perempted by the defendant; in other words, he contends that by his conduct subsequent to the judgment the defendant acquiesced in it, and that therefore he is not entitled to appeal against it. A similar point came up for decision in the case of *Bongers* vs. *Ekstein* (1908, T.S. 910). There the authorities were reviewed at some

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length, and the Court came to the conclusion—though there are decisions to the contrary in various other colonies of South Africa—that the doctrine of acquiescence in a judgment is a portion of our law, and that, under the circumstances of that case, the appellant had acquiesced in the judgment, and therefore could not appeal against it.

The facts of the present case are shortly as follows. The magistrate's judgment was delivered on Tuesday, the 3rd October. On the following Thursday, the 5th—it is not quite clear at what time (the attorney for the respondent says at a little past nine o'clock)—he gave the other side notice of taxation of his bill of costs to take place at 11 o'clock on that day. The attorney for the appellant says that he only received the notice shortly after ten o'clock. I wish to say, in passing, that, although the law does not prescribe that any particular period of time should elapse before taxation, it implies that a reasonable time should be given. Here no reasonable time was given, and the clerk of the court was wrong in allowing the bill to be taxed under the circumstances. He received notice from Mr. Hutchinson, the attorney for the appellant, that the latter could not attend at eleven o'clock that day, and it was the clerk's duty, under these circumstances, to have told Mr. Bergh, the attorney for the respondent, that he must give a reasonable notice. Mr. Hutchinson did not appear that morning, but the bill was nevertheless taxed by the clerk; and a letter was immediately written by Bergh to Hutchinson asking for payment. On the same day Hutchinson wrote the following reply: " In terms of par. 17 of Law 18 of 1899 I herewith give notice that I shall bring in review the taxation of your bill of costs herein on Wednesday, the 11th instant, at 10 a.m. before the R.M., Bethal." On the following Saturday, the 7th October, a writ of execution was taken out by the plaintiffs, and the messenger proceeded to the defendant's farm and obtained from the defendant a cheque, postdated the 10th October, for the amount of the judgment plus the taxed costs. There is a dispute as to what took place. The messenger says Clarke told him that the only reason why

he gave a post-dated cheque was because he had not enough money in the bank then, and he meant to go into town on the following Monday and arrange matters. Clarke, on the other hand, says that that was not the reason, but that he told the messenger he was surprised that the plaintiff was executing, and that he had put the matter into the hands of his attorney, and contemplated an appeal, and that the messenger undertook to impound the cheque and not to pay it over to the plaintiff until the defendant had again seen him, and in any case not before the 10th October. In this conflict of testimony the Court has to decide which of the parties to believe, and I entertain no doubt that the story of the messenger is not an acceptable one. He made an affidavit in which he said that he had received a certain letter from the defendant's attorney after he had paid over the cheque to the plaintiff, and he had to admit that this was incorrect, although he says that it was a mistake. It is difficult to see how such a mistake could have arisen. The messenger knew perfectly well the sequence of events, and in this conflict of testimony I prefer to accept the statement of Clarke on this point. Clarke came into town on the following Monday. He was annoyed, and spoke to his attorney very sharply in the presence of the messenger, and the messenger there undertook not to hand over the cheque. In spite of that he handed it over that day. The cheque was, as I have said, post-dated for the following Tuesday, and it was cashed by the respondent on that day. On the same day, however, an appeal was noted by the defendant's attorney. On the following day—the day which had been fixed for the review—the review was heard, in spite of the fact that an appeal had been noted the day before.

Mr. *Gregorowski* has argued that, on these facts, there are two reasons why the appellant must be held to have acquiesced in the judgment. First, he relies upon payment; his contention is: "We are in possession of the money; we have been paid, and the Court will not disturb our possession." Secondly, he says that the conduct of the appellant's attorney in notifying his willingness to attend the taxation, and the fact that he wrote the

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letter of the 5th October, saying that he was going to bring the taxation in review on the following Wednesday, as well as the review itself, are all matters which show that the appellant acquiesced in the judgment. With regard to the first point, namely, the payment, it is clear law that in order to rely upon that the payment must be voluntary. The authorities are all agreed on one point, namely, that there must be either an express or an implied agreement between the parties not to pursue the appeal. If there is no express agreement, the appellant must have so conducted himself that his acts, when fairly construed, necessarily lead the Court to the conclusion that he has impliedly agreed with the other side not to prosecute his appeal. That is the law as it is laid down in the *Code* (7, 52, 5), and by *Voet* (49, 1, 2). *Voet's* actual words are: "A person cannot prosecute an appeal when he has approved (*comprobaverint*) of the sentence." *van der Linden,* on the other hand, uses the word "*homologatie,*" which also means an agreement. *Merlin,* in his *Repertoire de Jurisprudence* (Vol. 1, p. 132, *sub voce* "*acquiescement*"), defines acquiescence generally as the agreement which one or other of the parties has come to in regard to a proposition, a clause, a condition, a judgment, or any other act whatever, and he goes on to say that no formal act is necessary to constitute acquiescence; it is sufficient if it results necessarily from the conduct of the parties. In *Bongers* vs. *Ekstein* the costs of the action had been paid, and it was stated that a cheque was forwarded in settlement of the defendant's bill of costs. The Court held that that was inconsistent with an intention to appeal. If in this case there was a voluntary payment, then that would be an act inconsistent with an intention to appeal, for whatever the intention of the appellant may have been when he paid the Court will not hear him when he says that he had a mental reservation to appeal. But in my opinion there was no voluntary payment, first, because I believe Clarke's version, and secondly because, when a party pays in consequence of a writ of execution, that cannot be considered to be a voluntary payment. In face of the fact that the messenger was ready to execute the writ of execution the

Court can come to no other conclusion than that it was not a voluntary payment. The appellant, therefore, cannot be said to have acquiesced in the judgment by reason of his having given a cheque for the amount of the capital and costs.

I have had greater difficulty with regard to the other point. The acts of the appellant here are very close to the border line. But in my view the Court ought not to be astute in construing the acts of a party so as to take away a clear right from him. If it is a necessary inference from his conduct, then the Court will not hesitate to say so; but if his acts are consistent with a continued intention to preserve the right of appeal he will not be held to have acquiesced. As I have said, the defendant hardly had any time to consider the matter. He only received one or two hours notice that the bill of costs was going to be taxed, and it cannot be argued that because he did not reserve any rights to himself at so short a notice he must be considered to have waived his right of appeal; and if this be so, we cannot hold that afterwards he intended to sacrifice any of his rights. On the contrary it is clear that he did not intend to give up his right of appeal; because on the Tuesday, the day before the taxation was brought into review, he actually noted an appeal and sent the plaintiffs notice to that effect. No exception seems to have been taken to that, although it would have been open to the attorney for the respondents to have drawn attention to the alleged inconsistency. It does not seem to me that the acts referred to compel the Court to come to the conclusion that the appellant meant to waive his rights, nor do I think that those acts are necessarily inconsistent with a continued intention to exercise the right of appeal. I have come therefore to the conclusion that the preliminary point must be decided against the respondents.

Coming to the merits, two points were taken by Mr. *Tindall*, on behalf of the appellant. The first was that the magistrate ought to have allowed a set-off. But I see no reason for disturbing the finding of the magistrate on this point. The magistrate says: "I had no reason to disbelieve the witness McLaren as to the number of

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bags of mealies (177) sold by the society for the defendant, and that they had paid an advance of 7s. per bag upon 180 bags of mealies, in fact defendant admits in his evidence having received this amount. Moreover, under the rules of the society that amount was not payable at the date in question, and therefore on this point the appeal must fail.

With regard, however, to the question of costs, I have come to the conclusion that the magistrate was wrong in ordering the defendant to pay all the costs. He held that the second issue was so closely involved with the first that the plaintiffs were entitled to all the costs. With regard to this I desire to say, first, that it does not seem to me that the second issue was at all closely involved with the first. They were two separate and distinct issues, and most of the witnesses who were called testified with regard to the second issue, and the costs of the two issues were very easily separable. It has been repeatedly laid down by this Court that the Court will not lightly interfere with the discretion of the magistrate on a question of costs. The magistrate has a discretion, and unless it is clear that he has wrongly exercised his discretion—in which case it is considered that he has exercised no discretion—the Court will not interfere. But to my mind it is clear, seeing that these two issues were separate and distinct, that the ordinary rule should have been followed, and that the magistrate should have given costs in favour of the plaintiffs only with regard to the first issue. For these reasons, I have come to the conclusion that the appeal must be allowed on the question of costs. The appellant is entitled to the costs of appeal.

BRISTOWE, J.: I am of the same opinion, and I do not desire to add anything with regard to the merits. But as to the point of peremption, which is a matter of some difficulty, I think it desirable to say a few words. The law with regard to peremption is stated by Baron PARKE, in the case of *The Ship "Clifton"* (12 Eng. Rep. 696), in this way: "He" (the appellant) "has so conducted himself as to induce the Court and the opposing party to believe that he had no intention of appealing, and to

act upon that supposition; and by that conduct he must be bound.". That, I think, is a correct statement of the law, and it certainly is the way in which the law was put in the case of *Bongers* vs. *Ekstein*. The question of the peremption of an appeal is part of the doctrine of election, which was dealt with by the Court in the cases of *Angehrn and Piel* vs. *Federal Cold Storage Co., Ltd.* (1908, T.S. 761), and is simply this: that where a man has two courses open to him, and he unequivocally takes one, he cannot afterwards turn back and take the other. Where there has been no unequivocal act, then whether an election has taken place or not is a question of fact. There are three events in the present case, occurring on three different days, each one of which it has been argued, or suggested, amounted to election. The first occurred on Thursday, the 5th October, when the defendant's attorney, replying to the plaintiff's attorney's telephone message that the bill of costs was going to be taxed at eleven o'clock that morning, stated that he could not attend then and the taxation must be postponed. On the same day he wrote to the taxing officer that the taxation must stand over; and later in the day he wrote a letter to the plaintiff's solicitor saying that he intended to review the taxation. I have been carefully through the cases on this subject, and I have not found any where a mere expression of intention, not carried out, has been held to perempt an appeal. I can quite understand that an expression of intention, if made under circumstances amounting to a contract, would have the same effect as an unequivocal act. But a mere statement of intention, unless and until acted upon, is not in my judgment an unequivocal act. It may be revoked; there is a *locus poenitentiae;* and it is not final. I agree with the JUDGE PRESIDENT in thinking that we ought not to carry this doctrine beyond the limits of the doctrine of election.

The second event occurred on Saturday, 7th October, when the messenger went to Clarke's premises with a writ of execution, with the intention of levying execution in satisfaction of the amount of the judgment and costs. On that occasion Clarke gave the messenger a

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cheque post-dated Tuesday, the 10th. There is a conflict of testimony, but I think the evidence, on the whole, is clear, that the messenger was informed that the post-dated cheque was given with the object of enabling Clarke to consult his attorney in view of his intended appeal. This is borne out by the fact that on the Monday Clarke came to town and saw his attorney. The messenger was present at the interview, and it is clear that he was then informed by the defendant's attorney that they intended to appeal, and that the cheque was paid under protest. That being so, it seems to me that the payment must be taken to have been a payment under protest. I should like to say, though it is not necessary to decide the point, that I doubt whether a payment on a writ of execution is necessarily an involuntary payment. A man may be willing to pay notwithstanding that a writ is presented to him, and that such payment may be voluntary seems to have been the view taken in the case of *The Brinhilda* (45 L.T.N.S. 389), one of the cases followed in *Bongers* vs. *Ekstein*, and I think that in the latter case the opinion of the Court was that payment made on a writ of execution may be voluntary, and that if the person who pays desires to reserve his rights he should do so by making the payment under protest, or showing in some other way that he does not intend to abandon any right he possesses.

The third event occurred on the 11th October, when the defendant's attorney proceeded to carry out his intention of reviewing the taxation. It is this part of the case which has presented, to my mind, the greatest difficulty, because it was argued, with much force, that this at all events was an unequivocal act inconsistent with an intention to appeal. I think, notwithstanding that some of the cases may have gone rather far, that the true way of dealing with the matter is to consider whether the circumstances are such that the opposite party can have believed that there was any intention to abandon the appeal. That, I think, is the proper test. Now here the review of taxation was not like taking a fresh step in the proceedings. It was merely a process for reducing the amount for which the post-dated cheque

had been given. It was ancillary to the payment of the costs, and seeing that the payment itself was under protest, I think such protest covered also the review. When we bear in mind, in addition, that an intention to appeal had already been expressed, and that between the Monday and the Wednesday an appeal had been noted, I think it becomes plain that the plaintiff never for a moment imagined that the defendant intended to abandon the appeal which he had noted and which he had stated that he intended to prosecute, and in respect of which he had reserved his rights when he paid the amount of the taxed bill of costs. For these reasons, I think that there has been no peremption of the appeal.

DE VILLIERS, J.P.: The appeal is allowed, insofar that the appellant is declared entitled to the costs, in the Court below, of the second issue; the appellant is entitled to costs of appeal. My brother CURLEWIS concurs in the judgment.

[Appellant's Attorneys, TINDALL & MORTIMER.
Respondents' Attorneys, LUDORF & STRANGE.]

[Reported by GEY VAN PITTIUS, Esq., Advocate.]

DE VILLIERS, J.P., WESSELS & BRISTOWE, JJ. Nov. 29th, Dec. 28th, 1911.

MAHOMED HASSAN *vs.* MINISTER OF JUSTICE AND ANOTHER.

Asiatic.—Registration.—Certificate of Age.—Right of Asiatic attaining age of sixteen to remain in Transvaal.—Act 2 of 1907.—*Act* 36 *of* 1908.

An Asiatic under the age of sixteen is not entitled, under Act 2 *of* 1907, *in his own person to make an application for registration, but if not liable to deportation is entitled, without the assistance of parent or guardian, to ask the Court to prevent his deportation.*

The certificate of age, issued by the Registrar of Asiatics under 2 *of Act* 1907, *sec.* 14, *or Act* 36 *of* 1908, *sec.* 12, *can only be disregarded by the Court when it is proved that the Registrar in issuing it has made a gross error or has acted in an arbitrary and wanton manner.*