

COLONIAL TREASURER v. SENEKAL
MUNICIPALITY.

1910. *February 22, March 1.* MAASDORP, C.J., and WARD, J.

Appeal.—Municipality.—Pound.—Proceeds of sale of unclaimed stock.
—*Art. 22 of chap. 124.*

The provisions of art. 22 of chap. 124 of the Law Book, requiring a poundmaster to deliver the proceeds of a sale of unclaimed stock to the resident magistrate of the district, do not apply to pounds established by a municipality.

This was an appeal from a decision of the Resident Magistrate of Senekal. The appellant (plaintiff in the court below) had claimed under art. 22 of chap. 124 of the Law Book an amount of 3s. 8d., being the net balance of the proceeds of a sale of unclaimed stock sold in accordance with the provisions of municipal regulation 55, which reads as follows :—

All impounded stock whose owners are unknown, or which are not released or claimed, shall be sold after forty-two days by the poundmaster by public sale, and the proceeds, after deducting the pound fees and expenses, shall be paid by him to the commissioners, to be kept for the owners, who may claim their share within a year of the sale, in default of which it shall be paid into the municipal funds.

Lloyd, for the appellant: Art. 22 of chap. 124 is a summary of the common law. See Voet, 9, 1, 3. See also art. 48 (*u*) of chap. 84, which gives the municipality the right to pass regulations “for the establishment of pounds and in order to provide for the control thereof subject to existing laws.” Chap. 84, which was repealed, was substantially re-enacted in sec. 126, sub-sec. 18, of Ordinance 35 of 1903, and incorporated in Ordinance 6 of 1904, of which sec. 78, sub-sec. (*c*), mentions pound fees without distinction. From the wording of chap. 124 it is clear that no distinction was made between municipal and Government pounds, and therefore that the word “pound” in

art. 22 includes a municipal as well as a Government pound. See also arts. 1, 2, 3, 4, 24, 36 and 37.

Blaine, K.C., for the respondent municipality: There is a clear distinction in the law between municipal and Government pounds. Chap. 124 provides for the establishment of general Government pounds, and does not apply to municipal pounds except in arts. 36 and 37. The Government has nothing to do with the establishment of municipal pounds: they are provided for under the municipal law. See art. 1, which limits the period for which the pound is established, and the poundmaster appointed, to two years. The words "impounded otherwise than in pursuance of the municipal regulations of any town or village, to wit," in art. 1, clearly contemplate the establishment of pounds under municipal regulations apart from this Law. Arts. 2 and 4 show that pounds outside the limits of any municipality are alone dealt with. Compare art. 5 with art. 36, the former of which gives the tariff of charges to be made by poundmasters, while the latter reads as follows: "Poundmasters of municipal pounds may not demand any payments in respect of stock brought in from outside municipal lands in excess of that provided by this chapter in the case of ordinary pounds." Arts. 15, 20 and 26 refer to Government pounds exclusively. It would be absurd to give the municipality power and then legislate so as to override that power.

[MAASDORP, C.J.: The municipality can show no right to any property in the proceeds of these sales.]

There is nothing in the law expressly giving the municipality the right to appropriate the balances, but regulation 55 does so, and that regulation is not *ultra vires*, because the municipality have power to regulate the control of pounds.

[WARD, J.: The municipality claims to appropriate, and not merely to hold in trust.]

The summons alleges a specific right to ownership under art. 22, and the plaintiff has not established its right under that section. The property in the moneys could in no case pass to the Government until the lapse of a prescriptive period.

Cur. adv. vult.

Postea (March 1):—

MAASDORP, C.J.: In this case the Colonial Treasurer appeals from a decision of the Resident Magistrate of Senekal on a claim for 3s. 8d. It is practically a test action, as its decision would involve large sums of money all over the colony. It appears that this sum is claimed as the net balance of the proceeds of certain pound sales after the deduction of all expenses. Such balance would go to the owners of the stock, if found; but the owner in this case is not forthcoming, and the question is whether the municipality is entitled to keep this money in default of the owner, or whether the Government is entitled to claim it. It is alleged that on the 23rd April a sheep was sold by public auction under art. 22 of chap. 124 of the Law Book, and it is said that in terms of art. 22 the Government is entitled to claim this money from the municipality. It appears that at the time this law came into force there were in existence public or ordinary pounds and municipal pounds. The question is whether this art. 22 applies to municipal as well as to non-municipal pounds. In the first place, it must be pointed out that the action was brought entirely under art. 22—not in a general way under the common law, but under that article alone. It was specially put to Mr. *Lloyd*, and he stated that he was not proceeding under the common law, and he was not prepared to claim under the common law, except that he urged that such claim might be allowed under the prayer for alternative relief. I may state that alternative relief can scarcely be argued as synonymous with an alternative cause of action. It means that other relief is asked for with the same cause of action standing. We must therefore deal with the claim entirely under this law and under this article of the law. We need not state what our decision would have been if this had not been the case. Now does this article apply to municipal as well as ordinary pounds? It is too much to expect anything like perfect draftsmanship in these old laws; but we must apply as far as possible the ordinary rules of construction. The first article of this law raises trouble owing to its draftsmanship. It reads, “. . . and that the following regulations shall be observed and adhered to as regards any o.r.c. '10.

stock impounded otherwise than in pursuance of the municipal regulations of any town or village, to wit," and there then follow three subsections. According to the ordinary rules of construction these three subsections should contain all the regulations referred to; but further on it appears that these regulations are not in the subsections, but are contained in the whole of the chapter. I have not been able to trace the whole history of the law; but there was apparently a stage when there were merely regulations in force, and this word used in art. 1 has been carried on. There is no mention in this law of municipal pounds except where there is an intention to exclude them. There is, however, one article (art. 37) which contains a reference to municipal poundmasters by way of enactment, not merely by way of exception. This was a general provision it was necessary to make in this law, because it was not such an enactment as the municipalities could have effected under the powers deputed to them. It required express legislation, and that is the reason it was inserted here. The references throughout the law excepting municipalities are made by way of superabundant caution. The first appears in art. 1, where stock impounded in pursuance of the municipal regulations of any town or village in a municipal pound is expressly excepted. Art. 2 excludes private land situate within a municipality. The intention was, as a general rule, that stock within the bounds of a municipality should be sent to the municipal pound, if there happened to be one; if not, it might be sent to the nearest Government pound, and the law leaves stock found trespassing in a municipality in such a case to be dealt with by the municipal regulations. In art. 4 there is an exception made in the case of towns and villages in regard to the hour before which stock may not be removed to a pound. Then we come to art. 22. The article makes no reference whatsoever to municipal pounds. It begins with the words, "If any stock having been impounded. . . ." The question is: "In what manner impounded?" The article speaks of the poundmaster, who is instructed to sell publicly stock impounded and unclaimed. It clearly means in terms of this law, and the poundmaster referred to must be the master

appointed under this law. This article can refer to nothing else but country pounds. Art. 36 makes this clearer, and it has a very direct bearing on art. 22. Municipalities have the right to impose pound fees, which may be different from those contemplated by this law. This art. 36, referring to payments to be demanded for stock brought in, expressly excludes municipal pounds, and what would the effect be if art. 22 were held to refer to municipal pounds? It would mean that the net balance after the payment of fees would be quite different in the case of Government as compared with municipal pounds. The appeal must therefore be dismissed with costs, as the magistrate's decision was right under the particular article of the law.

WARD, J.: This is an appeal from a decision of the Resident Magistrate of Senekal, in which judgment was given against the appellant (plaintiff in the court below) on a claim for the sum of 3s. 8d., being the balance of the proceeds of certain unclaimed stock sold by the poundmaster of the municipal pound at Senekal, and paid over to the respondents in pursuance of regulation 55 of the municipal regulations of Senekal.

The appellant bases his claim to this money upon art. 22 of the Pound Law (chap. 124 of the Law Book), and the only question we have now to decide is whether that law has any application to municipal pounds, unless where it is so expressly stated in the law itself. For the purposes of this case it is unnecessary to go into the questions whether the municipality can claim the money under this regulation or whether it belongs to the appellant under the common law. No claim has been put forward to it upon that ground, nor has any argument been adduced to us to show that it does belong to the appellant by the common law.

Now the first article of the law (chap. 124) provides that "it shall be lawful for the State President . . . to approve of the establishment . . . of stock pounds on such *farms* as he shall think fit, . . . and that the following regulations shall be observed and adhered to as regards any stock impounded *other-*

wise than in pursuance of the municipal regulations of any town or village.”

Art. 2 is to the following effect: “All stock doing damage on private land, not situate within the limits of a municipality, may be lawfully impounded. . . . If within a municipality there be no pound established by or under municipal regulations, any stock causing damage within the limits of such municipality may be impounded in the general pound.”

Then art. 4 prohibits the removal of stock “found in his garden or coming on to his *farm* during the night” before eight o’clock in the morning, and adds: “This provision shall not apply to stock trespassing in towns or villages.”

Art. 5 is perfectly general, and fixes a uniform tariff of fees in respect of all pounds coming under chap. 124, but it is clear from art. 36 that art. 5 does *not* apply to municipal pounds. Art. 36 provides for the impounding in certain cases of stock trespassing outside the municipal areas in municipal pounds, and concludes: “Poundmasters of municipal pounds may not demand any payments in respect of stock brought in from outside municipal lands in excess of that provided by this chapter in the case of ordinary pounds.” Such a provision is unmeaning if art. 5 applied to municipal pounds, as in that case there could be no such thing as difference in the fees.

Again, art. 37 authorises the landdrosts and other officials to send animals (such, for instance, as those which are exhibits in a criminal case) to the pound, and the section requires that “poundmasters of *municipal* or *Government* pounds” are bound to accept and detain such stock. Such a provision would be unnecessary if the law applied to municipal pounds.

Chap. 124, therefore, explicitly states that it applies to pounds established by Government on *farms*, that it does not apply to pounds established under municipal regulations, and when it is intended that its provisions should apply to municipal pounds it expressly says so—as in art. 37. Moreover, art. 36 is wholly unmeaning if the law does apply to municipal pounds. Therefore, without travelling outside the law itself, I am of opinion that it does not, unless when it is expressly so stated, apply to municipal pounds.

This view is strengthened by a reference to the previous legislation on the matter of pounds. The first law I can find relating to municipalities is Law 8 of 1856, art. 33 of which provides for the establishment of pounds under municipal regulations, as in the present municipal law. The first pound law is Law 4 of 1857, art. 15 of which is practically the same as art. 22 of chap. 124. The first municipal regulations relating to pounds are those made for Bloemfontein, which were published in the *Staatscourant* of the 29th March, 1859. Regulation 81 provides for the payments of the proceeds of unclaimed stock sold out of the pounds to the municipality. The regulations for Fauresmith are to the same effect (see the *Courant* for the 13th December, 1859, regulation 40). At the time these regulations were made and approved by the Government the Pound Law of 1857 was in force, and is indeed referred to in the regulations above mentioned. It seems, therefore, incredible, if that law was intended to apply to municipal pounds, that the Government should have allowed municipalities thus to appropriate Government moneys, and still more incredible that this practice should have been allowed to continue to the present day, that is, for a period of more than half a century.

I may add that in 1890 village boards were established, and pounds fees arising from stock impounded in pounds established by village boards were vested in them by regulation.

The appeal is dismissed with costs.

Appellant's Attorney: *G. A. Hill*; Respondents' Attorneys: *Botha & Goodrick*.

