# PARKIN v. McCULLAGH AND BOTHWELL

1910. *April* 2. MAASDORP, C.J.

*Magistrate's court.—Appeal.—Petty debts recovery.—Defendant's costs.*

Costs of appearance through a legal practitioner to defend an action brought under the Petty Debts Recovery Ordinance are governed by rules 53 and 57 of schedule B of the Magistrates' Courts Ordinance of 1902.

This was an appeal from a decision of the Resident Magistrate of Bloemfontein. The appellant had been sued in the court below for an amount of £6, 19s. 6d. for goods sold and delivered under the Petty Debts Recovery Ordinance (2 of 1906). The court had granted absolution from the instance, but had refused to allow defendant's costs of appearance through an attorney. This decision as to costs was based on sec. 10 of the Ordinance, which reads as follows: "An award of costs in any proceedings under this Ordinance shall not include the costs or fees payable to legal practitioners for their professional services."

*Blaine, K.C.*, for the appellant: The intention of the legislature in passing this Ordinance was to facilitate the recovery of certain petty debts amounting to less than £10, such as shop accounts presenting no difficulty of proof. There was no intention to penalise the defendant, and the Ordinance does not deal with his rights. This is quite clear from the Ordinance itself. Sec. 10 only refers to plaintiff's costs. Sec. 8 enacts that, when appearance is entered by the defendant within one month, the proceedings shall be as in rule 30 and succeeding rules of schedule B of Ordinance 7 of 1902—the Magistrates' Courts Ordinance. See rules 53 and 57 of that schedule. The word "proceedings" in sec. 10 is really equivalent to the claim provided for by and made under the Ordinance. The award of costs asked for by the defendant would not be one made in respect of the plaintiff's claim, but one made to the defend-

ant in respect of his opposition to that claim. There is a very good reason why this should be so: the Ordinance provides a very drastic alteration of the law under the Magistrates' Courts Ordinance, but this is no hardship as far as the plaintiff is concerned, because it is at his option to use this Ordinance or not. See sec. 1.

[MAASDORP, C.J.: See sec. 11.]

The costs there referred to which are given in the second schedule are all plaintiff's costs. Sec. 8, dealing with defendant's costs, is not mentioned in sec. 11. The Cape Act (15 of 1905) omits the provisions of sec. 2 in our Law permitting the plaintiff to appear by an agent appointed in writing. The Transvaal Law (10 of 1897) provides in sec. 3 that no further costs may be charged than the said 10s. stamp, costs of service of summons and costs of execution; but see *Mataffin* v. *Bouman* ([1903] T.S. 130), in which case it was held that the defendant was entitled to have his costs taxed in the usual way. If the legislature had intended to penalise the defendant by refusing him his costs of appearance through a legal practitioner, the intention would have been stated in clear and express terms. See Maxwell's *Interpretation of Statutes* (2nd ed.), pp. 95 and 127.

MAASDORP, C.J.: I think this appeal must he allowed. The reasons for which it will be allowed are those stated by Mr. *Blaine*. We need not go outside the Ordinance itself. It is clear that the costs referred to in sec. 10 are the plaintiff's costs; the costs of the defendant would come under sec. 8, referring to rule 30 and the subsequent rules of schedule B of Ordinance 7 of 1902. It would appear that the magistrate has erred, but it is hardly to be wondered at.

No costs were asked for, as the appeal had been instituted at the instance of the Law Society.

Appellant's Attorney: *G. A. Hill.*