SMITH, MASON and BRISTOWE, JJ. May 27th, June 17th, 1912.

PATEL *vs.* CORREA.

Magistrate's Court. — Civil Jurisdiction. — Counterclaim beyond Jurisdiction. — Unliquidated Claim and Counterclaim. — Leave to Reduce Counterclaim. — Proc. 21 *of* 1902.

An unliquidated claim for an amount within a magistrate's jurisdiction is not ousted from the magistrate's jurisdiction by virtue of an unliquidated counterclaim for an amount beyond that jurisdiction, if judgment upon the claim will not extinguish the counterclaim.

Where a counterclaim is made for an amount beyond the magistrate's jurisdiction and the magistrate dismisses it as being beyond his jurisdiction, it is too late to apply for leave to reduce the counterclaim in amount so as to bring it within the jurisdiction.

Quaere, *whether a magistrate has power, under Proc.* 21 *of* 1902, *to grant leave to reduce a counterclaim which is beyond the amount of his jurisdiction so as to bring it within that jurisdiction.*

Semble: per MASON, J., *that he has not;* per BRISTOWE, J., *that he has.*

1912. May 27. June 17.

Patel *vs.* Correa.

Appeal against a judgment by the A.R.M., Bloemhof.

The plaintiff (Correa), alleged in his summons that on the 21st November, 1911, he entered into a written contract with the defendant by which the plaintiff agreed to build certain premises for the defendant as *per* plan and specification annexed to summons. Thereafter the defendant altered the said plan and specification and instructed the plaintiff to carry out the alterations in the building. The plaintiff duly carried out the said alterations and the extra work and labour entailed thereby amounted to £88 10s., which defendant refused to pay. He therefore prayed for judgment for this amount with costs.

In his plea the defendant admitted the said contract, dated 21st November, 1911, and also that he had caused certain alterations in the plan and specifications to be made, but denied all the other allegations in the summons.

As an alternative plea, the defendant pleaded that the said contract provided for the completion of the said building on the 20th January, 1912, whereas it had only been completed on the 13th February, 1912, and that by reason of such delay defendant had suffered £50 damages; and that plaintiff in erecting the said building had not adhered to the terms of the said contract of the 21st November, 1911, in certain particulars (which were specified), thereby causing the defendant to suffer damage to the extent of £100; and that, owing to wrong timber being used and the carelessness of plaintiff's workmen, defendant had suffered damage to the extent of a further £12 4s. 6d.

The defendant further claimed in reconvention the sum of £30 for the use and occupation of a certain erf by the plaintiff and repeated his claim for the £162 4s. 6d. He therefore claimed judgment for £162 4s. 6d. and £30 with costs.

The magistrate held that the alternative plea and the claim in reconvention were beyond his jurisdiction and refused an application by the defendant to reduce them so as to bring them within his jurisdiction. An application by the defendant to regard the claim for £30 as distinct from the rest of the case was also dismissed. On the claim in convention the magistrate gave judgment for the plaintiff as prayed with costs. The defendant appealed.

T. J. Roos, for the appellant: The magistrate is wrong as far as his conclusion on the alternative plea and counterclaim is concerned. The whole question is whether an unliquidated counterclaim can oust an unliquidated claim in convention arising out of the same set of circumstances, if the unliquidated counterclaim is beyond the magistrate's jurisdiction? I submit it can. If it can only oust the claim in convention where set-off operates, then it can only apply where the claim in con-

1912.
May 27.
June 17.

Patel *vs.* Correa,

vention is of a liquidated nature and there is nothing to show what happens when the claim is unliquidated. The correct rule is that where the claim is unliquidated any counterclaim, whether liquidated or unliquidated, can be compensated against it: *Weber* vs. *Glanz* (8 H.C. G. 131). See also *Attwell & Co.* vs. *Purcell and others* (14 S.C. 368); *Torr* vs. *Ziehl* (15 C.T.R. 756). It was therefore the magistrate's duty merely to enquire into the *bona fides* of the counterclaim, and if beyond his jurisdiction, to dismiss the case with costs; see *Hunter* vs. *Bruns* (1904, T.S. 687); *Lewis & Sachs* vs. *Meyer* (1904, T.S. 898); *Marlow* vs. *Marlow* (1909, T.S. 1040); *Jack* vs. *Kipping* (9 Q.B.D. 113). Should the magistrate have allowed a reduction of the amount claimed in the counterclaim so as to bring it within his jurisdiction? It is clear that he cannot allow reduction of an amount claimed in a summons, see *Scheepers & Nolte* vs. *Pate* (1909, T.S., at p. 357). But there is a difference between a summons and a counterclaim. The counterclaim can be informally stated at the trial in a magistrate's court, and so can be altered at any stage; see *Marais* vs. *McKenzie* (17 C.T.R. 844); *Braude* vs. *Louw* (23 S.C. 428).

[BRISTOWE, J.: But we have not followed those cases in the Transvaal.]

Only in cases like *Cook* vs. *Aldred* (1909, T.S. 150), where the amendment is material to the merits. The defendant can at any time abandon, amend, or reduce his counterclaim, or withdraw it and file a new counterclaim. Where he has two distinct counterclaims, the one without and the other within the magistrate's jurisdiction, he can abandon the one without the jurisdiction and go on with the hearing of the other, see *Dale* vs. *Winship* (9 S.C. 509); *Jooste* vs. *Petzer* (11 S.C. 61); *Bakker* vs. *Ludolph* (22 S.C. 540); *Schoevers* vs. *du Plessis* (14 S.C. 290); *Jones* vs. *Williams* (1911, T.P.D. 536). The alternative plea should not have been dismissed, nor should the application to treat the counterclaim for £30 as distinct from the £162 4s. 6d.

C. E. Barry, for the respondent: A counterclaim stands on the same footing as a summons, and a plaintiff

in reconvention is entitled to the same privileges in regard thereto as an ordinary plaintiff in convention: see *S.A. Fisheries and Cold Storage* vs. *Zankelowitz* (23 S.C. 667). If he has the same privileges as a plaintiff in convention he must also have the same burdens. The abandonment must therefore appear *ex facie* the claim in reconvention. A claim in reconvention is really a separate action, although instituted by the summons.

[BRISTOWE, J.: But there need only be a verbal counterclaim.]

It must be in writing at request of the plaintiff under Rule 16 of the Magistrate's Court Rules, and the abandonment to bring within the jurisdiction of the court should then also be stated. The jurisdiction of the magistrate depends upon the total amount sued for: see *Joffe* vs. *Fraser* (1903, T.S. 104); *Yates* vs. *Simon* (1908, T.S. 878); *English County Courts' Practice*, 1912, Vol. I., p. 180; *Lewis and Sachs* vs. *Meyer* (1904, T.S. 898). The Cape practice as laid down in *Braude* vs. *Louw* (*supra*) is not allowed in the Transvaal under section 44 of the Magistrate's Court Proclamation. The claim for £88 10s. is for an amount in the nature of a liquidated sum; see *Sey* vs. *Thomas* (19 S.C. 165); *Kruger* vs. *du Pisani* (15 C.T.R. 574). The magistrate's decision was correct.

T. J. Roos, replied.

Cur. adv. vult.

Postea (June 17th).

MASON, J.: This is an appeal from the decision of the assistant resident magistrate, Bloemhof, in a case in which the plaintiff claimed £88 10s. for labour and work done in executing certain extras in connection with the building constructed by the plaintiff for the defendant under a written contract which only made provision for such alterations as would entail no extra labour.

The defendant filed a written plea admitting that certain of the extras were executed by the plaintiff, but

1912.
May 27.
June 17.

Patel *vs.* Correa.

denying that they entailed any additional labour and denying the plaintiff's right to recover in respect of the other items. The defendant also filed an alternative plea alleging certain breaches of the contract by the plaintiff which caused him damage to the sum of £162 4s. 6d. by reason of which, so it is said, the plaintiff is not entitled to make any further claim upon the defendant. The plaintiff also filed a claim in reconvention repeating the allegations in the alternative plea and also alleging the wrongful use and occupation of certain premises to which the defendant was entitled and in respect of which £30 was a reasonable rent or alternatively compensation for the alleged wrongful occupation. The defendant claimed judgment against the plaintiff for the sum of £162 4s. 6d. and £30 with costs. On the 15th April the magistrate heard argument on the matter and on the 22nd decided that the alternative plea and claim in reconvention were above his jurisdiction. The defendant's application to reduce the alternative plea and claim in reconvention to a sum within the magistrate's jurisdiction was dismissed as also an application to regard the claim for £30 as distinct from the rest of the counterclaim. The appellant does not challenge the decision of the magistrate upon the merits of the claim in convention, but contends that the claim in reconvention ousts the magistrate's jurisdiction or alternatively that the magistrate should have granted either the application to reduce the counterclaim or the application to try the counterclaim for £30 separately. It is apparent from the documents filed that all the items in both claim and counterclaim are of an unliquidated nature.

The first question which must be decided is whether the magistrate was right in deciding that the counterclaim would not oust his jurisdiction to try the claim in convention. The effect of a counterclaim upon the magistrate's jurisdiction has been considered in a large number of cases the result of which may be summed up as follows:—(1) Where both claim and counterclaim are within the magistrate's jurisdiction then he must try both claims whether they are liquidated or unliquidated. (2) Where both claim and counterclaim are liquidated,

so that the one can be compensated or set off against the other, then if the counterclaim exceeds the claim, the magistrate has no jurisdiction in the matter at all, because if compensation or set off should operate the claim in convention would be extinguished and this he could not decide without determining the claim in reconvention which is beyond his jurisdiction. It is not necessary to cite the cases in the various Courts of South Africa which clearly establish this doctrine. (3) It has also been as clearly established by a long series of decisions that, where a claim is liquidated and the counterclaim being beyond the magistrate's jurisdiction is unliquidated, then the magistrate must try the claim and dismiss the counterclaim. (4) Where the claim is unliquidated and there is a liquidated counterclaim in excess of the jurisdiction then the former should be tried and the latter be dismissed. (*Bakker* vs. *Ludolph*, 22 S.C. 540); *Smit* vs. *Philip*, 23 S.C. 776.) It was, however, contended in this appeal that as both claim and counterclaim were unliquidated the various authorities to which reference has been made do not apply, and that we should follow the decision of the High Court of Griqualand West in *Weber* vs. *Glanz* (8 H.C.G. 131). There the plaintiff claimed for lying in expenses and the defendant counterclaimed in libel for an amount exceeding the jurisdiction. The Court upheld the magistrate's decision, dismissing the case as beyond his jurisdiction. It is difficult to reconcile this judgment with the principle upon which the jurisdiction of the magistrate to try a plaintiff's claim has been disallowed. The only argument which could be used in its support, viz., that the defendant should not be called upon to pay the plaintiff any money when he might be able to establish that the plaintiff owes him a larger sum, would be equally valid against the magistrate exercising jurisdiction in any case whatsoever where the counterclaim is for an amount in excess of his jurisdiction and more especially in a case where the claim is unliquidated and the counterclaim is liquidated. There seems no reason either on principle or authority why this distinction should be drawn. It was also suggested during the course of the

1912.
May 27.
June 17.

Patel *vs.* Correa.

argument that the fact that both claims arose out of the same transaction and would therefore involve evidence of a similar nature was a reason why there should not be separate trials in different courts of the claim and the counterclaim. There may be in some cases some inconvenience arising from two trials, but that has not been held sufficient to oust the plaintiff from the Court in which he is entitled originally to bring his action: (see *Le Roes* vs. *Goldie,* 12 S.C. 131; *Burger* vs. *Burger,* 23 S.C. 555; *Dale* vs. *Winship,* 9 S.C. 509; *Smith* vs. *Ramsbottom,* 8 Buch. 98; and especially *Colonial Government* vs. *Stevens,* 10 S.C. 140). But in those cases in which the counterclaim in excess of the jurisdiction is of such a nature as, if established, to destroy the cause of action upon which the plaintiff's claim rests, or if a judgment in convention would become a *res judicata* in respect of the claim in reconvention which the magistrate *ex hypothesi* could not entertain as beyond his jurisdiction, then there may well be a doubt whether the magistrate's jurisdiction would not be ousted. That was the decision of the Cape Supreme Court in *Torr* vs. *Ziehl* (15 C.T.R. 756) and that seems to be supported by the reasoning which has led the Courts to the conclusion that a liquidated claim in reconvention of such an amount as would extinguish the claim in convention operates to oust the jurisdiction of the magistrate, unless it is as regards amount within his jurisdiction (*Robinson* vs. *Rolfes, Nebel and Co.,* 1903, T.S. 549). But it is unnecessary to decide this particular question in this appeal as it is quite clear that a judgment in favour of the plaintiff upon his conventional claim would not extinguish the counterclaim. The magistrate's decision that his jurisdiction was not ousted was therefore correct. The next question is whether the magistrate should have allowed the defendant to reduce his claim or have tried the separate reconventional claim for £30. It has been the practice in the Cape Courts to allow a plaintiff to bring a claim which as contained in the summons was beyond the magistrate's jurisdiction within the jurisdiction by striking out or abandoning any items in excess of the jurisdiction or reducing the claim by a sum to

bring it within the jurisdiction. (*Braude* vs. *Louw*, 23 S.C. 428; *Le Roes* vs. *Goldie*, 12 S.C. 377), but the Court has not allowed this to be done apparently upon appeal. These decisions, however, are not consistent with the judgments which have been given in our Courts in which it has been held that, where the summons on the face of it is beyond the jurisdiction, the magistrate's authority is excluded *ex facie* of the record and he has no power to allow a withdrawal or abandonment of the amount in excess of the jurisdiction as this would amount virtually to an amendment where there was no Court competent to sanction it. (*Scheepers and Nolte* vs. *Pate*, 1909, T.S. 357; *Jones* vs. *Williams*, 1911, T.P.D. 536; *King* vs. *Harris*, 1909, T.S. 294.) If, therefore, a claim in reconvention stands upon the same footing as a summons, it is clear that the magistrate's decision in refusing to allow the reduction or the separation of the claims would be correct. Our Court has held in *Yates* vs. *Simon* (1908, T.S. 878) that a plaintiff cannot, under the same branch of jurisdiction, bring claims to a greater amount than the pecuniary limit of the jurisdiction merely because they arise from separate causes of action. But the practice in the Cape Courts has apparently been to allow a reduction to take place in reconventional claims at any time at any rate prior to judgment and also, where the reconventional claim contains some items within the magistrate's jurisdiction as regards amount and founded upon separate causes of action, to direct the magistrate to try these items or portions of the claim in reconvention which are within his jurisdiction (*Smit* vs. *Philip*, 23 S.C. 776; *Marais* vs. *MacKenzie*, 17 C.T.R. 845; *Burger and others* vs. *Burger*, 23 S.C. 555). Now there is undoubtedly this difference between an original summons and a claim in reconvention that if the summons is without the jurisdiction, there is no case and there are no parties properly before the Court with whom the Court could deal in respect of the matter at issue, whereas the reconventional claim is only made when there is a Court competent to exercise jurisdiction over both parties. I have myself considerable doubts as to whether in face of the decision of *Yates* vs. *Simon*

1912.
May 27.
June 17.

Patel *vs.* Correa.

(*supra*), we should be justified in allowing a defendant, after he has once brought his reconventional claim before the Court, to split it up so as to give the Court the jurisdiction which it would not have in respect of the claim as filed, but assuming that there is no objection to such a course on general grounds, is a defendant entitled when his reconventional claim has been filed on record to reduce it or withdraw a portion of it so as to give the magistrate the jurisdiction which he did not possess before? And the question then arises whether the request of the defendant in the present case to reduce his claim to £100 or to have his claim for £30 tried separately amounted to an application for an amendment in terms of section 44 of Proc. 21 of 1902. It was argued that the course proposed to be adopted was equivalent to an abandonment by a plaintiff of a portion of his claim in a case in which there was jurisdiction, but the cases seem to me to differ entirely. In the one the plaintiff refrains from offering any evidence, but his claim so far as the record is concerned remains unaltered. If such a reduction or such a separation of the items of the claim in reconvention does not amount to an amendment of the claim in reconvention, then the reconventional claim stands unaltered on the record and the record would show that the magistrate had no jurisdiction. To adopt the language used by BRISTOWE, J., in *Jones* vs. *Williams* (1911, T.P.D. 550) there is either a "withdrawal or abandonment both of which virtually involve an amendment." Now section 44 of the Magistrates' Courts Proclamation, 1902, provides for the case in which it is competent for the magistrate to amend any plaint summons or other record. The claim in reconvention which has been filed seems to me without question a record in terms of this section. It is quite true that under Rule 15 a claim in reconvention may apparently be offered verbally, but the defendant's verbal answer has to be recorded, and it would seem probable that it would then become subject to the same rules as a claim in reconvention which was filed in writing but it is unnecessary to determine that point as in this case the claim in reconvention is a formal document filed with the record. Now

section 44 allows an amendment in respect of certain particulars provided the particular is not material to the merits of the case and the amendment does not prejudice the opposite party in the conduct of his action or defence. I am inclined to agree with the remarks of BRISTOWE, J., in *Davis* vs. *Pretorius* (1909, T.S. 875) that the phrase "merits of the case" means the substantial question which the parties come before the Court to try and that the amendment proposed in the present instance is not in that sense material to the merits of the case because exactly the same evidence will have to be given and exactly the same issue have to be tried whether the claim were reduced or not reduced, and the result of this would also be that such an amendment would not prejudice the opposite party in the conduct of his defence. But is this an amendment of a particular within the meaning of section 44? The construction to be placed upon the word "particulars" was dealt with in the case of *Michelman* vs. *R.* (1909, T.S. 454) and the Court there laid down that "particulars" must be given a restrictive meaning. The kind of particulars contemplated are apparently misdescriptions of persons or things or errors in date in matters where exactness is not essential. Now it seems to me clear that the reduction of a claim or the alteration of a claim so as to bring it within the jurisdiction cannot be held to be a particular in terms of the section. The magistrate therefore would not have been justified in granting the amendment for which application was made. It seems to me also that there is another objection which is fatal to the claim of the appellant upon this point. The application for amendment was only made after the magistrate had actually given judgment dismissing the claim in reconvention as beyond his jurisdiction. It seems to me it is then too late to endeavour to make a new claim in reconvention either by a fresh document or by amending the existing document. The appellant therefore has not succeeded upon any of the grounds which were so ably argued by Mr. *Roos* in showing that the judgment of the magistrate was wrong and the appeal must, therefore, be dismissed with costs.

1912.
May 27.
June 17.

Patel *vs.* Correa.

BRISTOWE, J.: Three points were argued on behalf of the appellant: (1) that the magistrate had no power to hear the case, because the counterclaim was beyond his jurisdiction; (2) that he should have allowed the counterclaim to be reduced so as to bring it within his jurisdiction; and (3) that in any event he should have heard the counterclaim for £30.

The first point was put on the ground that it was inconvenient to allow two claims arising out of the same transaction to be decided by different Courts, and the case of *Torr* vs. *Ziehl* (15 C.T.R. 756) was relied on as an authority for the proposition that where one of two such claims is sued on and the other is raised by counterclaim and exceeds the jurisdiction, the magistrate's power to entertain the former is excluded also. It seems to me that as a general rule a magistrate's jurisdiction over an action is and should be unaffected by any counterclaim the defendant may put forward. A counterclaim is only a cross action, and there is no more reason why a plaintiff should be deprived of his right to have his case tried in the Court of the resident magistrate, because the defendant chooses to embody his cross demand in a counterclaim than there would have been had he made it (as speaking generally he should do if it exceeds the jurisdiction) the subject of an independent proceeding in a superior court. This is borne out by the cases of *Smith* vs. *Ramsbottom* (1878, Buch. 98); *Brett* vs. *Soliman* (4 S.C. 6); *Dale* vs. *Winship* (9 S.C. 509); and *Colonial Government* vs. *Stevens and Hollingsworth* (10 S.C. 140) in the Cape Supreme Court and by the case of *Lewis and Sachs* vs. *Meyer* (1904, T.S. 898) in the Supreme Court of the Transvaal. The only discordant authority of which I am aware is the case of *Weber* vs. *Glanz* (8 H.C.G. 131) where the magistrate's power to try a claim was held to be excluded by an unliquidated counterclaim in excess of his jurisdiction arising out of an independent transaction. This case was not relied upon in argument and I doubt whether it would be followed.

The only recognised exception to the general rule which I have mentioned is where the counterclaim is of

such a nature that, if upheld, it would destroy the plaintiff's cause of action. Thus a *bona fide* counter claim which is beyond the jurisdiction and which, if established, will extinguish the plaintiff's claim by compensation precludes the magistrate from trying the claim. This is well established by numerous cases both in the Cape Colony and here (see *Hunter* vs. *Bruns*, 1904, T.S. 687; *Marlow* vs. *Marlow*, 1909, T.S. 1040; and *Theron* vs. *Nel*, 1910, T.P. 840); the ground of the decisions being that the dismissal of the counterclaim is, so to speak, a condition precedent to the existence of the plaintiff's cause of action. It may be that this exception should be extended not only to cases of compensation (where judgment for the claimant in re-convention shows the plaintiff's debt to have been non-existent) but also to cases where such judgment has the effect of depriving him of a cause of action which previously did exist, as for instance where the counterclaim impeaches the validity of a contract which formed the basis of his claim. The possibility of such an extension seems to have been contemplated by INNES, C.J., in *Robinson* vs. *Rolfes, Nebel and Co.* (1903, T.S., at p. 549). It seems to me that *Torr* vs. *Ziehl* (*supra*) was a case of this kind. The plaintiff sued for £15 due on a contract between himself and the defendant for an exchange of carts, and the counterclaim was for cancellation of the contract on the ground of fraud and for the return of the defendant's cart or payment of its value which was alleged to be £30. If, therefore, the counterclaim succeeded, the plaintiff's cause of action would disappear; and it was held that the counterclaim being beyond the jurisdiction excluded the magistrate's power to hear the claim. I do not think that this case supports the wide proposition contended for by Mr. *Roos* that wherever an unliquidated counterclaim beyond the jurisdiction arises out of the same transaction as the claim the magistrate cannot hear either. The cases of *Smith* vs. *Ramsbottom*, *Dale* vs. *Winship*, and *Colonial Government* vs. *Stevens and Hollingsworth* (*supra*) are direct authorities to the contrary; and as those cases seem to me to be in accordance with principle I think we should follow them. It may sometimes be

1912.
May 27.
June 17.

Patel vs. Correa.

inconvenient for two claims arising out of the same transaction to be tried by different Courts, though many of such cases would be met if *Torr* vs. *Ziehl* were followed. Where inconvenience arises, it could perhaps be obviated by some form of application to transfer. But I think that a general rule of the nature contended for might easily do more harm to the plaintiff than it would save inconvenience to the defendant.

As regards the second point, I think we must take it that where it is desired to reduce a claim so as to bring it within the magistrate's jurisdiction the reduction must appear on the face of the summons, otherwise the magistrate cannot entertain the case (*King* vs. *Harris*, 1909, T.S. 292; *Scheepers* vs. *Pate*, ibid. 553; *Jones* vs. *Williams*, 1911, T.P.D. 536). But I doubt whether this applies to a counterclaim, for when once the summons is within the jurisdiction the magistrate has control (so to speak) of the whole case and can deal with any point which may arise during its progress. I do not see, therefore, what objection there can be to an excessive counterclaim being reduced at the hearing, whether the reduction is mentioned in the counter-claim itself or not. In *Marais* vs. *MacKenzie* (17 C.T.R. 844) it was held that such a reduction ought to be allowed, and I agree with DE VILLIERS, C.J., when he said in that case (p. 845) "it seems a wholly unnecessary proceeding to dismiss the counter-claim altogether after it has been reduced and to put the defendant to the expense of having a fresh action." It was argued that even if the reduction were allowable it would be an amendment which, under sec. 44 of Proc. 21 of 1902, the magistrate could not sanction. I do not think that the reduction of a claim can be said to be either material or prejudicial to the other side though I am inclined to agree that it would not be a "particular" within the meaning given to that term by the majority of the Court in *Michelman* vs. *R.* (1909, T.S. 454). But I doubt whether a reduction in a claim is an amendment at all within the meaning of that section. It may be said truly enough, if I may repeat the words I used in *Jones* vs. *Williams* (1911, T.P.D.,p. 550), to "virtually involve an amendment." But it does not

follow that it is an amendment for which the authority of the Court is required. However, it is not material to express a positive opinion on this, because in the present case the application to reduce was only made after the magistrate had decided that the counterclaim was beyond his jurisdiction, and I am satisfied that that was too late. To reduce a claim implies that there is a claim with which the Court is called upon to deal. When once judgment has been given the claim in that sense ceases to exist, and there is no longer anything to reduce.

The same reasoning applies to the third point, namely, that the Magistrate should at all events have tried the £30 counter-claim. This is only one item of a total counter-claim of £192, and I cannot see that it makes any difference whether the reduction takes the form of deducting a certain sum from the aggregate of all the items composing the counter-claim or of discarding one or more of such items.

I therefore concur in thinking that the magistrate's decision was right and that the appeal should be dismissed with costs.

SMITH, J., concurred.

[Attorneys for Appellant: DE VILLIERS & DE KOCK.
Attorneys for Respondent, NESER & HOPLEY.]

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

WESSELS & BRISTOWE, JJ. June 17th, 1912.

JOUBERT *vs.* VERMOOTEN.

Principal and Surety.—Liability of Surety for Costs of Excussion.

In order to entitle a creditor to recover from a surety the costs of excussing the principal debtor, the creditor must allege in his summons that he gave the surety notice of his intention to excuss the principal debtor and to hold the surety liable for any costs he might incur thereby: Without such allegation the mere fact that the surety previously knew that the creditor was going to excuss the principal debtor is immaterial.