

for special purposes like stocktaking, but that does not interfere at all with the prohibition contained in sub-sec. (2) with regard to Wednesdays. It seems to me that the object of the legislature was to give a compulsory half-holiday, which should not be infringed upon at all, for purposes of recreation. I am somewhat surprised that Mr. *Tindall* boldly says that Wednesday is the most appropriate day for stocktaking and for other special work, and that he sees nothing unfair in thirty of the Wednesday afternoons in a year being devoted to special work. This contention conclusively shows that the whole object of the legislature would be frustrated if Wednesday afternoons could be appropriated by the employer for special work. Then the words at the commencement of sub-sec. (4), as regards the special days Christmas Eve, New Year's Eve and so on—"Notwithstanding anything to the contrary in this section"—clearly override the prohibition in sub-sec. (2), if Wednesday should happen to be one of these days on which extended hours can be required for ordinary business purposes. It seems to me that sub-sec. (2) is quite clear and that the magistrate's decision was correct.

Attorneys for accused: *Wagner & Klagsbrun*.

[G. v. P.]

WALTER v. KOLMANSKOP DIAMOND MINES, LIMITED.

1914. *February* 5, 12. MASON, J.

Practice.—Person in unlawful possession of property.—Criminal charge.—Ownership in dispute.—Application for leave to sell property to provide funds for defence of civil action.

The principle by which an accused person is allowed for purposes of his defence to dispose of property which had been in his possession and in respect of which a criminal charge has been laid against him, is not applicable to subsequent civil proceedings against such person relative to the ownership of such property.

Application for leave to sell or pledge certain diamonds in order to provide funds to enable the applicant to defend an action.

Applicant was arrested upon a charge of contravening Ord. 63 of 1903, and committed for trial. At the time of his arrest he had in his possession certain rough diamonds amounting to about 1,497 carats of the value of £4,000 or £5,000. These diamonds were taken possession of by the police authorities. On October 15th, 1913, the respondent company obtained an interdict against the Minister of Justice parting with these diamonds pending action to be instituted by them for their recovery within three weeks. It was alleged on behalf of the company that the applicant had been in their employment as sorter of diamonds in German South-West Africa, where they carried on their mining operations; that the diamonds in question were the produce of German South-West Africa, and that they were the property of and claimed by the company.

On October 25th, 1913, the applicant was convicted of contravening secs. 4 (1) and 33 of Ord. 63 of 1903, and sentenced to imprisonment.

On October 25th the company issued a summons against the applicant claiming the diamonds as its property and as having been stolen or otherwise illegally obtained by him from their fields in German South-West Africa. The defendant's plea admitted the possession of the diamonds, and, though he disputed the plaintiff's claim, he did not allege any ownership, and the case was set down for trial on March 4th. The present application was for an order that so many of the interdicted diamonds as might be necessary to produce £250 might be sold or pledged to provide funds to enable applicant to defend the action, on the ground that he had no other property and would otherwise be unable to defend the action. Notice of this application had been given to the Minister of Justice.

D. de Waal, for the applicant: In criminal matters the Court has invariably allowed applications of the present nature, see *McLeod v. The Transvaal Government* (1905, T.S. 299); *Horseley v. Attorney-General* (1907, T.S. 635); *Ex parte Palmer* (20, S.C. 624). These diamonds have been interdicted without opposition, and opposition would have been useless in view of sec. 38 of the Diamond Ordinance. Applicant alleges that he is the owner of the diamonds and he is in possession. No distinction should be drawn between civil and criminal cases.

T. J. Roos, for the respondent: The subject matter in the pending action is the ownership of the diamonds. Unless the applicant can show a greater right to the diamonds than the company the Court cannot grant the application. The granting of applications like the present for purposes of defence has been limited to criminal cases.

de Waal, in reply, referred to *Ex parte McIntosh* (16 C.T.R. 201).

Cur. adv. vult.

Postea (February 12th):—

MASON, J, (after stating the facts as above set out, proceeded): Beyond the statement in the petition that he contends that he is the lawful owner of the diamonds, and that in any event the plaintiff company has no right thereto, there is no allegation in the papers that the applicant is the real owner, and no explanation as to how he came into possession of these diamonds.

The application is supported by reference to cases such as *McLeod and Baird v. the Transvaal Government* (1905, T.S. 299), and *Horseley v. Attorney-General* (1907, T.S. 635), in which the court has allowed money found upon an accused person to be used for the purposes of his defence, notwithstanding evidence tending to show that it was stolen from the complainant, but it is admitted that no precedent exists for granting such an order in a civil action. It is quite true that, upon the papers filed in the various proceedings in this case, the company will probably have some difficulty in establishing its ownership of property so difficult to identify as diamonds, but on the other hand there is a most significant absence of any explanation by the applicant as to his possession of these diamonds.

The whole object of an interdict of this nature is to preserve the property *in statu quo*, pending the result of the action. If one party is to be entitled to resort to the disputed property for the purposes of defence, why should not the plaintiff have a similar privilege? It is argued that only a small portion of the diamonds will be affected by the application, but I do not know on what principle a small portion of the property may be taken, which would not justify the sale of the greater portion—if not of the whole. Notice of the application has been sent to the Minister

of Justice, on whose behalf there was no appearance, but who has not consented to the order prayed for. It seems to me doubtful in the absence of such a consent whether the Court ought to make any order. The accused was convicted under sec. 4 (1) of the Diamond Ordinance, and presumably the diamonds were found in his possession. He was not indicted for unlawful possession under sec. 1 of the statute, but apparently sec. 13 (3) would prevent the restoration of the diamonds to him until he had been able to prove a *bona fide* right to their possession, but it is not necessary for me to give a definite decision on this aspect of the case. I am not satisfied that either practice or principle would justify me in extending the custom which has been followed in criminal cases to a civil dispute of this nature. If the applicant has no assets and he has a good defence to the action, the rules and law of the land enable him to procure assistance, so that his rights may be defended in the ordinary way.

The application must be refused with costs.

Applicant's Attorneys: *Stegmann & Roos*; Respondent's Attorneys: *Lapin & Lapin*.

[G. v. P.]

IMMIGRATION OFFICER v. MAHOMED HASSAN.

1914. *March 2*. MASON, BRISTOWE and WARD, JJ.

Immigration.—Child born of polygamous marriage.—Exemption.
—Act 22 of 1913, sec. 5 (g).

A child born outside the Union of a polygamous marriage celebrated outside the Union does not come within the exemption of sec. 5 (g) of Act 22 of 1913.

Argument on a special case stated by the Immigration Board under sec. 3 of Act 22 of 1913.

Sec. 5 (g) of Act 22 of 1913, reads: "The following persons . . . shall not be prohibited immigrants . . . (g) any person who is proved to the satisfaction of an immigration officer, or . . . to the satisfaction of the board, to be the wife, or the child under the age of sixteen years, of any person exempted by paragraph (f) of this section, including the wife or child of a lawful and monogamous marriage duly celebrated according to the rites of any religious faith outside the Union." . . .