1915. *April* 4, *May* 11. DE VILLIERS, J.P., and BRISTOWE, J.

Criminal procedure.—Preparatory examination.—Remitted for trial by magistrate on a different charge.—Sec. 88, *Ord.* 1 *of* 1903.

Under sec. 88 of the Criminal Procedure Code, after a preparatory examination has been held, the *Attorney-General* can remit a case for trial by a magistrate, although the magistrate has discharged the accused or committed him for trial on a different charge.

Appeal against a conviction by the magistrate at Johannesburg.

A preliminary examination was held against the appellant, who was charged with the crime of extortion, and committed for trial thereon. The *Attorney-General* subsequently remitted the case to the magistrate, under sec. 88 (*c*) of the Criminal Procedure Code, for trial on a charge of theft by false pretences. He was convicted on this charge and sentenced to six months imprisonment with hard labour. He appealed against this conviction on the grounds that the proceedings were irregular, the verdict against the weight of evidence and the sentence excessive.

Guy Stent, for the appellant: The proceedings were irregular because the *Attorney-General* remitted for trial on a charge different to that in respect of which a preliminary examination was held. The *Attorney-General* must remit on the same charge for which there has been a committal; see sec. 88 (*d*) Ord. 1 of 1903, and *R.* v. *Gamata* (16 E.D.C. 32) and *R.* v. *Bamber* (2 Roscoe 8). The Cape Act gives wider powers than our Act.

He then argued on the merits.

C. W. de Villiers, Attorney-General, for the Crown: The Cape cases are decided on a Cape Statute, the words of which differ from sec. 88 of Ord. 1 of 1903. An analogous case is contemplated by sec. 92. The *Attorney-General* can indict for any crime disclosed by the preparatory examination under sec. 88.

The accused can always apply for a remand if he feels prejudiced by a new charge being preferred against him.

In *Hurliky* v. *R.* (1905, T.S. 19) it was held that sec. 134 applied to magistrates' courts.

In sec. 88 (*c*) "the case" is the charge decided upon by the *Attorney-General*.

Stent replied.

Cur. adv. vult.

Postea (May 11)

The judgment of the Court was delivered by:

BRISTOWE, J.: The appellant who carried on business as a private detective was employed by one Peterson to discover a gang of persons who were supposed to be endeavouring to murder him with a view to obtaining possession of an inheritance to which he believed himself to be entitled. A remuneration of £50 was agreed upon, which was duly paid. Afterwards the appellant obtained from Peterson a further sum of £40, and in respect of this sum he was charged with theft by false pretences, the false pretences alleged being that he had " ascertained that certain persons were plotting to injure " Peterson and that it was necessary for Peterson to supply him with money " to secure his safety from bodily injury." The appellant was convicted and sentenced to six months imprisonment with hard labour. He appealed on the grounds that the proceedings were irregular, the verdict against the weight of evidence, and the sentence excessive.

The alleged irregularity was that whereas the appellant had been committed for trial for extortion, the *Attorney-General*, purporting to act under sub-sec. (*c*) of sec. 88 of the Criminal Procedure Code, had remitted the case on a charge of theft by false pretences. It was contended that this was a fatal defect because the power of remittal given by that sub-section and also by sub-section (*d*) is limited to sending back for trial by a magistrate the precise charge on which the accused person has been committed. A remittal, according to this argument, must follow a committal and without a committal there can be no remittal. It is a plausible contention, and it is to some extent supported by the case of *Rex* v. *Ntwanambi Gamata* (16 E.D.C. 32), to which our attention was called. On the other hand it would certainly tend to complicate procedure. The *Attorney-General* can always stay a prosecution, and he can have a person prosecuted on any charge which he thinks is the correct one; and there would seem to be nothing to preclude him from using these powers where a prisoner has been discharged after a preparatory examination or has been committed by the magistrate on a wrong charge. If in such cases he can achieve the same result by this more cumbrous method, it would only cause unnecessary multiplication of proceedings if he could not do so by the simpler process of a remittal. It was suggested that if a committal were necessary to a remittal the difficulty might be met by applying sub-sec. (*b*) to remitted cases as well as to cases sent

to a superior Court. This again seemed plausible at first sight, but again it would lead to unnecessary complexity. For it would involve interposing a committal by order of the *Attorney-General*, thus rendering essential in remitted cases a step which itself is unimportant (for if the *Attorney-General* has made up his mind a formal committal by his order is mere machinery), and which sec. 92 makes unessential where the case is sent to a superior Court. These considerations seem to point to the intention of the Legislature having been against the contention advanced by the appellant. But this, of course, would not be conclusive if the construction of the section were clearly the other way. On consideration, however, I have come to the conclusion that this is not the case. Sub-sec. (*b*) seems to me to have no application to remittal cases but only to cases intended to be tried by a superior Court; and the remittal powers given by sub-secs. (*c*) and (*d*) are, I think, separate and independent powers. These powers (like all the other powers of the section) are exerciseable by the *Attorney-General* "after considering the preparatory examination." To consider the preparatory examination means to weigh its meaning and effect as a whole, not merely the view of it which commends itself to the magistrate. Certainly this is what the *Attorney-General* has to do when exercising the powers of sub-secs. (*a*) and (*b*), and if this is the meaning of the words "considering the preparatory examination" when taken in connection with those sub-sections why should it be more restricted when taken in connection with sub-secs. (*c*) and (*d*). If this, then, is the preliminary duty of the *Attorney-General*, what is the "case" which the sub-sections authorise him to remit. Is it merely the charge upon which the magistrate has committed the accused, or is it the case disclosed by the preparatory examination, weighed and considered in the manner that I have mentioned. In my opinion, the latter is the correct view; and if so then it follows that the case can be remitted even though the magistrate has discharged the accused or committed him on a different charge. I have considered the case of *Rex* v. *Ntwanambi Gamata*, but it was decided on a different statute and cannot, I think, be regarded as a binding authority on the construction of our own Criminal Procedure Code. In my opinion, therefore, the objection on the ground of irregularity fails. [His Lordship then dealt with the merits and dismissed the appeal and confirmed the conviction and sentence.]

[A. D.]

1915. *April* 7; *May* 11. DE VILLIERS, J.P., and BRISTOWE, J.

Sale of goods.—Inspection after delivery.—Right of purchaser to reject.—Reasonable time for inspection.

If a purchaser accepts delivery of goods sold he must satisfy himself within a reasonable time whether the goods are according to contract or not.

H sold dry lucerne to G to be delivered at F station. On the 4th December H trucked the lucerne at F station on behalf of G, and consigned the same at G's request to X at Boksburg, to whom G had sold. The lucerne arrived at Boksburg on the 10th December and was found to be of an inferior quality and in a fermenting condition. X refused to accept delivery and informed G. On the 11th December G instructed his agent at Boksburg to dispose of the lucerne to the best advantage. It was admitted that an immediate sale of fermenting lucerne was advisable. G thereupon sued H for damages, being the difference between the market price and the purchase price of the lucerne. *Held*, that although G must be taken to have accepted the lucerne at F station, he had nevertheless inspected the lucerne within a reasonable time after acceptance, and, finding it not up to contract, was entitled to reject it and claim damages.

Difference between the English and Roman-Dutch law on the subject discussed.

Appeal against a judgment by the magistrate at Potchefstroom.

The plaintiffs carried on business at Potchefstroom. The defendant was a farmer in the district. On the 28th November, 1914, and at Potchefstroom, the defendant sold to the plaintiffs 200 bales of dry lucerne at 4s. 9d. per 100 lbs. in weight, to be delivered at Frederickstad Station. In pursuance of this agreement the defendant on the 7th December trucked 204 bales of lucerne on plaintiff's behalf at Frederickstad, and consigned the same at plaintiffs' request to L. K. Harvey at Boksburg, to whom the lucerne had been sold by plaintiffs. On its arrival at the latter place about 10th December the lucerne was found to be of inferior quality and badly heated. When the bales were opened by Harvey's manager they were white and mouldy and in a state of fermentation. The manager thereupon refused to accept delivery on Harvey's behalf. Keeling & Co., agents of plaintiffs at Boksburg, were informed of this, who in their turn communicated this information to plaintiffs. Without communicating with the defendant the plaintiffs on 11th December gave instructions to Keeling & Co. to dispose of the lucerne to the best advantage. The lucerne was sold on the open market at Johannesburg on 15th December, and realised 2s. 9d. per 100 lbs., or £19 2s. 0d. in all. Of this amount the plaintiffs received £12 1s. 8d., after deducting

£5 18s. 0d. for railage and storage, 9s. 6d. commission, and 12s. 10d. for telegrams. The plaintiffs stated that they warned the defendant of what was going on verbally on 14th December and by letter of 22nd December, but the defendant denied that he ever received such warning. In the meanwhile the day after the lucerne had been trucked at Frederickstad the defendant went into Potchefstroom and received from the plaintiffs an amount of £44, which, together with an amount of £3 10s. 0d. advanced to him on 30th November, went to make up the purchase price. The plaintiffs sued the defendant, *inter alia*, for £8 0s. 0d. damages, *i.e.*, 9d. per 100 lbs., being the difference between the contract and the market price, and for £35 8s. 4d., *i.e.*, for the amount of the purchase price which the plaintiffs in their declaration called a loan, less what they received for the lucerne, and the magistrate gave judgment for the amount of £35 8s. 4d. with costs. From this judgment the defendant now appealed.

C. E. Barry, for the appellant: The magistrate has really given judgment for the plaintiffs for £47 10s. 0d. less £12 1s. 8d., which is the price the lucerne fetched on the Johannesburg market. No damages were proved. The magistrate seems to have given judgment for a refund of the purchase price of the lucerne. The plaintiffs should have claimed a return of the purchase price in the summons. The lucerne was to have been delivered the first week in December. The £47 10s. 0d. was paid on the 8th December, 1914, and was the purchase price of the lucerne.

Two points arise on the appeal:

(1) In terms of the contract the place of delivery was Frederickstad, and that was also the place of acceptance. As the plaintiffs accepted the lucerne at Frederickstad they cannot now reclaim the purchase price.

(2) If my contention is wrong on the question of acceptance, the defendant was not responsible for railage and commission from Boksburg to Johannesburg, amounting to £5 18s. 0d., and the commission to the broker in Johannesburg (9s. 6d.), making £7 0s. 4d. in all.

The stationmaster was the plaintiffs' agent for weighing and inspecting the lucerne. The place of delivery is presumed to be the place of inspection and acceptance, otherwise the purchaser could repudiate the goods wherever he wished. £3 had been paid on account, and £44 10s. 0d. was paid on production of the consignment note, which completed the bargain. In *Perkins* v. *Bell*

(1893, 1 Q.B. 193) it was held that the place of delivery was the place of acceptance.

T. J. Roos, for the respondents: On the merits it is clear that the lucerne was bad. Our authorities seem to show that the person purchasing need not examine immediately. *Dodd* v. *Spiralen* (1910, 27 S.C. 196). The purchaser is entitled to assume that the goods supplied are according to contract, and a reasonable time can elapse before examination. The property and the risk passes to the purchaser, but acceptance only takes place after the property has been examined, and if then found not according to sample it can be rejected. Our law differs from English law. In South Africa acceptance would only be acceptance with full knowledge. In *Nourse* v. *Malan* (1909, T.S. 202) the purchaser bought a stallion which turned out to be a gelding. It was held that the fact that the examination took place a long time afterwards did not prove acceptance. It depends upon the circumstances as to whether there had been an acceptance or not. After acceptance the *actio quanti minoris* would lie. In the present case the goods were rejected on examination.

Barry replied.

Cur. adv. vult.

Postea (May 11).

DE VILLIERS, J.P., after stating the facts as above set out, said: Mr. *Barry*, who appeared on behalf of the appellant contended that as Frederickstad was the place of delivery, it was—on the authority of *Perkins* v. *Bell* (1893, 1 Q.B. 193)—also the place of inspection. The plaintiffs should have inspected the lucerne at that place, and must be taken to have accepted it; the *dominium* in the lucerne passed to them at Frederickstad, and they cannot now reclaim the purchase price. But the case of *Perkins* v. *Bell*, which is based upon the consideration that otherwise the risk would remain in the seller is no safe guide to us. For whether the property had passed to the plaintiffs or not there can be no doubt that, according to our law, the risk was certainly in them. The case has, therefore, to be decided according to the principle of our own law. Upon the evidence it does not appear clearly whether the state in which the lucerne was must be considered a latent defect or not. According to Harvey's manager the colour of the bales of lucerne was brown, whereas good lucerne should be green. It

would therefore appear that we have to do with a case where the defect was patent. If this be so, (and I assume that it is in favour of the defendant) then unless the plaintiffs had accepted the lucerne in the sense that they were satisfied to receive it in fulfilment of the contract, they would still have their remedy by way of *actio ex empto*, because the lucerne had been warranted *dry*, whereas it was found to be wet and in a state of fermentation, due, as the magistrate found, to having been exposed to rain after it was cut. Now it may be conceded that the property in the lucerne passed to the plaintiffs by the delivery to the railway at Frederickstad and the subsequent payment. The plaintiffs, therefore, must be taken to have accepted the lucerne in the sense that they received it and intended thereby that the delivery to them should transfer the ownership in the lucerne to them. *Voet* (41, 1, 35). And it was in consequence of this that they actually paid defendant the balance of the purchase price on the following day. But it by no means follows from such an acceptance that they must be taken to have received the lucerne as satisfying the contract. To draw this inference from these facts is quite unjustified. The plaintiffs were entitled to assume that the defendant would faithfully discharge his obligations and deliver lucerne according to contract. It would, in my opinion, impose an altogether unwarranted burden upon the shoulders of the purchaser to insist that he loses all remedy if he does not inspect the goods when accepting delivery. Such a rule would unduly hamper transactions of this nature, besides making for fraud. In the present case Frederickstad is probably the most convenient station for the defendant; but whether this be so or not, if the plaintiffs would have been bound to inspect the lucerne at Frederickstad, they would either have had to appoint an agent there to do this for them (which may be difficult and expensive) or they would have had to stipulate for delivery at Potchefstroom. On the other hand it is equally clear that transactions of this nature cannot be left open indefinitely. If a purchaser accepts delivery, he must satisfy himself within a reasonable time whether the goods are according to contract or not. *Murray* v. *De Villiers* (1 M. 366); *Green* v. *Klipriver Farmers' Association* (22 N.L.R. 369).

Van Leeuwen, *Cens. For*, (part 1, bk. 4, c. 19, 17), after pointing out that any defect which arises after the sale of any animal falls upon the buyer, proceeds to say: "Hence if the defect or disease does not at once appear in the cattle sold, or the purchaser com-

plains after the lapse of time, the defect is presumed to have arisen afterwards, and the vendor is not liable to the purchaser, who has only himself to blame that he did not with greater diligence enquire into any defects which the animal he purchased might have." In how far this way of stating the law is strictly accurate need not now be considered. For it is now settled that a purchaser has a reasonable time in which to inspect. What is such a time must depend upon the circumstances of each particular case. In the case of *Murray* v. *De Villiers* delivery of the wine was complete on the 10th December, and yet it was held that plaintiff by delaying to ascertain the quality of the wine till 29th January following was not in such *mora* as to raise against him a *presumptio juris et de jure* that the wine was good and of proper quality, although such as to throw on him the *onus probandi* that the wine was bad when delivered and had not deteriorated after delivery. In the case of *Green* v. *Klipriver Farmers' Association*, where seed mealies had been bought by the secretary of the Farmers' Association, ten days was not considered an unreasonable period. In the present case the lucerne was inspected on its arrival at its destination, and it cannot therefore be considered that there was any undue delay in inspecting it. The plaintiffs were therefore entitled to sue for the *id quod interest* by means of the *actio empti*. The question whether they would have been entitled to anything more than the return of the purchase price does not now arise, for there is no cross appeal, but it is quite clear they are entitled to be refunded what they actually are out of pocket through having paid for lucerne which was not according to warranty. That is, they are entitled to the amount for which the magistrate gave judgment. It has also been contended that the defendant should have received the whole of the £19 2s. 0d. for which the lucerne had been sold on the Johannesburg market, but on what principle this is based it is difficult to see. If the defendant lays claim to the proceeds of the sale he cannot repudiate the expenses incurred in holding the sale. There is nothing to show that the lucerne was not sold to the best advantage. The defendant admitted that if the lucerne was in the state the magistrate found it to be, it was best to sell it as plaintiffs had done. The appeal must be dismissed with costs.

BRISTOWE, J.: It is well known that there are important differences between the English law of purchase and sale and our own

Under English law the general rule is that property and risk go together, and both pass to the purchaser immediately the contract is entered into if the goods are then ascertained and deliverable (in the sense of being in such a condition that the purchaser is bound to accept them), or if they are not at that time ascertained and deliverable, then so soon as they become so. Under the Roman-Dutch law on the other hand, although the risk passes at the same time as in England, the property itself does not vest until delivery, the purchaser's interest in the meantime being only a *jus ad rem.* Where, as in the case now before the Court, the contract is for the sale of unascertained or future goods, the purchaser under our law as much as under English law is allowed a reasonable time within which to accept in due performance of the contract, the goods appropriated to such contract by the seller, or to reject them if they are not in accordance with it. The acceptance may be either actual or notional, but until it has taken place there is no contract on the part of the purchaser to buy these specific goods; or in other words the contract still remains executory. But as soon as there has been acceptance, the position with regard to the goods is the same, *mutatis mutandis*, as in the case of a sale of ascertained articles.

Under each system of law delivery to a carrier, as for instance the railway, is *prima facie* delivery to the purchaser, but in the case of unascertained goods such delivery is not complete until it has been followed by acceptance, and it is only upon acceptance that the property passes to the purchaser; see as regards the Roman-Dutch law *Greenshields* v. *Chisholm* (3 S.C. at p. 327, per DE VILLIERS, C.J.); and *Voet* (41, 1, 35). The position under the English law is exactly the same. But when we turn to the risk, or *periculum rei venditae*, the difference between the two systems is the same in the cases now under consideration as it is where ascertained chattels are sold. In England it passes in each case simultaneously with the property. With us it passes on the making of the contract where ascertained goods are sold, and where they are not ascertained, then at the first point of time at which they can be said to become ascertained, that is when the vendor appropriates goods to answer the contract. (*Greenshields* v. *Chisholm supra.*) It is true that in England the risk is often held to pass on delivery to the carrier. A notable instance of this is an f.o.b. contract; see *Inglis* v. *Stock* (10 A.C. 263). But this is on the ground that that was the intention of the contract between

the parties. So, I take it, that here the parties might, if they chose, contract themselves out of the *primâ facie* position. But, apart from special contract, the difference is, I think, as I have stated.

Now from this distinction certain consequences follow. If the goods are at the risk of the purchaser, there is not (apart from the general desirability of completing transactions as rapidly as possible) any particular reason for limiting the time for inspection. The South African Courts have held that it must be a reasonable time (*Meintjes* v. *Deare*, 2 Searle 294; *Bell* v. *Kamp*, 15 E.D.C. 64), though what is reasonable may vary within wide limits (see *Vorster* v. *Louw*, 1910, T.S. 1099), but subject to this a purchaser has under our law an absolute right to reject goods not according to contract, unless and until he by his own act deprives himself of that right, by waiver or something unequivocally indicating an election to retain them. There is no need to hold (as was done in *Perkins* v. *Bell*, 1893, 1 Q.B. 193) that the purchaser is bound to inspect at the place of delivery, for the goods are at his risk and the vendor is not hurt by his not doing so. And the case of *Greenshields* v. *Chisholm* shows that with us this has not been considered necessary. But the position is different where, as in England, the goods are at the vendor's risk. In such a case an extension of the time for inspection not sanctioned by the contract which the parties have entered into might easily lead to the undesirable consequences referred to in the judgment of A. L. SMITH, L.J., in *Perkins* v. *Bell* (at p. 197). The English law is stricter in this respect than ours. There the maxim is *caveat emptor;* here it is *respondeat venditor*. In the case of latent defects it would seem to make little difference whether the goods are ascertained at the time of contract or not. If they are ascertained at the time of contract, the inspection takes place then; if not, it takes place within a reasonable time after delivery. In neither case will the defect be discovered, because *ex definitione* a latent defect is one which cannot be discovered by ordinary inspection. To sell a thing with a latent defect is with us a breach of contract, and it will accordingly support an action on the contract as well as the Aedilitian action (*Vorster* v. *Louw, supra; Vivian* v. *Woodburn*, 1910, T.S., p. 1285). In England it is a breach of warranty and will similarly support an action on the warranty (*Heilbutt* v. *Hickson*, L.R. 7, C.P. 438; *Drummond* v. *Van Ingen*, 12 A.C. 284; *Bostock* v. *Nicholson*, 1904, 1 K.B. 725).

Viewed in the light of these principles the main point in the case now before the Court admit of easy solution. The lucerne was undoubtedly defective. The resonable time which the law allows for inspection had not expired. And the plaintiffs did not intend to waive their rights. The only point, therefore, is whether they can be said to have done anything necessarily showing an intention to elect. It is true that they tendered the lucerne to a sub-purchaser in satisfaction of a contract for the sale of lucerne which they had entered into with him, and that they paid the purchase money to the defendant. But when they did these things, they were ignorant of the defect. They were entitled to assume that the lucerne was good. And the defendant was not misled. He knew that the plaintiffs had not even seen it, for he himself had consigned it from Frederikstad Station to the sub-purchasers at Boksburg, whereas the plaintiffs were to his knowledge at Potchefstroom. None of the elements of waiver or election are therefore present, and I think it is clear that, apart from the decision in *Perkins* v. *Bell*, the appellant cannot succeed on this part of the case. And the case of *Perkins* v. *Bell* is not, I think, an authority we ought to follow, because there the risk had not passed to the purchaser whereas here it has.

As regards the other points the rule no doubt is that a purchaser on rejecting goods should immediately notify the vendor and not dispose of them without his instructions.

But here it is admitted that the only thing to do with fermenting lucerne is to sell it as fast as possible; and the course which the plaintiffs adopted was therefore the one most beneficial to the defendant himself.

As regards the cost of transporting the lucerne to Johannesburg, it seems to me that if the defendant claims the proceeds of the sale, as it is admitted that he does, he must bear the burden.

For these reasons I agree that the appeal must be dismissed.

Attorneys for Appellant: *Neser & Hopley;* Attorneys for Respondents: *Stegmann & Roos.*

[A. D.]