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G.P.-S.14242-1947-8-5,000.

U.D.J. 445.
Late S.C. 7.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate) DIVISION).
AFDELING).

CIVIL
APPEAL IN ~~CRIMINAL~~ CASE.
APPEL IN ~~KRIMINELE~~ SAAK.

TED GALINOS

Appellant.

versus

MANUEL A. GALINOS

Respondent.

Appellant's Attorney C Reid Respondent's Attorney JJ
Prokureur van Appellant Prokureur van Respondent

Appellant's Advocate HN Respondent's Advocate IT
Advokaat van Appellant Advokaat van Respondent

Set down for hearing on: Thursday, 10th Nov., 1955
Op die rol geplaas vir verhoor op: Donnerdag, 10de Nov., 1955

(SR. 11) I-2,4,6,9,10 9.15 - 12.50 }
2.15 - 4.40 }

C.A.V.

Appeal dismissed, with costs.
Selvingshoofde, met koste.
Skryf, deklaart hof, 3/12/55.
3/12/55

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between:-

EDD GALINOS

Appellant

and

MANUEL ALAVERUS GALINOS

Respondent

Coram:Schreiner, Hoexter, Steyn, de Villiers et Brink, JJ.A.

Heard:10th. November, 1955.

Delivered: 3-12-1955

J U D G M E N T

SCHREINER J.A. :- The facts in this matter are set out in the judgment of my brother STEYN. Ultimately the issue depends on whether a few words were or were not said between the parties at an interview which took place more than a year before the trial. It is common cause that the appellant, without telling the respondent, set aside or took 34 of the respondent's cattle plus 5 strays and another animal ~~and~~ ~~at~~ ~~a~~ ~~time~~ ~~when~~ ~~he~~ ~~knew~~ that the respondent was negotiating to sell all the cattle on the farm. The appellant said that his justification for doing this was that in the previous June the respondent had said that he would let the appellant have some of his cattle sometime. That there was a discussion between them

when/.....

when the appellant revealed the fact that he had set aside or taken the cattle is not in dispute, nor is it in dispute that the appellant offered to pay the respondent £200 for them. What is in dispute is whether, as the appellant states, the respondent accepted the offer or whether, as the respondent states, he rejected it and said that the appellant would have to buy from the purchasers of the respondent's herd. That is the issue between the parties.

BEADLE J. rejected the appellant's evidence for three main reasons. He found that his demeanour was less satisfactory than that of the respondent, he placed some reliance upon the evidence of Mrs. Olympia Galinos and he found that in certain respects regarding which there was no room for mistake the appellant's evidence conflicted with that of Messrs. Barry, Leiserowitz and Szeftel whom he found to be truthful.

So far as the question of demeanour is concerned, though it is ~~hardly possible~~ ^{difficult} for an appeal court to treat as of no significance ~~the~~ a trial court's finding thereon, I do not think that BEADLE J.'s comments indicate that he formed a clear impression that the appellant was lying or that the respondent was telling the truth. The factor should not be taken further, I think,

than/.....

than that BEADLE J. did not gain the impression that the appellant was clearly an honest witness. In this form the finding on demeanour is not without importance in this case, where the appellant's evidence stands alone and the burden of proof rests upon him.

In regard to the evidence of Mrs. Olympia Galinos it would be difficult not to attach considerable weight to it, were it not for the evidence of the appellant's wife, Mrs. Muriel Galinos. According to Mrs. Olympia Galinos she was present when the appellant told the respondent that he had taken, "pinched" or stolen the cattle and she corroborates the respondent on the crucial issue; she says the offer to buy for £200 was made to the respondent and rejected by him because he had already sold the cattle. There is nothing on the record that shows Mrs. Olympia Galinos to be untrustworthy and if her evidence is unacceptable it must be because it was perjured; there is no room for mistake. A serious difficulty, however, is created by the fact that Mrs. Muriel Galinos gave evidence that in February 1954 she was in Bulawayo with the appellant and that at the respondent's house the appellant and the respondent talked together in the respondent's bedroom while she
and/.....

and Mrs. Olympia Galinos were together in other parts of the house. If her evidence is correct it would not have been possible for Mrs. Olympia Galinos to overhear what passed between the parties. Perhaps because the respondent's counsel was acting on the assumption that Mrs. Muriel Galinos was speaking to a date other than the one to which Mrs. Olympia Galinos subsequently spoke, he did not cross-examine Mrs. Muriel Galinos. And the learned Judge, though he made the assumption that they might be speaking to the same date, treated Mrs. Muriel Galinos's evidence as of little importance because it was only of a rebutting nature. That is quite true, of course, but if accepted it rebutted the very important evidence of Mrs. Olympia Galinos. One could have understood the learned judge's attaching relatively little weight to Mrs. Muriel Galinos's evidence on the ground that it was negative and that it would not be easy for her after a year to recollect that at no time was Mrs. Olympia Galinos out of her presence. But that was not the way in which Mrs. Muriel Galinos's evidence was treated by PEADLE J. and, as I have said, she was not cross-examined at all. In the circumstances the position of this Court is peculiarly difficult. The learned judge attached

some,.....

some weight to the evidence of Mrs. Olympia Galinos and it is not easy for this Court to disregard it entirely.

I turn now to the conflicts between the appellant's evidence and that of the three witnesses whom BEADLE J. found to be wholly trustworthy.

The first conflict was between the appellant and Litsserowitz as to the former's presence at the count of the respondent's cattle in October 1953. The appellant denied that he was there; Litsserowitz says that he was helped in the count by the appellant. BEADLE J. treated the conflict as a minor one but he believed Litsserowitz and if the appellant did lie on this point it would, of course, have importance in relation to his general credibility.

We were referred by counsel for the respondent to the evidence of the appellant and of Litsserowitz in regard to the count that took place on the 10th April 1954, after the dispute between the respondent and Litsserowitz and Szeftel had been ~~settled~~ ^{disposed of}. According to the appellant the respondent said to him, "Where are your cattle, Ted?.....Well, tell the boy to bring your cattle here. I want to sell them to Litsserowitz and Szeftel."

The/.....

The appellant ^{says that he} refused. The importance of this evidence is that according to the appellant the respondent used the word "your", thus admitting, in effect, a previous sale to the appellant. Leiserowitz says that there was an argument between the appellant and the respondent about 40 cattle on this occasion, the appellant claiming that he had bought the cattle from the respondent and the latter denying that he had ever sold him any cattle. If Leiserowitz's version is correct it is difficult not to infer that, when the appellant gave the evidence about the use of the word "your", he was trying falsely to create the impression that the respondent had admitted before Leiserowitz that he had sold the cattle to the appellant. This matter was not, however, dealt with by BEADLE J.

The conflict between the appellant and Szeftel was treated by the learned judge as of considerable importance and it seems to me that he was right in so regarding it. The appellant said that on the 17th February 1954, when Szeftel was counting the cattle, there seemed to be a shortage, and that the appellant said that that was correct, as he had put some aside that he was buying from "M. Galinos and Grandson." Szeftel's evidence was/.....

was that he mentioned the apparent shortage to the appellant, who replied that there were no more cattle belonging to M. Galinos. Asked if the appellant said anything about having some cattle that he was buying from his grandfather in another paddock, Szofitel said "Not at the time." He first heard of this from the appellant "quite later on" - apparently from the rest of his evidence he meant weeks or months later. Now it is true that BEADIE J. slightly misstates the appellant's evidence by saying that he said he told Szofitel that he had purchased cattle from the respondent, but the discrepancy seems to me to be unimportant. If Szofitel is correct and the appellant was untruthful this seriously affected his credit, it is also in keeping with the view, suggested by other points which I shall mention, that the appellant was trying to build up a case by means of small corroborative details. It was suggested on behalf of the appellant that the words, "belonging to M. Galinos," if used, show that the appellant was claiming the missing cattle as his, but as he had admittedly not bought them at that date the words could at most show a determination to keep them for himself, on whatever basis might turn out most suitable.

I do not propose to deal at

length/.....

length with the evidence of Mr. Barry, important though it was. BEADLE J. assumed in the appellant's favour that Mr. Barry's recollection might have been at fault in certain respects; his evidence is not in harmony with that of either of the parties. But the learned judge had no doubt that when at the end of April 1954 the appellant told his own attorney that Mr. Barry had admitted to him that very morning that he remembered that on the 20th February a sale of cattle by the respondent to the appellant was confirmed, there was no room for mistake and the appellant had been untruthful. It was argued that conceivably the appellant might only have put too optimistic a complexion on Mr. Barry's statement that the appellant had spoken, according to Mr. Barry's evidence, in a sort of aside, of having some cattle of his own. But the incident suggests that the appellant was trying to build up his case and that he hoped that Mr. Barry might fail to make a prompt and definite repudiation of the allegation in the letter of the appellant's attorney that he had recollected the confirmation of the sale.

It is convenient at this stage to mention exhibits 1 and 5. The former is a document in the appellant's handwriting which contains the following

:"34/.....

: "34 head of cattle taken over by Ted Galinos are valued at
"£200 offer accepted by M. Galinos and Ganson." This
document was given by the appellant to his brother Basil
on the 26th February 1954 to obtain the respondent's sig-
nature. On its face it is consistent with a previous sale
and also with an offer now being made for the first time.
If there had been a sale amicably concluded the previous
week it is difficult to see why the appellant should have
hesitated to approach the respondent direct for his written
confirmation of it, or why having given it to Basil he did
not follow it up. Another feature is the mention in
Exhibit 1 of 34 cattle and not 40. According to the respon-
dent the appellant first spoke of having taken 34 cattle
and then on a subsequent occasion said that there were 40.
The appellant on the other hand said that in the discussion
on Friday the 19th February, when according to him the sale
was concluded, he mentioned the 5 strays and the old black
cow, and these were added to the 34. In this respect
Exhibit 1 seems to support the respondent's version as
against that of the appellant. Exhibit 1 is consistent
with the view that the appellant, having wrongfully taken
the respondent's cattle in the hope perhaps that he would
let him keep them, was trying to obtain evidence of title
for/.....

for himself.

Exhibit 5 is an extract from the books of H. Galinos and Grandson which shows an item, ^{Sales,} ~~under~~ "Ted Galinos 8 oxen 30 cows 2 bulls - £200. 0. 0. "

This it was argued told against the respondent. But BEADLE J. accepted his evidence that he had not seen the entry, and the appellant admitted that the information was furnished by him to the respondent's bookkeeper after the 31st March 1954. In the circumstances it seems to me that the entry is not against the respondent but is in line with what I have suggested may have been the appellant's policy of creating pieces of corroborative evidence.

There is no doubt that the conflicting evidence on the question whether there was only one meeting of the parties with Mr. Barry or whether there were two creates a major difficulty in the case. BEADLE J. was obviously uncertain whether the respondent or Mr. Barry was right in this respect and his judgment, which was given orally at the conclusion of argument, wavers on this point. I find myself in sympathy with the learned judge; there is much to be said for the view that the respondent is wrong in saying that there were two such interviews, and that ^{in fact} there was only one, on the 20th February. But -

even/.....

even if this was the position it does not, in my view, lead to the ^{Conclusion} ~~view~~ that the appeal should succeed. In the first place it must, throughout, be borne in mind that the decision of the case turned less upon the strength or weakness of the respondent's case than on that of the case of the appellant. He had to convince the court that his account was, on a ^a balance of probabilities, true on the crucial point. If the respondent was wrong in saying that there were two meetings that affects his credibility but does not point directly to his having sold the cattle to the appellant. The respondent is old and his memory may play him tricks. If there was ~~only~~ one meeting this does not mean that his evidence that he never sold the cattle to the appellant is devoid of any value. He would be less likely to forget this fact than whether there was only one meeting of the parties with Mr. Barry, especially as he was probably at the latter's office on various occasions during the period in question. If the appellant's version were ~~the~~ correct, one would have expected the parties, as soon as they met Mr. Barry, to report the sale, and one would have thought that had they done so he could not possibly have forgotten it. He would not have been left with a rather vague recollection of an aside mention by the

appellant/.....

appellant that he had cattle of his own, for which he wanted grazing. Assuming that there had been no sale but that the appellant was nevertheless determined to keep the cattle which he had taken, ~~and~~ ~~concluded~~, one could understand his asking Szeftel about grazing and his mentioning the cattle to Mr. Barry. He was no doubt taking risks, but his conduct in taking the cattle ~~and~~ ~~concluding~~ ~~that~~, admittedly in advance of anything more than a vague promise of the previous year to which he deposes, shows that he is not always afraid to take risks.

It is, of course, not necessary for the dismissal of the appeal that this Court should consider that the respondent's version was more probable than the appellant's; nor is it necessary to agree with every piece of reasoning in the judgment. It is sufficient to say that I am unable on the record to hold that the learned judge ought to have held that the appellant had discharged the onus of proving that the respondent sold him the cattle.

In my view the appeal should be dismissed with costs.

Hoexter J.A. }
 de Villiers J.A. } *Concur*
 Brink J.A. }

D. W. Schreiner

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IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :p

TED GALINOS Appellant

and

MANUEL ALAVERUS GALINOS Respondent

Coram: Schreiner, Hoexter, Steyn, de Villiers et Brink, JJ. -A.

Heard: 10th November, 1955. Delivered: 3-12-1955-

J U D G M E N T

STEYN J.A. :- In the court below the respondent claimed from the appellant, his grandson, the return of forty head of cattle together with any natural increase thereof, the property of the respondent, or in the alternative, payment of the sum of £464. 13. 4., being the value of the cattle, together with interest. It was not disputed that the appellant took the cattle into his possession while they were the property of the respondent, his defence being that he thereafter purchased the cattle from the respondent for £200. In these circumstances it was common cause that the onus was on the appellant to prove his defence, and the trial judge came to the conclusion that the onus had not been discharged./.....

discharged. He gave judgment in the following terms:
"the defendant will return to the plaintiff the 40 head of
"cattle together with their natural increase, or, at his
"option, he will pay to the plaintiff the sum of £240, with
"interest a pempore morae, and he will pay the costs of the
"suit."

It appears that the respondent, who lives at Bulawayo, had a herd of some 511 head of cattle on Vashu Farm, of which he was the owner. The appellant was conducting a store on the same farm and was also keeping an eye on the cattle. On 18th February, 1954, the whole herd was sold to the firm of Lieserowitz and Szeftel. They had been counted by Szeftel on 17th February and found to number 466. Before the count the appellant had separated 54 head from the herd, mostly heifers, and put them into a separate paddock. He said he did so as a result of previous promises by his grandfather that, in the event of the sale of the cattle, he would allow him to have some of them. The respondent denies that he ever made any such promise. Shortly after the count the appellant came from the farm to visit the respondent at his home and informed him that the cattle which had been sold had been delivered into what was referred to as No. 2 paddock, which Lieserowitz and Szeftel

had/.....

had on lease. The respondent was annoyed at this (apparently because he did not want the cattle to be delivered before he had satisfied himself as to the exact number on the farm) and remonstrated with the appellant. The respondent says that that was the only matter discussed on this occasion. The appellant made no mention at all of any cattle he desired to obtain from him. According to the appellant, this was the occasion on which he reminded the respondent of his promise and informed him that he had put aside 24 head of cattle that he wished to purchase. There were also 5 head of stray cattle and a black cow that had not been counted by Szeftel. These were to be included in the purchase. The respondent, he says, replied that he would prefer him to take the cattle without payment, giving as the reason: "I'm an old man. One of these days I'm going to die, and I'm not going to take it with me." The appellant, however, insisted upon a purchase, because he wanted to be under no obligation. He offered £200 and told the respondent that he had already arranged with a Mr. Goldstein for a loan of the money. The respondent then accepted his offer.

The next day, the 20th February, the parties went to the respondent's attorney, Mr. Barry. The appellant says he went there (presumably in the expectation of meeting Lieserowitz and Szeftel) to see about

grazing for the cattle he had purchased. The respondent informed Barry that the appellant had bought some of his cattle, and the appellant himself gave the number as 34. This the respondent denies. The situation arising from the removal of the cattle to No. 2 paddock was put to Barry, and he requested Lieserowitz and Szeftel to come to his office, which they did. A heated and somewhat prolonged discussion ensued. The respondent denied the agreement of 18th. February, by which he had sold the cattle to Lieserowitz and Szeftel. The appellant says that in the course of this discussion he raised the question of grazing for his cattle with Lieserowitz and Szeftel. The respondent says that he knows nothing about that. The upshot of the matter was that the purchasers instituted action against the respondent for the cattle and obtained judgment against him, with the result that he had to hand over the cattle to them. This was done on 10th April.

According to the respondent the appellant paid him another visit at his home towards the end of March or the beginning of April. They had tea together in his bedroom. The appellant then remarked "I have heard "that you sold all the cattle and you gave nothing to me."

On/.....

On being told that the cattle had in fact been sold, he said that he wanted some for himself. The respondent replied that he had sold all the cattle, whereupon the appellant said : "I must tell you what I have done. I have stolen some of "your cattle." On being pressed he disclosed that he had stolen 34 heifers, and gave as the reason that he had seen his brother Basil steal cattle from the respondent and sell them to Lieserowitz and the Cold Storage Commission, and as he was also a grandson, he did the same. Basil, I may here say, had been brought up by the respondent from his childhood. He was living with his wife, the witness Olympia Galinos, in the respondent's home, and was, or at any rate claimed to be, a partner in the latter's farming operations, which were allegedly carried on under the style of Galinos and Grandson. According to the respondent's evidence there appears on this occasion to have been some talk of a purchase by the appellant of the stolen cattle, because the respondent says : "I told him to ^{be} have these things as he is not allowed "to buy cattle because he has no place to put them and he "still owes me £367 which he cannot pay me. I said 'As you "are unable financially, how are you going to buy the "cattle ?' " He further told the appellant that he had not stolen from him, but from Lieserowitz to whom the cattle

had/.....

had been sold. In the end the appellant said that he was going to the respondent's solicitor to tell him he had stolen the cattle. The respondent dissuaded him from doing so, suggesting that he should tell Barry he had "found the 34 "head while he was separating or while he was moving the "cattle to No. 2 paddock. They then went to Barry's office , where the respondent informed the latter that the appellant had found 34 heifers on the road, and the appellant explained that he had found them while he was moving the other cattle to No. 2 paddock. Barry thereupon said that the heifers must go to Lieserowitz and Szeftel. The respondent says that the appellant then "started new affairs, trying "to break the contract," i.e. and the contract between the respondent and the purchasers of the cattle. The appellant made it clear to Barry that he did not want the respondent to sell, "so that he could keep the cattle he wanted and "the farm and everything."

The respondent's evidence as to the appellant's visit at the end of March or the beginning of April, is confirmed by Olympia Galinos. She says that she was present throughout the conversation. In broad outline her evidence coincides with that of the respondent, but she is more definite about an attempt to purchase the stolen cattle./.....

cattle. The appellant, she says, offered £200 for them, but the respondent replied: "I have not got anything to sell. "If you want any, you buy from Mr. Lieserowitz." She also says that the appellant stated that he was going to tell Barry how many he had stolen.

The appellant called his wife, Muriel Galinos, to say that she accompanied him to the respondent's house in February to arrange about the sale of the cattle, and that neither she nor Olympia Galinos was present at the conversation.

Barry, Lieserowitz and Szeftel were all called as witnesses for the respondent, and gave evidence to which I shall refer later.

The learned trial judge found that the probabilities of the case were about equally balanced, and that the issues of fact could only be decided on the credibility of the various witnesses. In regard to the appellant's demeanour he remarked: "In examination-in-chief there was nothing about the defendant's demeanour which impressed me unfavourably, but I was not so impressed with his demeanour in cross-examination. There were times when he became flustered and times when he flushed when answering questions; /.....

"questions; and the general impression I got from his demeanour as a witness was that his evidence should be subjected to careful scrutiny." He had no hesitation in accepting the evidence of Barry, Lieserowitz and Szeftel. He found nothing in the demeanour of Olympia Galinos which assisted him in forming an opinion of her credibility and dismissed Muriel Galinos with the remark that she "merely gave evidence of a rebutting character." Of the respondent he expressed the following view : " The plaintiff, as I have said, is a very old man. He gave his evidence with the aid of an interpreter, which always makes an accurate appraisal of a witness's demeanour difficult. He was very evasive in cross-examination, but I am inclined to think that the evasiveness was due rather to that simplicity of mind which is so often associated with extreme old age rather than to any deliberate intention to mislead the Court. While I would not like to rely too much on the demeanour of the plaintiff, on the whole he made a favourable impression upon me as a witness, certainly a very much more favourable impression than was made by the defendant."

In weighing the evidence of the respondent against that of the appellant, the trial court

appears/.....

appears to have accepted that it was or may well have been towards the end of March or the beginning of April that the respondent first came to hear of the cattle separated from the herd by the appellant, and that the second interview with Barry, referred to by the respondent, did or may well have taken place then. In dealing with the evidence to the effect that at the interview in February the appellant did mention to Barry that he had some cattle out of the respondent's herd, the learned trial judge remarked: " I "can see nothing very improbable in his making known to "Barry that he had them in his possession, especially as at "the same time he was trying to obtain from Lieserowitz and "Szeftel grazing for these cattle. It may well be that at "this time he thought that his grandfather would be prepared "to let him have the cattle, and he may not have appreciated "at that stage that his grandfather would take such a deter- "mined line on the question of the misappropriation of these "cattle. If he had no previous conversation with his grand- "father about it that may well have been his state of mind, "that his grandfather would not particularly mind in the "circumstances." In connection with this alleged second interview with Barry, the trial judge referred to the fact that "it was quite clear from the way the case has proceeded

"that/.....

"that Mr. Barry only recollects one," and proceeded: " That
"is a point which I have taken into account and I think the
"only explanation for it is that the second interview with
"Barry was a very hurried one; it did not really concern the
"making of any new agreement or any dispute between the
"litigants.....and Barry's reaction was : 'Well, if you
"have found cattle, give them to Lieserowitz. Let them go
"in terms of the agreement.' I can only assume that he
"must have forgotten. However, I have taken that factor
"into account in my appraisal of the credibility of the
"plaintiff." I understand this to mean that because the
second interview either did or may well have taken place,
this factor did not, in the view of the trial judge, affect
the credibility of the respondent.

From the above it will appear that
the impressions which the trial judge formed of the relative
credibility of the appellant and the respondent, as also
his estimate of certain probabilities in the case, were in-
fluenced to a substantial degree by the respondent's
evidence as to the time when he was informed of the separa-
tion of the 34 heifers from the other cattle, and as to
the second interview with Barry. It is necessary, I think,

to/.....

to examine this evidence more closely.

Both the respondent and Olympia Galinos say that the appellant told the respondent that he had stolen the heifers, and informed ^{him} that he was going to tell Barry that he had done so. To my mind the truth of this is highly questionable. In fact he had not stolen the heifers. He had put them into another paddock, knowing that they had been or were going to be sold to Moserowitz and Szeftel, but that he had not done so with the intention of stealing them from the respondent, is shown by the admitted fact that he shortly thereafter told the respondent what he had done and offered him £200 for the cattle. There was no reason, therefore, for him to say he had stolen them, or to tell Barry he had done so. If he thought that he had stolen them, it is difficult to conceive of any reason why he should want to inform Barry of the theft. According to the respondent, he and the appellant then went to Barry and told him that these cattle had been found. That such an interview took place, appears to be, and was in effect found to be, inconsistent with Barry's evidence. He meticulously kept notes of his interviews, and seems to have no note or recollection of this interview. The trial judge ascribed this to the perfunctory nature of the interview. But according to the respondent, the interview

could/.....

could have been neither short nor hurried. What he describes is not merely a brief conversation, of no great consequence, in which Barry is informed of the existence of these heifers, but an occasion on which the appellant "started new affairs, trying to break the contract," so that he could retain the benefit he derived from the presence of the cattle on the farm, i.e. so that he could get milk for the use of his household. That must have led to some altercation between himself on the one hand, and Barry and the respondent on the other, and it is not likely that Barry, after the trouble there had been between the parties in February, would have forgotten all about such a presumptuous attempt on the part of the grandson to induce his grandfather once again to repudiate the contract. He must in any case have understood that the respondent desired him to pass on the information to Lieserowitz and Szeftel, and there is nothing to suggest that Barry ever enlightened Lieserowitz or Szeftel about the existence of these cattle, or that the respondent did so himself. Up to the time the herd was delivered on 10th April, Lieserowitz did not seem to know about them. When on that occasion the respondent and the appellant were arguing about them in his presence, his attitude was: "I am going only to take over what I see and

"what/....."

"what I do not see I do not take over. If you find them
"afterwards you^d can always bring them back and we will pay
"for them." Neither Lieserowitz nor the respondent suggest-
ed in any way that their inclusion in the contract had already
been arranged.

By consent the following facts ,
which were not before the trial court, have been placed before
this Court:

"1. The Respondent, in his statement given to his Attorneys,
"said that at the beginning of April, and before the handing
"over of the cattle to Lieserowitz, Appellant told him of
"his having stolen the cattle, and that straight away the
"Appellant and the Respondent went to Barry where Respondent
"told Barry that Appellant had found 34 head of cattle.
"2. In pre-trial consultations, Respondent said that at the
"end of March or beginning of April the appellant told him of
"his having stolen the cattle. The Respondent said that al-
"most immediately after this he went to see Barry and told
"him that the Appellant had found 34 head of cattle, but he
"was so uncertain as to whether or not the appellant was with
"him at the time that Respondent's Counsel at the trial did
"not consider that he was justified in putting to Appellant
"that he was present or in making this visit to Barry a part
"of Respondent's case."

These facts cast further doubt upon the reliability of the
respondent's evidence in regard to the interview with Barry.

For these reasons it is, I think,

more/.....

more probable that the alleged second interview with Barry did not take place and that it represents the respondent's confused recollection of part of the happenings at the meeting in February. In this connection it is relevant to point out that according to Barry the respondent, apparently because of his old age, has not got all his wits about him. As to part of these happenings his recollection is clearly incorrect. Barry's evidence is to the effect that neither the respondent nor the appellant told him that 34 heifers had been found, and about the appellant's attitude at that meeting he says : " in all fairness to him, he did not back "up his grandfather in his anger with the purchasers. He "sat very quiet; but he did, when he got a chance, bring in "about wanting grazing." This ill accords with the picture of a man starting "new affairs, trying to break the contract

If there was no second interview with Barry, it would further follow that both respondent and Olympia Galinos are probably mistaken in placing the discussion between the respondent and the appellant about the "stolen" heifers at the end of March or the beginning of April, and that the appellant is probably right when he says that he mentioned the heifers to the respondent in February, the day before the meeting in Barry's office. This would

raise/.....

raise the further difficulty that the evidence of Muriel Galinos, the appellant's wife, to the effect that Olympia was with her and not at the discussion, was not considered by the trial court in this light. Muriel, in fact, was not cross-examined at all, but that may be because it was assumed that she was testifying to a different occasion. With no finding as to her demeanour or credibility, it is hardly feasible to dismiss her evidence as of no account. It is true that she is the appellant's wife, but Olympia had been living in the respondent's home ever since her marriage in 1949 to his grandson Basil, whom he regards as a son rather than as a grandson. With no favourable finding as to Olympia's demeanour there is little reason ex facie the record, to prefer the evidence of the one to ~~the other~~ that of the other.

Once it is accepted that this discussion about the heifers took place in February, there is a great deal of the evidence which falls into an entirely different perspective. It will then be common cause that the appellant sought to purchase the heifers at this discussion, that he intimated that he was going to see Barry in connection with them, whatever his purpose may have been in wanting to do so. The fact that he admittedly disclosed such an intention, /.....

intention, appears to me to be more consistept with a purchase than with a refusal on the respondent's part to sell. Had the respondent refused to sell, it is more probable that the appellant would, in his disappointment, have left it to the respondent to inform Barry or the purchasers of the existence of these heifers. There was no reason for him to take the initiative in that direction. If he intended to retain the heifers in any event, that would have been taking a step calculated to frustrate his own purpose. It may be said that it is equally improbable that the respondent would agree to a sale of part of the herd he had already sold to Lieserowitz and Szoftel, but it must be borne in mind that he had been made aware of the fact that the purchasers did not know of these heifers, and that he had just received information which caused him to be so angry with them that on the following day he wanted to repudiate the sale. In these circumstances he may well have been prepared to accede to his grandson's request. Had he refused to do so, it is highly probable that at this meeting, when the deficiency in the number of cattle was discussed, he would forthwith have mentioned these heifers. This he did not do.

Further facts which would require re-assessment would be the statement by the appellant to

Barry/.....

Barry at the meeting in the latter's office, that he had some of the Vashu ranch cattle. In fact Barry paid little attention to that statement as a possible explanation of the cattle said to be missing, but the appellant could not have known that he would do so. By mentioning the matter to Barry he ran the risk of further enquiry which would, if the respondent had refused to sell him the heifers, almost certainly have resulted in a repudiation of his claim and the inclusion there and then of the heifers in the herd sold to Lieserowitz and Szeftel. He could, in such circumstances, hardly have thought, as suggested by the trial judge, "that his grandfather "would not particularly mind." This renders it improbable that he would have mentioned these cattle to Barry if he had no right to them.

There are, of course, a number of criticisms of the appellant's evidence which may rightly be advanced. His evidence as to what he said to Barry at this meeting, and as to what Barry said to him in a subsequent conversation in regard to these cattle, has been found to be untrue. But the respondent's evidence as to what he told Barry is equally untrue. The appellant's statement that he told Szeftel, when the latter was counting the cattle in March or April, that he had purchased a number of cattle

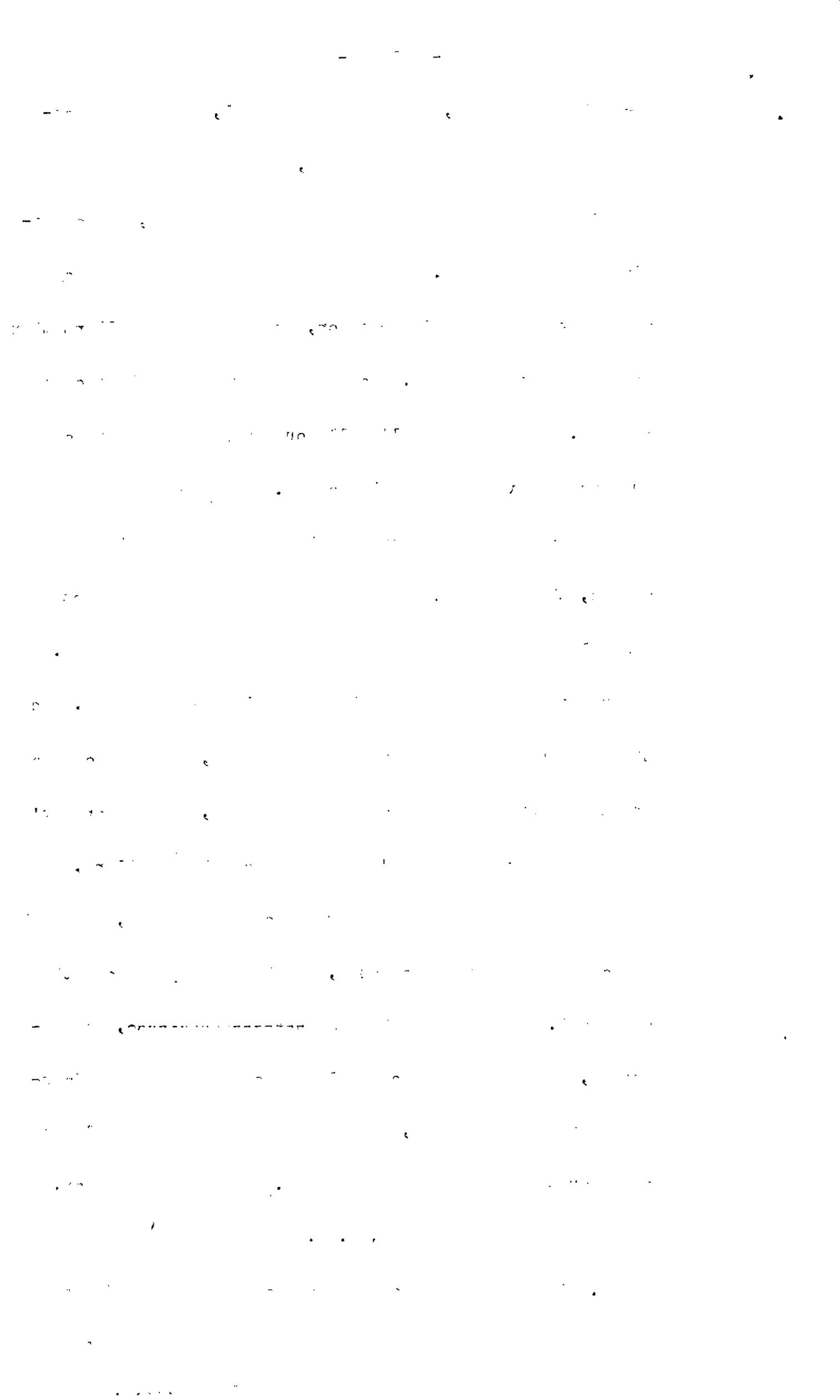
from/.....

from the respondent, is denied by Szeftel, but the respondent's evidence on the other hand, as to what transpired at the ultimate delivery of the herd to Lieserowitz, is contradicted by the latter. The respondent says that Lieserowitz claimed the 40 head in question, and that the appellant then said to the respondent : "You had better go to Bulawayo and see Mr. Barry and he will tell you why I do not want to return or give these cattle to you." From the evidence of Lieserowitz it is clear that he did not claim these cattle, that the appellant contended that the respondent had sold them to him and that the respondent denied this. In substance this agrees with the appellant's evidence. In these circumstances it cannot be said that, on the ground of inconsistency with other credible evidence, the respondent's evidence is more acceptable than that of the appellant.

There is other evidence, although not of any decisive importance, which tends to support the appellant. There is the fact ~~that he handed to~~, for instance, that he handed to Basil Galinos the following document headed "Agreement", purporting to set out a settlement of account as between himself and M. Galinos and Grandson:

"Agreed for profit of £387. 8. 4. is correct and accepted
"by M. Galinos and Grandson and due to Ted Galinos 34 head
"of cattle taken over by Ted Galinos and valued at £200

"offer/.....



"offer accepted by M. Galinos and Grandson. The balance of "amount to be taken ~~an~~ off stock." This document, he says, was intended to form the basis of a written agreement, confirming the verbal sale. He left it with Pasil Galinos, and it was disclosed by the respondent in the course of the proceedings. It does not appear that the appellant kept a copy of this document, nor is it suggested that he enjoined his brother to preserve it or to persuade the respondent to sell the cattle to him. If he did none of these things, it is not apparent what purpose he could have sought to achieve, if the respondent had in fact refused his request to purchase the cattle.

I am accordingly of opinion that the learned trial judge erred in finding that the second interview with Parry, mentioned by the respondent, did or may well have taken place. Certain facts, also, in connection with that interview, ^{which} were not before him, have by consent been placed before this Court. That finding had a substantial effect on the view he took of the rest of the evidence, the relative credibility of the witnesses and the probabilities of the case. In my view the probabilities are not equally balanced but clearly in favour of the appellant.

For/.....

For these reasons I am satisfied that the judgment in the court below was wrong. The appeal must, I think, be allowed with costs, and the judgment of the court below altered to judgment in favour of the defendant with costs.

L. C. Steyn.

~~Scrimgeour, J. C. J.~~)
~~Macdonald, J. C. J.~~)
~~de Villiers, J. C. J.~~)
~~Brink, J. C. J.~~)