whether the game is played or the race won, or not, may recover from the stake-holder. That principle was followed in *Clarke* v. *Bruning* (1905, T.S. 295), and those authorities are in line with the authorities quoted by Mr. *van Heerden*, under the English law. It seems to me, therefore, that we have here, apart from the considerations which my brother WESSELS has pointed out, this fact—that there was a breach of a legal duty also on the part of the accused. The complainant was entitled to get his money back; the accused stole it. Therefore I think the conviction was right.

BRISTOWE, J.: I am of the same opinion. I do not think it is necessary in this case to go so far as to decide whether this money is civilly recoverable—not that I wish to dissent from the opinion expressed by my brother MASON on that point, but I would rather reserve my opinion. But, whether that is so or not, I am clearly of opinion that in the circumstances of the present case the conversion of the money by the accused to his own use amounted to theft. It is not a question of enforcing or not enforcing an invalid contract. This was money which was handed to the accused on a condition, and subject to the performance of that condition the money belonged to the person who handed it over. It may be that the condition was invalid, and that the Courts will not assist in the recovery of the money. But all the same, the money remained the property, not of the accused, but of the complainant, and the conversion of it by the accused to his own purposes seems to me to have amounted to theft. Therefore, without expressing any opinion upon the question of civil right, I agree with the view expressed by my brother WESSELS, and think that the appeal should be dismissed.

Accused's Attorney: *C. van D. Mathey.*

[J. M. M.]

REX v. OPPERMAN.

1915. *November* 22. WESSELS, MASON *and* GREGOROWSKI, JJ.

Liquor laws.—Liquor concealed at a certain spot.—Preconcerted arrangement.—Supply.—Ord. 32 *of* 1902, *sec.* 46.

An accused was observed to deposit and conceal liquor at a spot on the veld and was thereupon arrested. Shortly thereafter a native came to the spot and removed the liquor. *Held*, that this was evidence of a preconcerted arrange-

ment between the accused and the native and in the absence of explanation was sufficient to justify a conviction for supplying liquor to the native in contravention of sec. 46 of Ord. 32 of 1902.

Appeal against a conviction by the magistrate of Boksburg at Benoni.

The accused was charged with having contravened sec. 46 of Ord. 32 of 1902 in having, on 15th October, 1912, near the Apex Mine, supplied seven bottles of brandy to a native, Plaatje, under the following circumstances: On the day in question certain detectives took up their position in a plantation near the mine. At about 2 p.m. the accused approached on a bicycle, dismounted some distance from the detectives, and leaving his bicycle walked for a few yards on to the veld, where he knelt down, placed two or three brown paper parcels, which he had brought with him, on to the ground, and covered them with grass. He thereupon walked to his bicycle, and as he was about to mount the detectives rushed towards him. He managed to escape, but after being pursued for several miles, was captured, and on being brought to the detective in charge, said: "The liquor does not belong to me; it belongs to my brother and he sent me out with it." About 4 p.m. a native named Plaatje came over the veld, went straight to the spot where the liquor had been deposited by the accused, and took some of it. The magistrate, in these circumstances, convicted the accused and sentenced him to two years' detention in a Juvenile Adult Reformatory under sec. 73 (1) of Act 13 of 1911.

P. Millin, for the accused: When arrested, the accused had committed no offence: *R.* v. *Hellman* (1913, T.P.D. 727), at the outside he had only done an act of preparation. He had a *locus poenitentiae* of two hours, of the benefit whereof his arrest deprived him. The test is, when did the liquor pass out of his control?

[MASON, J., referred to *R.* v. *Woolf and Bannas* (1912, T.P.D. 794).]

In *Woolf and Bannas*' case the liquor was placed in a house in an Asiatic location, which the Court held was equivalent in itself to a supply to coloured persons.

The *onus* was on the Crown to prove that Plaatje had come there by arrangement, and not by accident. Plaatje should have been called as a Crown witness.

The sentence imposed is excessive. See *R.* v. *Fredericks and Others* (1914, T.P.D. 531) *re* suspended sentences in liquor cases.

I. P. van Heerden, for the Crown, was not called upon.

WESSELS, J., after stating the facts, continued:

Mr. *Millin's* contention is that here we have not to deal with a completed crime, but merely with preparation for a crime, and that, under the circumstances, the magistrate was not entitled to convict. He relies upon the case *R.* v. *Hellman* (1913, T.P.D. 727) for the proposition that circumstances similar to these led the Court in that case to the conclusion that there was not an actual crime or attempt to commit a crime, but only a preparation. Now the facts in *Hellman's* case were these. The accused was driving a cart. The cart stopped near the Witwatersrand mine, and Hellman proceeded to a dump some two hundred yards from a native compound, and left a parcel of liquor on the dump; he then returned to the cart, and was arrested. No natives came near the liquor which he had deposited on the dump, and the only evidence which attempted to connect natives with the liquor was the fact that some natives had been seen far away in the distance. In these circumstances two of the Judges held that there was not enough before the Court to justify it in coming to the conclusion that the liquor was deposited for supply to natives, because it was possible that it might have been deposited for some white liquor seller, who would, later on, supply it to natives. My brother MASON did not take that view of the facts; he was of opinion that the circumstances justified the Court in coming to the conclusion that the liquor was placed on the dump for the purpose of supplying it to natives. The terms of my judgment in that case are as follows. After considering the case of *R.* v. *Woolf and Bannas* (1912, T.P.D. 794), I said: "I am now asked to go still further. I am asked to presume that because a person deposits liquor on a mine dump some 200 yards from a native compound, he must be held to have had an agreement with natives, and that he deposited the liquor there for the benefit of natives, and natives only. I cannot take that view. Although there is a very strong suspicion that the liquor was placed there for natives, it may very well have been placed there for some white person. There may be liquor sellers living along the Reef who are being supplied with liquor in this way, and who would supply it later to natives. That the liquor was placed where it was for an honest purpose, I doubt very much. But that is not sufficient. We have to be certain that the liquor was deposited not only for a dishonest but for an illegal purpose—namely, to supply it to natives. It may be that in nine cases out of ten liquor deposited under such circumstances would be intended

for natives, and not for white men. But in the tenth case it may be deposited for a purpose other than supplying liquor to natives, and we do not know that this particular case is not that tenth case. I do not think I can put the case clearer than this. Under these circumstances there is not such a high probability of guilt as would justify the Court in coming to the conclusion that the crime has been proved." Now I wish it to be clearly understood that I am not prepared to go further than that. In *Hellman's* case all that was proved was that the accused deposited liquor on a mine dump, in the neighbourhood of a compound. In those circumstances I did not think the Court was justified in saying that the facts led to an irresistible conclusion that the liquor must have been intended for natives, and no one else. Here the facts are very different. There is no such thing here as a point of law divorced from facts. We have to take the facts, and apply the law to the facts. The facts here are these: That the accused took the liquor on to the veld, put it down and covered it with grass; he then went away, and when he saw the detectives he tried to escape; he ran away, was pursued, and was caught. When he was brought back, he said: "The liquor does not belong to me; it belongs to my brother, and he sent me out with it"; that was his excuse. Some time afterwards a native named Plaatje came along the veld, walked straight to the spot where the accused had deposited the liquor, and picked up the liquor. From these facts the Court has to determine whether there was or was not a preconcerted arrangement between the accused and Plaatje. If the accused was only acting for his brother, and did not know whether the liquor was to be taken by a native or not, something might be said on his behalf; but this the magistrate did not accept. Therefore the deposit of the liquor on the veld by the accused must have been in consequence of a preconcerted arrangement between himself and Plaatje. If that is the case, it is clear that the liquor was deposited there for a native to take away. Of course it is possible that Plaatje may have wandered along the veld, seen the parcel there, and then picked it up as a lucky find. Had that been proved, there might be something in Mr. *Millin's* contention. But Plaatje was not called for the defence. Mr. *Millin* has contended that it was the duty of the Crown to call him. I can see no such duty on the Crown. All the Crown had to do was to lay sufficient facts before the Court to enable it to draw the conclusion the Crown asked the Court to draw. If the accused thought that he could elucidate the matter by calling Plaatje, he ought to

have called Plaatje. He did not call Plaatje, and therefore the magistrate was justified in coming to the conclusion that the liquor was placed there under a preconcerted arrangement between the accused and Plaatje.

Then Mr. *Millin* has advanced a further argument. He says the accused ought not to have been convicted, because he had a *locus poenitentiae*. Between the time of his arrest, and the time Plaatje took the liquor, the accused still had an opportunity of removing the liquor. No such case was set up in the lower Court by the accused; he did not allege that he wanted to remove the liquor, but that the police prevented him. And I do not think that even if he had set up that case it would avail him much. If there was an arrangement between the accused and Plaatje (as the magistrate has found and as is no doubt true) that the accused was to deliver the liquor by placing it at a certain spot, if he placed the liquor at that spot, and left the spot, he actually attempted to supply liquor to a native. If he was arrested before the native actually took the liquor, all that it was necessary to show is that the liquor was destined for a native. I am therefore of opinion that the conviction is correct.

Then it has been said that the sentence is too severe, and that the accused ought not to have been sent to a reformatory, but ought to have been given a suspended sentence, or the option of a fine, payable in instalments. I do not think we ought to interfere with the discretion of the magistrate in that respect. The accused is eighteen years of age; therefore according to law the magistrate was entitled to send him to a reformatory, if he thought that was the correct course to adopt. I am not aware whether the accused can or cannot pay a fine, nor do I see any reason why the magistrate should have imposed a fine rather than send the accused to a reformatory. Under the circumstances I do not think we have any right to interfere with the sentence.

MASON, J.: I concur.

GREGOROWSKI, J.: I am of the same opinion. It is common cause between the accused and the Crown that he parted with the control of the liquor. The Crown says he left it in the veld so that Plaatje might come and fetch it, and that by a preconcerted arrangement he had supplied Plaatje with the liquor. The accused says: "No; it is true I parted with the liquor and left it in the veld, but I

parted with it to a white man, who had given me money with which to buy it, and he told me I was to put it there so that he could go and fetch it." It seems to me that all the argument which Mr. *Millin* has expended on this point of law has nothing to do with the facts, and is quite inconsistent with the case set up by the accused, for he says he had completed the act by putting the liquor where he did in the veld. It is not a case where the accused had only made preparation for an offence; according to his own account, he had completed the offence, only he says there was no offence, because what he had done was in consequence of a preconcerted arrangement with a white man. The case for the Crown is that the preconcerted arrangement was with a coloured person; and that the preconcerted arrangement was with a coloured person, is amply proved by the fact that Plaatje came and fetched the liquor, and that a white man did not appear on the scene. The conduct of the accused in other respects also harmonises with his guilt.

Accused's Attorney: *F. D. Foley.*

[J. M. M.]

MELTZER v. THE RESERVE INVESTMENT COMPANY, LTD.

1915. *October* 26, 27, 28, 29; *November* 18. WESSELS and CURLEWIS, JJ.

Negligence.—Lift.—User by persons other than operator.—Prohibition.—Accident.—Breach of statutory regulations.—Liability of owner of lift.—Sec. 221 *of Mines and Machinery Regulations,* 1913.

The defendants were the owners of premises containing a lift, in charge of an operator. There was a notice in the lift that only the operator was allowed to work the lift. A new button system was installed in the lift, which the operator demonstrated to the plaintiff, who was an employee of the defendants' tenants, and a notice was placed over the buttons directing their use. The defendants knew that the lift was being worked by persons other than the operator, but took no adequate steps to prevent it. There was a small defect in the working of the lift, which was known to the operator, The plaintiff, whilst using the lift, met with an accident and claimed damages. *Held,* that the plaintiff was working the lift by sufferance, and not by invitation of the defendants, who owed no duty to her.