1915. *March* 19, 22. DE VILLIERS, J.P., CURLEWIS and GREGOROWSKI, JJ.

Review.—Magistrate's court proceedings.—Right of reply on Law and fact.—Irregularity.

In magistrate's court proceedings the attorney for the plaintiff is entitled to reply both on the law and on facts to the arguments of defendant's attorney.

Where a magistrate had refused to allow the plaintiff's attorney to reply on the facts, *Held*, to be such an irregularity as entitled plaintiff to have the proceedings set aside.

Application to review certain magistrate's court proceedings and also an appeal against the magistrate's decision.

In this matter appellant sued respondent in the court of the resident magistrate, Johannesburg, for £100 damages, for having knocked him down by his motor bicycle. The plea was a denial that the defendant was guilty of any act of negligence: alternatively there was a plea of contributory negligence on the part of appellant, the facts set forth in the alternative plea being that, while the defendant was riding along, a safe distance away from the plaintiff, the latter, suddenly, without any warning, jumped up against the defendant's motor cycle, and so himself caused the collision. The magistrate who heard the evidence, believed the witnesses for the defendant and gave judgment for the defendant with costs. The defendant had also instituted a claim in reconvention for damages to the motor cycle, to the amount of £9 11s. 6d., and the magistrate allowed an amount of £4 11s. with costs on the counterclaim. The matter now came both in review and on appeal. It was alleged in an affidavit made by the solicitor for the plaintiff that the magistrate was guilty of gross irregularity, and the irregularities on which he based this claim were first, that the magistrate refused to allow the plaintiff to call rebutting evidence on the plea of contributory negligence and on the counterclaim; secondly, that the magistrate refused to hear the plaintiff in reply on facts, and would not allow the attorney for the plaintiff to read the arguments of counsel in a certain case.

L. Greenberg, for the appellant, argued on the merits of the appeal and quoted *Baratz* v. *Johannesburg Municipality* (1913, T.P.D. 732); *McKenzie* v. *S.A. Taxi Cab Co.* (1910, W.L.D. 232).

In connection with the review, the magistrate refused to allow the plaintiff to call rebutting evidence on the facts and would not allow plaintiff's attorney to argue or reply on the facts.

There is no rule disallowing a plaintiff being heard in reply on the facts in the magistrate's court. See *Shagan Bros.* v. *Lewis* (1911, T.P.D. 417).

R. Honey, for the respondent, was called upon to argue the points raised by the review: The plaintiff in his main case led evidence to meet the case that the defendant intended to make. He was, therefore, precluded from leading evidence in rebuttal: Taylor on *Evidence* (9th ed., vol. 1, p. 272, par. 385); *Stent* v. *Roos* (1909, T.S. 1057 at p. 1064); *Wright* v. *Willcox* (19 L.J.C.P. 333).

There was no prejudice to the appellant, who must prove that he was prejudiced by the irregularity: *Pienaar* v. *Godden* (10 S.C. 129); *Stemmer* v. *Sabina* (1910, T.P.D. 479, *per* SOLOMON, J., at p. 484); Taylor, *ibid.*, p. 272, vol. 1, par. 387.

The magistrate's court rules lay down no rule of procedure. In connection with a right to reply on a question of fact it would not be necessary to hear a reply. The magistrate points out that the practice is not to allow a reply on facts but on law only.

Greenberg, in reply: We need only prove a likelihood of prejudice by the irregularity in order to succeed on the review.

Cur. adv. vult.

Postea (March 22).

DE VILLIERS, J.P. (after stating the facts as above set out): The Court heard the arguments, both on appeal and on review, but, as we have come to the conclusion that in this particular case the proceedings were characterised by gross irregularity, the case must go back to the magistrate.

The first point is that the magistrate refused to allow the plaintiff's attorney to put the plaintiff into the box by way of rebuttal. This is what he says: "The first defendant asked me what was the nature of the evidence which I intended to lead. I replied that I was acquainted with no rule of law which compelled one side to disclose to the other the evidence which its witnesses ought to give. The first defendant then allowed me to put in a nurse who had attended to the plaintiff while in the hospital. I put in the nurse; then, seeing no objection was raised, the doctor who attended the plaintiff in his illness, and then wished to put in the

plaintiff. The magistrate refused to allow me to put in the plaintiff and recorded his decision. The plaintiff's rebutting evidence herein, besides denying the truth of the evidence of the defendant and his witnesses with regard to the manner in which his injuries had been sustained by him, would have disclosed that he had no mark whatsoever, nor any pain in that part of the body which was alleged by the defendant and his witnesses that the defendant's bicycle had struck; further, that he had measured his height from the beginning of his thigh to the heel, and that it measured 29 inches; that he had further measured the height of the weel of the defendant's bicycle, and that it measured 28 inches, and that the said wheel together with the mud-guard on top of such wheel and the sharp iron plate on top of the said mud-guard, measured together 30 inches. The said evidence I intended to lead to show that the evidence by the witness Fell, that the wheel struck the plaintiff in the middle of the back is impossible as in such case the said iron plate on the wheel must have inflicted some wound on the lower part of the defendant's buttock or between his legs."

It was argued on behalf of the defendant that the plaintiff had elected to anticipate the defence of contributory negligence, and he was not entitled to split his defence. But it was pointed out to counsel for the defendant that that is not strictly correct, because although the plaintiff gave evidence on the point as to whether he jumped into the bicycle or not, the evidence was only elicited after cross-examination by counsel for the defendant. The question which was put to him was replied to as follows: "The cycle did not pass me on the right side; I did not jump into it; the cycle fell on my legs." In re-examination he said: "I did not jump against the cycle," and, thereafter, the point having been made by counsel for the defendant in the first instance, evidence was led.

I must confess on this point I do not feel so very strongly because it appears to me that in a case like this, where the evidence does come out, it would have been more convenient for the plaintiff to lead all his evidence as the evidence was being elicited, as the evidence on the question of contributory negligence is so closely connected with the evidence on the claim, but I am not prepared to say he was not within his strict legal rights, if he had kept the two distinct, nor is it quite clear (looking at the magistrate's version) that he definitely refused to allow him to re-call the plaintiff. He says: "I told him, after hearing the evidence of both

sides, I was perfectly able to arrive at a conclusion; as he was very pressing I allowed him to call the nurse and the doctor, and they actually made the plaintiff's case in my opinion worse." However, the plaintiff has a right to reserve his defence and to meet the case in rebuttal by the defendant, and the magistrate does not specifically say that his evidence is not correct. Therefore we must hold that the plaintiff's affidavit is correct and the magistrate actually refused to allow him to re-call the plaintiff in rebuttal.

A point which is of more importance in the present case is the second point, that the magistrate refused to allow counsel for the plaintiff to reply upon the facts. This is what the magistrate says: "After both attorney for plaintiff and counsel for defendant had addressed me, plaintiff's attorney wanted to address me again on facts. I told him there was no right of reply on facts in the magistrates' court; he could only address me on any point of law which had been raised. He then wanted to quote arguments of counsel in the case of *McKenzie* v. *S.A. Taxi Cab Co.* (1910, T.H. 232). I told him I did not want to hear counsel's arguments, that I was only bound by the decision of the learned judge who had tried the case."

It appears to me that the magistrate was wrong in both instances. The attorney for the plaintiff had addressed the court and he had put his case both in law and in fact before the magistrate as he had the right to do. Then, in his turn, counsel for the defendant addressed the court, and he was entitled not only to reply to the arguments which had been advanced by the attorney for the plaintiff, but he was also entitled on behalf of his client to advance any fresh arguments, both in law and in fact to the magistrate. Thereafter according to our procedure, the attorney for the plaintiff was entitled to reply. He was certainly not entitled to re-argue the whole case, but he was entitled to reply to the arguments which had been advanced by the counsel for the defendant. Why he should be allowed only to reply on law and not on fact is not clear to me. The magistrate says it is not done in the magistrates' court, but if that is so, it appears to me an unreasonable practice. Sometimes the facts are of such a nature that it may materially assist the magistrate in coming to a conclusion to hear what reply upon the facts counsel for the plaintiff has to the arguments advanced by counsel for the defendant.

The law that we have to apply in a case like this has already been

laid down in the case of *Stemmer* v. *Sabina* (1910, T.P.D. 479). There it was said it is not for every irregularity that the Court will upset the proceedings in a lower court. The irregularity must be of so gross a nature that it is calculated to prejudice the party and if it is calculated to prejudice the party then, unless the Court is quite clear in the particular case, that it did not prejudice him, the proceedings must be set aside. In this case to me it is quite clear that the refusal of the magistrate to hear the arguments of the plaintiff's attorney in reply, on the facts, was an irregularity of such a nature that it was calculated to prejudice the plaintiff. We must assume that the magistrate had an open mind upon the facts and upon the law up to the very last, and *non constat* that if he had given the plaintiff's attorney an opportunity of addressing him in reply upon the facts, he would have come to the same conclusion to which he eventually came. And as it was calculated to prejudice the plaintiff, it is impossible for us to say that it did not prejudice him. This is therefore such an irregularity that the plaintiff is entitled to have the proceedings set aside.

The other matter of which the plaintiff complains, namely, that he was not allowed to re-quote the argument of counsel is also in my opinion an irregularity, although it is not such an irregularity as the previous one. The magistrate should of course give attorneys and counsel the fullest opportunity of laying their case before the court. If they are prolix or if they repeat themselves or adduce irrelevant argument, he has it in his power to stop them. But very often the arguments of counsel on the facts of a particular case are essential to a proper understanding of the decision in the case which, according to the magistrate, binds him. For this reason I have come to the conclusion that there was gross irregularity and that the decision must be set aside. The case must be remitted to the magistrate to re-open and to hear the witness, the plaintiff, and then he will give the parties a proper opportunity of being heard.

As the matter only came before us virtually in review, nothing need now be said about the appeal proceedings, except that there are no extra costs which have been incurred owing to the fact that we have allowed parties to argue the appeal before us.

CURLEWIS, J.: I concur.

DE VILLIERS, J.P.: My brother Gregorowski concurs in the judgment. The review will be allowed with costs and the judg-

ment of the lower court, both in convention and in reconvention, set aside, and the case remitted to the magistrate to hear the evidence of the plaintiff in rebuttal and thereafter to hear arguments *de novo*, and to allow plaintiff's attorney to reply both on facts and law.

Greenberg applied to the Court to grant a new trial.

DE VILLIERS, J.P.: That is a matter which was considered by the Court, but there are no facts before the Court which would justify it in considering that plaintiff would not get a fair trial. It is merely an error of judgment on the part of the magistrate, and there is no reason to think he would not give you a fair trial.

Attorney for Appellant: *E. Gluckmann*; Attorneys for Respondent: *Wagner & Klagsbrun.*

[A. D.]

BURTON v. ROTH.

1915. *March* 22. WESSELS and GREGOROWSKI, JJ.

Bill of exchange.—Cheque.—"Refer to drawer."—Summons.—Allegation of notice of dishonour.—Proc. 11 *of* 1902, *secs.* 46 *and* 71.

Where a cheque on being presented for payment at a bank was referred back to the drawer, *Held*, that in order to recover from the drawer notice of dishonour should be given to him and alleged in the summons.

Appeal against a judgment by a magistrate at Johannesburg.

A cheque for £7 0s. 10d. was drawn by the defendant, Henrietta J. Roth, on the Standard Bank, in favour of Bell & Anders or their order and was dated 2nd February, 1914. On 10th February, 1915, it was presented for payment and dishonoured by the bank. Thereupon summons in this action was issued by the holder against the drawer without notice of any sort to her that the cheque had been dishonoured.

It appeared from the evidence that the date, 2nd February, 1914, had been mistakenly written by the defendant for the 2nd February, 1915.