

THE SUBORDINATE COURTS PROCLAMATION
(Chapter 5)
as amended by
THE SUBORDINATE COURTS (AMENDMENT) PROCLAMATION, 1959
(No. 49 of 1959)
(Date of Effect 1st September, 1959)
and
THE SUBORDINATE COURTS (AMENDMENT) PROCLAMATION, 1961
(No. 28 of 1961)
(Promulgated 26th April, 1961)
and
THE SUBORDINATE COURTS (AMENDMENT NO. 2) PROCLAMATION, 1961
(No. 42 of 1961)
(Date of Effect 1st June, 1961)
and
THE 1959 REVISED EDITION OF THE LAWS (CORRECTION) LAW, 1962
(No. 39 of 1962)
(Date of Effect 12th August, 1960)
and
**THE CONSTITUTIONAL AMENDMENT (ADAPTATION OF EXISTING LAWS)
ORDER, 1963**
(Order of Her Majesty's Commissioner No. 1 of 1963)
(Date of Effect 16th October, 1963)
and
THE GENERAL LAW (REMOVAL OF DISCRIMINATION) REVISION LAW, 1964
(No. 28 of 1964)
(Promulgated 19th November, 1964)
and
THE SUBORDINATE COURTS (AMENDMENT) LAW, 1964
(No. 32 of 1964)
(Date of Effect 4th March, 1966)
and
**THE CONSTITUTIONAL AMENDMENT (ADAPTATION OF EXISTING LAWS)
ORDER, 1966**
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BOTSWANA
THE SUBORDINATE COURTS PROCLAMATION
(CHAPTER 5)

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(1) Inserted by Proclamation 42/1961

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(CHAPTER 5)
SUBORDINATE COURTS

*To make provision for Subordinate Courts and for the jurisdiction and duties of
Officers presiding over such Courts*

51 of 1938
53 of 1947
Cap. 4
65 of 1951
78 of 1954
97 of 1955
2 of 1957
49 of 1959
28 of 1961
42 of 1961
39 of 1962
28 of 1964
32 of 1964

PART I

PRELIMINARY

Short Title.

1. This Proclamation may be cited as the Subordinate Courts Proclamation.

Interpretation

2. In this Proclamation, unless inconsistent with the context —

(Attorney-General)¹

“Court” means a Subordinate Court as established under this Proclamation;

“District” means one of the several areas prescribed under section four of the General Administration Proclamation; and in relation to any Subordinate Court means the district or sub-district or area within which that court has jurisdiction;

“High Court” means the High Court of Botswana² established under the High Court Proclamation;

“Immovable property” includes every right or interest to and in any buildings and other fixtures erected within Botswana² with the consent express or implied of the Government;

(1) Deleted by Order of H M C. 1 of 1963

(2) Amended by L.N. 84 of 1966

- “Judge” means a Judge of the High Court;
- “Judgment” in civil cases includes a sentence, decree, rule or order;
- “Judicial Officer” includes any officer or person entitled or appointed, under section *four*, to hold a court;
- “Offence” means an act or omission punishable by law or by a regulation or order made and in force under any Proclamation, Law or Act;
- “Rules” means rules in force under section *ninety-three* of this Proclamation;
- “Sheriff” means any officer duly appointed to execute the sentences, decrees, judgments, writs, summonses, rules, orders, commands and processes of the High Court, and includes a Deputy Sheriff;
- “Subordinate Court” means a Subordinate Court as constituted by this Proclamation.

PART II

COURTS

Constitution of Courts

3. There shall be and are hereby constituted Courts subordinate to the High Court, to be known as “Subordinate Courts” as follows, namely —

- (1) Subordinate Courts of the First Class;
- (2) Subordinate Courts of the Second Class; and
- (3) Subordinate Courts of the Third Class.

Who may hold Courts

4. (1)(a) Every Senior District Officer and every District Commissioner may hold a court of the First Class;

(b) Every District Officer may hold a court of the Second Class; and

(c) Every Cadet or District Assistant¹ may hold a court of the Third Class, within any district of Botswana².

(2) The President² may, with the concurrence of the Chief Justice, by notice in the *Gazette* appoint —

- (a) any person as a magistrate or assistant magistrate to hold a Subordinate Court of a class to be specified in such notice;

(1) Amended by Law 32 of 1964

(2) Amended by L.N. 84 of 1966

(b) any District Officer to hold a Subordinate Court of the First Class, or any Cadet or District Assistant¹ to hold a Subordinate Court of the Second Class; and any appointment made in terms of this sub section shall be deemed to confer jurisdiction to hold such court within any district of Botswana², unless otherwise stated in such notice.

Local Limits of Jurisdiction

5. The local limits of the jurisdiction of any Subordinate Court of the First, Second or Third Class shall be the district within which such Court is situated, and (without derogating from the jurisdiction of the Courts therein) within such part of any adjoining district as the President² may prescribe by notice in the *Gazette*: Provided that where an Assistant District Officer or a Cadet is placed in charge of a sub-district or of any portion of a district he shall exercise jurisdiction only within that sub-district or portion of a district.

Nature of Subordinate Courts, and Force and Effect of Process

6. (1) Every Subordinate Court shall be a court of record.

(2) Every summons, subpoena, writ, warrant or other process issued out of any Subordinate Court shall be of force throughout the district, and all such process when endorsed by a judicial officer of any other district (and every judicial officer is hereby required on production to him of any such process to endorse the same) shall be of force throughout the district for which such judicial officer is appointed, and may be served or executed therein through the messenger of such last-mentioned district or of the court out of which such process is issued.

Courts to be Open to the Public

7. (1) Subject to the exceptions provided in this Proclamation or in any other law in force in Botswana,² the proceedings in Subordinate Courts in all criminal cases and the trial of all defended civil actions shall be carried on in open court, and not otherwise, and the evidence shall be recorded in the English language.

(2) The trial of any child who is, in the opinion of the court, less than 16 years of age may be held *in camera* and in some other place than an ordinary court room: Provided that in such case the parent or guardian of such child shall have the right to be present.

(3) The court may in any case, in the interest of good order or public morals, direct that a trial shall be held with closed doors, or that (with such exceptions as the court may direct) females or minors or the public generally shall not be permitted to be present.

(1) Inserted by Proclamation 42/1961

(2) Amended by L.N. 84/1966

(4) If any person present in court disturbs the peace or order thereof, the court may order that person to be removed or detained in custody until the rising of the court, or, if in the opinion of the court peace cannot otherwise be secured, may order the court room to be cleared and the doors thereof to be closed to the public.

(5) Except where it may otherwise be provided by law, every witness in a criminal case shall deliver his evidence *viva voce* and in open court: Provided that where any witness is unable on account of ill health or advanced age to attend the court, his evidence may be taken in the presence of the presiding officer, the prosecutor, the accused person, and the legal representative (if there be such representative and he chooses to attend) of the accused person at such place as may seem to the court most convenient.

Public Access to Records

8. The records and proceedings of the court shall in all cases be accessible to the public under the supervision of an officer of the court at convenient times and upon payment of such fees as may be prescribed by the rules: Provided that after a period of thirty years has expired from the date of judgment in such proceedings, the President¹ may order the removal of such records and proceedings to a central place of custody.

OFFICERS OF THE COURTS

Clerk of the Court

9. (1) There may be appointed for every court so many clerks of the court and assistant clerks of the court as may be necessary.

(2) A refusal by the clerk of the court to do any act which he is empowered by this Proclamation to do shall be subject to review by the court on application either *ex parte* or on notice, as the circumstances may require.

Messenger of the Court

10. (1) Any officer empowered under section 4 to hold a court may, subject to the approval of the President¹, appoint a messenger of the court, subject to such conditions as to remuneration and tenure of office as the President¹ may determine.

(2) The messenger may, with the prior approval of the presiding officer of the court, appoint one or more deputy messengers, for whom he shall be responsible.

¹ Amended by L.N. 84/1966

(3) Whenever in any matter objection is made to the service or execution of process by the messenger or his deputy by reason of the interest of either of them in such matter or of the relation of either of them to a party to such matter or of any other good cause of challenge, or whenever, by reason of the illness or absence of the messenger, it is necessary to appoint an acting messenger, the presiding officer may appoint a person so to act.

Service of Process by the Police

11. Whenever process of the court in a civil case is to be served and no messenger or deputy messenger has been appointed at the place where the court is held, or whenever process of the court in a criminal case is to be served, a member of the Botswana' Police shall be as qualified to serve all such process and all other documents in such a case as if he had been duly appointed deputy messenger. The fees payable in respect of or in connection with any such service shall be accounted for by means of revenue stamps affixed to the relative documents.

Messenger's Return to be Evidence

12. The written return of a messenger or of any person authorised to perform any of the functions of a messenger to any process of the court shall be *prima facie* evidence of the matters therein stated.

Suspension of Messenger for Misconduct

13. A messenger who is alleged to have been negligent or dilatory in the service or execution of process, or to have knowingly or wilfully demanded payment of more than his proper fees or expenses, or to have made a false return, or in any other manner to have misconducted himself in connection with his duties, may, pending investigation, be suspended from office and profit by the presiding officer, who may appoint a person to act in his place during the period of suspension. The presiding officer shall report forthwith to the President' any action he has taken under this section, and the President' may, after investigation, set aside the order of suspension or may confirm it and may also dismiss from his office the messenger who has been so suspended.

Officers Appointed Previously to Remain in Office

14. Every officer of the court holding office immediately prior to the commencement of this Proclamation shall be deemed to be duly appointed under this Proclamation and shall be invested with power, duties and authority accordingly.

PART III

CIVIL MATTERS

CIVIL JURISDICTION

Jurisdiction in Respect of Persons

15. Saving any other jurisdiction assigned to any courts by this Proclamation or by any other law the persons in respect of whom the court shall have jurisdiction shall be —

- (a) any person who resides, carries on business, or is employed within the district;
- (b) any partnership whose business premises are situated or any member whereof resides within the district;
- (c) any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person himself;
- (d) any person, whether or not he resides carries on business, or is employed within Botswana, if the cause of action arose wholly within the district;
- (e) any party to interpleader proceedings, if —
 - (i) the execution creditor and every claimant to the subject-matter of the proceedings reside, carry on business, or are employed within the district; or
 - (ii) the subject-matter of the proceedings has been attached by process of the court;
- (f) any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court.

Jurisdiction in Respect of Causes of Action

16. (1) The civil jurisdiction in respect of causes of action of Subordinate Courts constituted under this Proclamation shall be :

- (a) Courts of the First Class.
All actions where the claim or value of the matter in dispute does not exceed R1,000.
- (b) Courts of the Second Class.
All actions where the claim or value of the matter in dispute does not exceed R500.

(c) Courts of the Third Class.

All actions where the claim or value of the matter in dispute does not exceed R100.

Provided that when both parties are Africans and the cause of action is in the opinion of the Clerk of the Court one suitable to be heard in an African Court of appropriate jurisdiction established or recognised under the law relating to African Courts, the Clerk of the Court may refuse to issue summons and may order the plaintiff to commence his action in such African Court.

Provided further than at any time after the issue of summons commencing action in any case where both parties are Africans the court may order that the action be transferred to an African Court of appropriate jurisdiction established or recognised under the law relating to African Courts.

(2) The civil jurisdiction of Subordinate Courts constituted under this Proclamation in respect of proceedings brought under the provisions of sections *twenty-seven, twenty-nine and thirty-two* of the African Courts Proclamation, shall be:

(a) Courts of the First Class.

All such matters.

(b) Courts of the Second Class.

All such matters where the claim or judgment, as the case may be, or the value thereof, does not exceed R500.

Arrests and Interdicts

17. (1) Subject to the limits prescribed by this Proclamation, Subordinate Courts of the First and Second Class may grant against persons and things orders for arrest *tanquam suspectus de fuga*, attachments, interdicts and *mandament van spolie*.

(2) Confirmation by the court of any such attachment or interdict in the judgment in the action shall operate as an extension of the attachment or interdict until execution or further order of the court.

(3) No order of personal arrest *tanquam suspectus de fuga* shall be made unless the following conditions are complied with, i.e. unless:

- (a) the cause of action appears to amount, exclusive of costs, to at least R40 ; and
- (b) the applicant appears to have no security for the debt, or only security falling short of the amount of the debt by at least R40 ; and
- (c) it appears that the respondent is about to remove from Botswana.

Curator Ad Litem

18. The court may appoint a *curator ad litem* in any case in which such a curator is required or allowed by law for a party to any proceedings brought or to be brought before the court.

Assessors

19. In any action the court may summon to its assistance one or more persons to sit and act as assessors in an advisory capacity.

Transfer from One Court to Another

20. An action or proceeding may, with the consent of all the parties thereto, or upon the application of any party thereto, and upon its being made to appear that the trial of such action or proceeding in the court wherein summons has been issued may result in undue expense or inconvenience to such party, be transferred by the court to any other court of the same class or of a higher class than the court from which it is desired to remove the proceedings.

What Judgments May be Rescinded

21. (1) The court may, on the application of the party in whose favour a judgment has been given, rescind or vary such judgment in the absence of the party against whom the judgment was granted, provided such last-mentioned party has received notice of the application and has been given an opportunity to appear at the hearing of the same.

(2) The court may rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties.

(3) The court may correct patent errors in any judgment in respect of which no appeal is pending.

(4) The court may rescind or vary any judgment in respect of which no appeal lies.

Incidental Jurisdiction

22. (1) In actions wherein the sum claimed, being within the jurisdiction, is the balance of an account, the court may enquire into and take evidence if necessary upon the whole account, even though such account contains items and transactions exceeding the amount of the jurisdiction.

(2) Where the amount claimed or other relief sought is within the jurisdiction, such jurisdiction shall not be ousted merely because it is necessary for the court, in order to arrive at a decision, to give a finding upon a matter beyond the jurisdiction.

(3) In considering whether a claim is or is not within the jurisdiction, no prayer for interest on the principal sum claimed or for costs or for general or alternative relief shall be taken into account.

Abandonment of Part of Claim

23. (1) In order to bring a claim within the jurisdiction, a plaintiff may, in his summons or at any time thereafter, explicitly abandon part of such claim.

(2) If any part of a claim be so abandoned it shall be thereby finally extinguished: Provided that if the claim be upheld in part only, the abandonment shall be deemed first to take effect upon that part of the claim which is not upheld.

Deduction of Admitted Debt

24. In order to bring a claim within the jurisdiction, a plaintiff may, in his summons or at any time after the issue thereof, deduct from his claim, whether liquidated or unliquidated, any amount admitted by him to be due by himself to the defendant.

Splitting of Claims Disallowed

25. A substantive claim exceeding the jurisdiction may not be split with the object of recovering the same in more than one action, if the parties to all such actions would be the same and the point at issue in all such actions would also be the same.

Jurisdiction Cumulative

26. (1) If two or more claims, each based upon a different cause of action, are combined in one summons, the court shall have the same jurisdiction to decide each such claim as it would have had if each claim had formed the sole subject of a separate action.

(2) If a claim for the confirmation of an interdict or arrest granted *pendente lite* be joined in the same summons with a claim for relief of any other character, the court shall have the same jurisdiction to decide each such claim as it would have had if each claim had formed the sole subject of a separate action, even though all the claims arise from the same cause of action.

Application of Sections Eighteen to Twenty-Five to Claims in Reconvention

27. In sections *nineteen* to *twenty-six* inclusive, "action", "claim", and "summons" include "claim in reconvention"; and "plaintiff" and "defendant" include "plaintiff in reconvention" and "defendant in reconvention" respectively.

Jurisdiction by Consent of Parties

28. Subject to the provisions of the next succeeding section, the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto.

Matters beyond Jurisdiction of Subordinate Courts

29. Subordinate Courts shall have no jurisdiction in matters :

- (a) in which the dissolution of a marriage or separation from bed and board or of goods of married persons is sought ;¹
- (b) in which the validity or interpretation of a will or other testamentary document is in question ;
- (c) in which the status of a person in respect of mental capacity is sought to be affected ;
- (d) in which is sought the specific performance of an act without an alternative of payment of damages (except the rendering of an account in respect of which the claim does not exceed an amount within the jurisdiction of the court, or the delivery or transfer of property not exceeding in value the jurisdiction of the court) ;
- (e) in which is sought a decree of perpetual silence ;
- (f) in which provisional sentence is sought.

Counterclaim Exceeding Jurisdiction

30. (1) When in answer to a claim within the jurisdiction the defendant sets up a counterclaim exceeding the jurisdiction, the claim shall not on that account be dismissed ; but the court may, if satisfied that the defendant has a reasonable prospect of recovering an amount exceeding the jurisdiction, stay the action for a reasonable period in order to enable him to institute an action in a competent court. The plaintiff in the court in which the action was originally instituted may (notwithstanding his action therein) counterclaim in such competent court, and in that event all questions as to the costs incurred shall be decided by that competent court.

(2) If the period for which such action has been so stayed has expired and the defendant has failed to issue and serve a summons in a competent court in relation to the matters the subject of such counterclaim, the court in which the action was originally instituted shall, upon application, either ;

- (a) stay the action for a further reasonable period ; or
- (b) dismiss the counterclaim (whether the defendant does or does not reduce such counterclaim to an amount within the jurisdiction of the court).

(1) Amended by Law 28/1964

(3) If the defendant has failed to institute action within such further period, or if the action instituted by the defendant be stayed, dismissed, withdrawn, or abandoned, or if the competent court has granted absolution from the instance thereon, the court in which the action was originally instituted shall, upon application, dismiss the counterclaim and shall proceed to determine the claim.

Judgment

31. The court may, as the result of the trial of an action, grant :
- (a) judgment for the plaintiff in respect of his claim in so far as he has proved the same ;
 - (b) judgment for the defendant in respect of his defence in so far as he has proved the same ;
 - (c) absolution from the instance, if it appears to the court that the evidence does not justify the court in giving judgment for either party ;
 - (d) such judgment as to costs as may be just.

Removal of Actions to Higher Court

32. (1) Any action in a Second Class Subordinate Court in which the amount of the claim exceeds R200, exclusive of interest and costs, may, upon application to the court by the defendant or any one of the defendants (if there be more than one defendant), be removed to a First Class Subordinate Court.

(2) Subject to the terms of the proviso to section four of the High Court Proclamation, any action in a First Class Subordinate Court or a Second Class Subordinate Court in which the claim exceeds R400, exclusive of interest and costs, may, upon application to the court by the defendant or any one of the defendants (if there be more than one defendant), be removed to the High Court.

(3) The removal of any action in terms of sub section (1) or (2) shall be subject to the following conditions and provision :

- (a) Notice of intention to make such application shall be given to the plaintiff and to other defendants (if any) before the date on which the action is set down for hearing ;
- (b) the notice shall state that the applicant objects to the action being tried by a Second Class Subordinate Court or any Subordinate Court, as the case may be ;
- (c) the applicant shall give such security as the court may determine and approve, for payment of the amount claimed and such further amount to be determined by the court, not exceeding R200, for costs already incurred in

the action and which may be incurred in the court to which the action is removed.

Upon compliance by the applicant with the conditions in this section prescribed, all proceedings in the action in the court shall be stayed, and the action and all proceedings therein shall, if the plaintiff so requires, be, as to the defendant or defendants, forthwith removed from the court into a First Class Subordinate Court or into the High Court, as the case may be. Upon the removal, the summons in the court shall, as to the defendant or defendants, stand as the summons in the court to which the action is removed:

Provided that the plaintiff in the action may, instead of requiring the action to be so removed, issue a fresh summons against the defendant or defendants in a First Class Subordinate Court or in the High Court, as the case may be, and the costs already incurred by the parties to the action shall be costs in the cause.

Return of Civil Proceedings'

32A. (1) At such intervals as the Chief Justice may require every Subordinate Court shall forward to the High Court, in such form as the Chief Justice may from time to time direct a complete list of all civil matters decided by, pending in, or brought before such court during such interval.

(2) The Chief Justice may require separate lists in respect of individual judicial officers or separate lists in respect of specified classes of judicial officers.

WITNESSES AND EVIDENCE IN CIVIL ACTIONS

Modes of Procuring Attendance of Witnesses and Penalty for Non-Attendance

33. (1) Any party to any civil action or other proceeding where the attendance of witnesses is required may procure the attendance of any witness (whether residing or for the time being within the district or not) in the manner in the rules prescribed.

(2) If any person, being duly subpoenaed to give evidence or to produce any books, papers or documents in his possession or under his control, which the party requiring his attendance desires to show in evidence, fails, without lawful excuse, to attend or to give evidence or to produce those books, papers or documents according to the subpoena, or, unless duly excused, fails to remain in attendance throughout the trial, the court may, upon being satisfied upon oath or by the written return of the messenger that such person has been duly subpoenaed and that his reasonable expenses have been paid or offered to him, impose upon the said person a fine, not exceeding R50, for his default, and in default of payment imprisonment for a period not exceeding one month.

- (b) If any person so subpoenaed shall fail to appear or, unless duly excused, to remain in attendance throughout the trial, the court may also, upon being satisfied as aforesaid and in case no lawful excuse for such failure shall seem to the court to exist, issue a warrant for his apprehension in order that he may be brought up to give his evidence and to be otherwise dealt with according to law.
- (c) The court may, on cause shown, remit the whole or any part of any fine or imprisonment which it may have imposed under this sub section.
- (d) The court may order the costs of any postponement or adjournment occasioned by the default of a witness, or any portion of such costs, to be paid out of any fine imposed upon such witness.

Interrogatories

34. (1) Whenever a witness resides or is in a district other than that wherein the case is being heard, the court may, if it appears to be consistent with the ends of justice, upon the application of either party approve of such interrogatories as either party shall desire to have put to such witness and shall transmit the same, together with any further interrogatories framed by the court, to the court of the district within which such witness resides or is.

(2) The last-mentioned court shall thereupon subpoena such witness to appear, and upon his appearance shall take his evidence in manner and form as if he were a witness in a case pending before that court, and shall put to the witness the said interrogatories and such other questions as may seem to it necessary to obtain full and true answers to the interrogatories, and shall record the evidence of the witness and shall transmit such record to the court in which such case is pending. The said record shall (subject to all lawful objections) be received as evidence in that case.

(3) Every witness so subpoenaed to appear shall be liable to the like penalties in case of non-attendance or failure to give evidence or to produce books, papers or documents as if he had been subpoenaed to give evidence in the court of the district in which he resides or is.

Commissions De Bene Esse

35. (1) The court may in any case which is pending before it, where it may be necessary or expedient and consistent with the ends of justice so to do, appoint a person to be a commissioner to take the evidence of any witness, whether within Botswana¹ or elsewhere, upon the request of one of the parties to such case and after due notice to the other party.

(1) Amended by L.N. 84/1966

(2) The person so appointed shall put to such witness such questions as have been transmitted to him on agreement between the parties, or otherwise shall allow the parties to examine such witness, and shall be permitted himself to examine such witness as if the witness were being examined in court, and shall record the evidence or cause it to be recorded, whereupon the evidence taken down shall be read over to the witness and shall be signed by him.

(3) The said record shall (subject to all lawful objections) be received in evidence in the case.

EXECUTION

Jurisdiction of Courts to Issue Execution

36. Any court which has jurisdiction to try any action against any party thereto shall have jurisdiction to issue against any party thereto any form of process in execution of its judgment in such action.

Superannuation of Judgments and revival thereof, and force of Warrants of Execution

37. (1) A judgment shall become superannuated by the lapse of three years from the day on which it was pronounced, and execution against property may not thereafter be issued upon it; but it may be revived for the purpose of the issue of such execution on the application and at the expense of the judgment creditor, after due notice to the judgment debtor to show cause why it should not be revived, either in the court in which judgment was pronounced or in any court having jurisdiction in respect of the judgment debtor.

(2) A warrant of execution once issued shall remain of force until the judgment on account of which it was issued has been satisfied.

Setting Aside of Warrant

38. The court may, on good cause shown, stay or set aside any warrant of execution or arrest issued by such court.

Execution in Case of Judgment Debt Ceded

39. Any person who has, either by cession or by operation of law, become entitled to the benefit of a judgment debt may, after notice to the judgment creditor and the judgment debtor, be substituted on the record for the judgment creditor and may obtain execution or process in aid in the manner provided for judgment creditors.

Manner of Execution

40. (1) Whenever a court gives judgment for the payment of money the amount shall be recoverable, in case of failure to pay the same forthwith or at the time or times and in the manner ordered by the court, by execution against the movable

property and, if there be not found sufficient movable property to satisfy the judgment, then against the immovable property of the party against whom such judgment has been given.

(2) Where it is required that immovable property subject to any claim ranking in priority to that of the judgment creditor be sold in execution such property shall be sold only through the sheriff after process in aid to that end shall have been granted by the High Court.

Property Exempt from Execution

41. In respect of any process of execution issued out of any court, the following property shall be protected from seizure and shall not be attached or sold, to wit:

- (a) The necessary beds, bedding and wearing apparel of the person against whose property execution is levied and of his family;
- (b) the necessary furniture and household utensils in so far as the same do not exceed in value the sum of R30;
- (c) the supply of food and drink in the house sufficient for the needs of such person and of his family during one month;
- (d) tools and implements of trade, and tools necessarily used in the cultivation of land, in so far as any such tools or implements do not exceed in value the sum of R40;
- (e) professional books, documents, or instruments, necessarily used by such person in his profession, in so far as the same do not exceed in value the sum of R40;

Property Seizable

42. (1) The messenger executing any process of execution against movable property may, by virtue of such process, also seize and take any money or bank notes and may seize, take and sell in execution cheques, bills of exchange, promissory notes, bonds or securities for money belonging to any person against whom any such execution shall have been issued as aforesaid.

(2) The messenger may also hold any cheques, bills of exchange, promissory notes, bonds or securities for money which shall have been seized or taken, as security for the benefit of the execution creditor for the amount directed to be levied by the execution so far as it is still unsatisfied; and the execution creditor may, when the time of payment shall have arrived, sue in the name of the execution debtor, or in the name of any person in whose name the execution debtor might have sued, for the recovery of the sum secured or made payable thereby.

(3) The messenger may also under any process of execution against movable property attach and sell in execution the interest of the execution debtor in any movable property belonging to him and pledged or sold under a suspensive condition to a third person, and may also sell the interest of the execution debtor in property movable or immovable leased to the execution debtor or sold to him under any hire purchase contract or under a suspensive condition.

(4) Whenever, if the sale had not been in execution, it would have been necessary for the execution debtor to endorse a document or to execute a cession in order to pass the property to a purchaser, the messenger may so endorse the document or execute the cession, as to any property sold by him in execution.

(5) The messenger may also, if he is authorised to do so, sell by him in execution, by a public auction, or by a private sale, any property which is liable to be sold by the messenger under this section, and may also sell by him in execution and effectual to him as purchaser, any such property.

(6) Where a person is liable to be sold by a messenger in execution, he may, before the sale, apply to the court for an order that the property should be sold by the messenger in execution, and the court may, if it thinks fit, make such order.

Interpleader Summons

43. (1) Where any person, claiming the judgment debt or the interest of another or in respect of any property attached or about to be attached in execution under the process of any court or of the proceeds of such property, states in a summons his claim shall be adjudicated upon after issue of a summons in the manner provided by the rules.

(2) Upon the issue of such summons any action which may have been brought in any court whatsoever in respect of such claim shall be stayed, and the court in which such action has been brought or any judicial officer thereof may, on proof of the issue of such summons, order the party bringing such action to pay the costs of all the proceedings in such action after the issue of the aforesaid summons, and such action shall abide the result of the proceedings taken upon such summons.

Sale in Execution gives Good Title

44. A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.

Surplus after Execution

45. If, after a sale in execution, there remains any surplus in the hands of the messenger, it shall be liable to attachment for any other unsatisfied judgment debt.

Debt, Salary or Wages may be Attached

46. (1) Without prejudice to section 18 of the Hire Purchase Proclamation 1961 (which, *inter alia*, prohibits the making of any garnishee order for the purpose of enforcing payment by the buyer of any amount payable under a hire-purchase agreement or an instalment sale agreement or as a result of the termination or rescission thereof or as damages for any breach thereof)¹, the court may order the attachment of any debt, salary or wages actually due to a judgment debtor by any other person residing, carrying on business or employed within the district to the amount necessary to satisfy the judgment and the costs of the proceedings for attachment, whether such judgment has been obtained in such court or in any other Subordinate Court, and may order such other person (hereafter called the "garnishee") to pay to the messenger of the court so much of the debt, salary or wages appearing at the time of making the order to be due and payable as may be sufficient to satisfy the said judgment and costs, and may enforce the order as if it were a judgment of the court.

(2) No such order in respect of salary or wages shall be granted unless the court is satisfied upon sworn information that sufficient means will, after satisfaction of the order, be left to the judgment debtor to maintain himself and those dependent on him.

(3) If, after any such order in respect of salary or wages has been granted, it is shown to the satisfaction of the court that sufficient means to maintain himself and those dependent upon him will not, after satisfaction of such order, be left to the judgment debtor, the court shall vary or set aside such order in such manner that such order will only affect the balance of such salary or wages over and above such sufficient means.

Future and Accruing Earnings, when Attachable

47. (1) Nothing in this Proclamation contained shall be construed as authorising the attachment of future or accruing earnings otherwise than with the consent in writing or in open court of the judgment debtor; but upon such consent being given the court, if satisfied upon sworn information that sufficient means will, after satisfaction of the order, be left to the judgment debtor to maintain himself and those dependent on him, may grant a garnishee order in respect of such earnings as if they were actually payable.

(1) Amended by Proclamation 28/1961

(2) Such an order may require the garnishee to pay periodically to the messenger definite amounts out of the earnings of the judgment debtor.

(3) The provisions of sub section (3) of the last preceding section shall apply to any order made under this section only if the judgment debtor proves to the satisfaction of the court that, after he gave such consent as aforesaid, his financial position changed substantially for the worse otherwise than by his own serious and wilful default.

Jurisdiction to Decide Disputes Arising out of Garnishee Orders

48. (1) If the garnishee disputes that the debt sought to be attached is owing or accruing, or alleges that it is subject to a set-off or belongs to or is subject to a claim by some third person, the court may determine the rights and liabilities of all the parties and may declare the claim of that third person to be barred, provided that the claim or value of the matter in dispute is otherwise within the jurisdiction of the court.

(2) If it be proved that such third person neither resides nor carries on business nor is employed within Botswana¹, and that he has a *prima facie* claim to the debt, the court shall not have jurisdiction under this section.

Execution or Payment is Discharge pro tanto

49. Payment made by or execution levied upon the garnishee under the provisions of this Proclamation shall be a valid discharge of the debt or amount of salary or wages due from him to the judgment debtor to the extent of the amount paid or levied.

Saving of Existing Law Prohibiting Attachment of Certain Property

50. Nothing in this Proclamation contained shall be construed as authorising the attachment of any debt, salary or wages or any moneys or property specially declared by any law not to be liable to attachment.

Order for Payment by Instalments

51. Every court may make orders concerning the time or times, and by what instalments, any debt or costs for which judgment shall be obtained in such court shall be paid, and all such moneys shall be paid into court unless such court shall otherwise direct; and every such order shall be in the form prescribed by the rules.

(1) Amended by L.N. 84/1966

Execution or Suspension in Case of Appeal

52. Where an appeal has been noted or an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application. The direction shall be made upon such terms, if any, as the court may determine as to security for the due performance of any judgment which may be given upon the appeal or application.

CIVIL IMPRISONMENT

Summons for Civil Imprisonment

53. (1) Without prejudice to section 18 of the Hire-Purchase Proclamation, 1961 (which, *inter alia*, prohibits the making of any decree of civil imprisonment for the purpose of enforcing payment by the buyer of any amount payable under a hire-purchase agreement or an instalment sale agreement or as a result of the termination or rescission thereof or as damages for any breach thereof), if a judgment has remained unsatisfied during a period of seven days, or if the judgment debtor has admitted in court or in writing or if it appears from the return of the messenger to any process of execution that the judgment debtor has not sufficient property liable to be attached in execution to satisfy the judgment debt and costs, the judgment creditor may summon the judgment debtor to show cause why the court should not make a decree of civil imprisonment against him.

(2) Such summons may be taken out either in the court wherein the original judgment was given or in the court of any district wherein the judgment debtor is for the time being residing, carrying on business or employed.

(3) Where it appears from the return of such summons that service was issued, the proceedings shall, unless the judgment debtor appears, be stayed until the court is satisfied that the judgment debtor has been paid or tendered the sum which would have been payable to him if he had been subpoenaed as a witness.

(4) A judgment debtor shall not be liable for any costs incurred by the judgment creditor in any proceedings in connection with a decree of civil imprisonment against such debtor (other than fees or charges which accrue to the Government or to the messenger of the court) —

- (a) if the judgment debt arose from the purchase on credit of goods other than foodstuffs or medicine¹ or from a loan of money, unless it is proved that the seller of those goods was induced to grant such credit¹ or the lender was induced to lend the money, as the case may be, by wilful misrepresentation made by or on behalf of the judgment debtor; or

(1) Amended by Proclamation 28/1961

- (b) if the rights of the judgment creditor against the judgment debtor accrue to the judgment creditor by virtue of a cession.

Decree of Civil Imprisonment

54. The court may, upon the return of the summons and whether the judgment debtor appears or not, make a decree of civil imprisonment against such judgment debtor and authorise the issue of a warrant for his arrest and detention in any gaol named in such warrant: Provided that —

- (1) the court may at any time suspend the execution of or altogether discharge any such decree or warrant upon such terms as may appear to the court to be fair and reasonable;
- (2) no such decree shall be pronounced and no such warrant shall be issued if the judgment debtor prove to the satisfaction of the court that he has no means of satisfying the judgment debt either wholly or in part and either out of present means or out of future earnings or income, unless it appears that the judgment debtor either —
 - (a) has wilfully made away with any property in order to defeat or delay payment of the judgment debt; or
 - (b) is able to earn sufficient to satisfy the judgment debt by instalments or otherwise to settle the same, but in order to defeat or delay payment of the judgment debt wilfully refuses to do so; or
 - (c) is squandering his money or is apparently living beyond his means;
- (3) in computing the degree to which the debtor can satisfy such debt the court shall take into consideration the conditions under which he obtains his income and the amount of his necessary expenses and those of the persons dependent on him.

Debtor May Show that he has Executable Property

55. When, on the hearing of a summons for civil imprisonment, the judgment debtor satisfies the court that he has property capable of being attached in execution by the messenger and sufficient to satisfy the judgment debt and costs, the court shall either dismiss the summons or adjourn the further hearing thereof until the said property has been sold in execution.

Period of Imprisonment

56. The period of civil imprisonment shall be decided by the court, but shall not in any case exceed three months, and, where the judgment debt and costs, so far as the same are unsatisfied, amount to less than R10, shall not exceed fourteen days.

Costs of Civil Imprisonment

57. (1) Unless it appears to the court upon the hearing of any proceedings for civil imprisonment that the debtor has, within forty-eight hours after having notice of the judgment upon which such proceedings are founded, made to the judgment creditor an offer to satisfy the debt by instalments which the court judges to be reasonable, or notified the creditor that he is unable to make an offer and the court finds this to be true, the court may order the debtor to pay the costs of such proceedings; but if it appears that the judgment creditor has refused such offer, the court may order the creditor to pay those costs.

(2) Upon any proceedings for the discharge or suspension of any decree, warrant or order for civil imprisonment, the court may order the judgment debtor to pay the costs of such proceedings, unless it appears that the proceedings were due to some fault or omission on the part of the judgment creditor.

(3) Nothing in this section contained shall be construed as depriving the court of its discretion to make such order as to costs as may be just.

Custody by Gaoler

58. The keeper of any prison or gaol thereto authorised by warrant or order shall receive into his custody and detain in such gaol the judgment debtor named in such warrant or order in accordance with the tenor of such warrant and the provisions of the Prison Regulations: Provided always that the judgment creditor shall pay and satisfy the charges for the maintenance of the judgment debtor, which shall be such an amount not exceeding thirty-five cents per diem as the court shall determine and shall be paid weekly in advance to the keeper of the prison or gaol, who shall then issue to the judgment debtor a daily ration based on the amount of the maintenance money received.

Discharge from Imprisonment

59. The keeper of the gaol shall forthwith discharge the judgment debtor from imprisonment:

- (1) upon expiry of the time for which such judgment debtor was imprisoned;
or
- (2) when the judgment creditor gives his written consent to such discharge;
or
- (3) when the judgment creditor or the messenger certifies in writing that the amount of the judgment debt and costs mentioned in the warrant and of any maintenance money that may have been paid by him for the unexpired portion

of the period of the imprisonment has been satisfied; and upon such satisfaction the judgment creditor or the messenger shall so certify to the said keeper; or

- (4) when such amount is paid to the said keeper by or on behalf of the judgment debtor; or
- (5) upon an order given by a Judge of the High Court or by any judicial officer of the district where the decree of civil imprisonment was pronounced against the judgment debtor or of the district wherein the gaol is.

Effect of Discharge from Imprisonment

60. No judgment debtor who has been once lawfully discharged from imprisonment (except a debtor discharged by an order of court suspending such imprisonment) shall ever again be liable to be arrested for the same debt or cause of action; but no arrest or imprisonment or discharge therefrom shall be deemed to be a satisfaction of the judgment debt, or of any part thereof, so as to prevent the judgment creditor from having further execution against the property of the said debtor.

Warrant of Civil Imprisonment may be Suspended by Court of District Wherein it is Executed

61. The court of any district wherein a judgment debtor is arrested shall have the same jurisdiction as the court from which the warrant was issued to suspend such warrant and may cancel or vary any order of suspension made by itself; but such first-mentioned court may not discharge altogether any warrant issued out of any other court.

APPEALS

By Consent Decision of Subordinate Court may be Final

62. No appeal shall lie from the decision of a court if, before the hearing is commenced, the parties lodge with the court an agreement in writing that the decision of the court shall be final.

Appeals from Subordinate Courts.

63. Subject to the provisions of the last preceding section, a party to any civil suit or proceeding in a Subordinate Court may appeal to the High Court against:

- (a) any judgment of the nature described in section *thirty-one*;

- (b) any rule or order made in such suit or proceeding and having the effect of a final and definite sentence, including any order as to costs;
- (c) any decision overruling or upholding an exception, when the parties concerned consent to such an appeal before proceeding further in an action, or when it is appealed from in conjunction with the principal case, or when it includes an order as to costs.

Time, Manner and Conditions of Appeal

64. Every party so appealing shall do so within the period and in the manner prescribed by the rules, but the High Court may in any case extend such period.

Right of Appeal not Lost by Satisfaction of Judgment

65. A party shall not lose the right to appeal through satisfying or offering to satisfy the judgment in respect of which he appeals or any part thereof or by accepting any benefit from such judgment, decree or order.

Respondent may Abandon Judgment

66. (1) The respondent to an appeal may, by notice in writing, abandon the whole or any part of the judgment against which appeal is noted.

(2) Where the party so abandoning was the plaintiff or applicant, judgment in respect of the part abandoned shall be entered for the defendant or respondent with costs.

(3) Where the party so abandoning was the defendant or respondent, judgment in respect of the part abandoned shall be entered for the plaintiff or applicant in terms of the claim in the summons or application.

(4) A judgment so entered shall have the same effect in all respects as if it had been the judgment originally pronounced by the court in the action or matter.

(5) This section shall not apply to any action for affiliation, defamation or seduction.

Powers of High Court on Appeal

67. The High Court may, on appeal:

- (a) confirm, vary or reverse the judgment appealed from, as justice may require;
- (b) if the record does not furnish sufficient evidence or information for the determination of the appeal, remit the matter to the court from which the

appeal is brought, with instructions in regard to the taking of further evidence or the setting out of further information;

- (c) order the parties or either of them to produce at some convenient time in the High Court such further proof as shall to it seem necessary or desirable; or
- (d) take any other course which may lead to the just, speedy and as much as may be inexpensive settlement of the case; and
- (e) make such order as to costs as justice may require.

Execution of Judgment of High Court on Appeal

68. The judgment of the High Court on appeal shall be recorded in the court appealed from, and shall be enforced as if it had been given in such last-mentioned court.

PART IV

CRIMINAL MATTERS

CRIMINAL JURISDICTION

Jurisdiction in Respect of Classes of Crimes and Offences¹

69. (1) Subordinate Courts of the First Class shall have jurisdiction over all offences except treason, murder and sedition and any conspiracy or attempt to commit any of these offences.

(2) Notwithstanding any provision in any law to the contrary, Subordinate Courts of the First Class may punish any person convicted of the offence of rape or of any conspiracy or attempt to commit such offence with imprisonment with or without hard labour for a period not exceeding four years.

(3) Subordinate Courts of the Second and Third Class shall have jurisdiction over all offences except treason, murder, sedition, offences relating to coinage and currency, rape and any conspiracy or attempt to commit any of these offences.

Local Limits of Jurisdiction

70. (1) Subject to the provisions of the last preceding section, any person charged with any offence committed within any district may be tried by the court of that district.

(1) Replaced by Proclamation 42/1961

(2) When any person is charged with any offence :

- (a) committed in Botswana¹ within the distance of two miles beyond the boundary of the district; or
- (b) committed in or upon any vehicle employed on a journey any part whereof was performed within the distance of two miles of the district; or
- (c) begun or completed within the district,

such person may be tried by the court of the district as if such person had been charged with an offence committed within the district.

(3) Where it is uncertain in which of several jurisdictions an offence has been committed, it may be tried in any of such jurisdictions.

(4) A person charged with any offence may be tried by the court of the district wherein any act or omission or event which is an element of the offence took place.

(5) A person charged with theft of any property or with obtaining by any offence any property or with any offence which involves the receiving of any property by him may also be tried by the court of any district wherein he has or had any part of the property in his possession.

(6) A person charged with kidnapping, child-stealing or abduction may be tried by the court of the district in which this took place or of any district through or in which he conveyed or concealed or detained the person kidnapped, stolen or abducted.

(7) Where by any special provision of law a Subordinate Court has jurisdiction in respect of any offence committed beyond the local limits of the district, such court shall not be deprived of such jurisdiction by any of the provisions of this section.

Jurisdiction in the Matter of Punishment

71. (1) Subject to the provisions of this Proclamation and of any other law in force in Botswana¹, Subordinate Courts may punish any person convicted of any offence in the following manner and (save as is specially provided by this Proclamation or any other law) in no other or more severe manner, that is to say :

- (a) A Subordinate Court of the First Class :
 - (i) Imprisonment for a period not exceeding two years with or without hard labour;
 - (ii) fine not exceeding R400² or in default of payment such imprisonment as aforesaid;

(1) Amended by L.N. S4 1966

(2) Amended by Proclamation 42 1961

(iii) whipping, subject to the provisions of section *eighty-one* and to any other provisions hereinafter contained, not exceeding fifteen strokes with a cane.

(b) A Subordinate Court of the Second Class :

- (i) Imprisonment for a period not exceeding one year with or without hard labour;
- (ii) fine not exceeding R100 or in default of payment such imprisonment as aforesaid;
- (iii) whipping, subject to the provisions of section *eighty-one* and to any other provisions hereinafter contained, not exceeding eight strokes with a cane.

(c) A Subordinate Court of the Third Class :

- (i) Imprisonment with or without hard labour for a period not exceeding six months;
 - (ii) fine not exceeding R50 or in default of payment such imprisonment as aforesaid;
 - (iii) whipping, subject to the provisions of section *eighty-one* and to any other provisions hereinafter contained, not exceeding four strokes with a cane.
- Notwithstanding anything contained in the foregoing provisions of this section, any person convicted of an offence under any law for which a punishment of imprisonment with or without hard labour or of a fine or of whipping may be imposed shall be punished with imprisonment with or without hard labour and such fine or whipping as may be provided for in the law for which he is convicted.

(1) If a person is convicted of an offence for which a punishment of both fine and imprisonment may be imposed, and he is sentenced to a further period of imprisonment if the fine is not paid, provided that the maximum period of imprisonment laid down in section (1) of this section be not exceeded.

(2) The punishment of whipping shall be subject to the provisions of section *eighty-one* hereof and shall only be imposed for:

- (i) assault of an aggravated or indecent nature or with intent to do grievous bodily harm;
- (ii) culpable homicide, robbery, bestiality or an act of gross indecency committed by one male person with another or any attempt to commit any such offence; or
- (iii) any statutory offence for which whipping may be imposed as a punishment:

Provided that the punishment of whipping shall not be imposed on females :²

(1) Corrected by Law 89 of 1962
(2) Amended by Proclamation 42 of 1961

Provided further that, anything to the contrary in any other law notwithstanding, the punishment of whipping shall not be imposed more than once for the same offence.

(5) Where any law provides that for any offence there may be imposed any forfeiture or confiscation, the court before which such offence is prosecuted may impose such forfeiture or confiscation in addition to any other penalty.

(6) Nothing in this section contained shall be construed as authorising a court to impose for any offence a punishment greater than may by law be imposed for such offence, or as preventing a court from imposing, as often as it is specially authorised by any law so to do, any other or more severe punishment than the punishments mentioned in sub section (1)

(7) Nothing in this section contained shall be construed as authorising a court to declare a person to be an habitual criminal.¹

Extension of Criminal Jurisdiction of Specified Officers²

71A. (1) The President³ with the concurrence of the Chief Justice may, by order under his hand, authorize an increased jurisdiction in criminal cases to be exercised by the judicial officer named in the order either throughout Botswana⁴ or within the district stated in the order and to the extent specified in the order and either generally or in respect of the particular matter or class of case named therein.

(2) No such order shall authorize the person named therein to award a sentence of imprisonment in excess of four years with or without hard labour and any such order may, at any time, be varied or revoked by the President³ with the concurrence of the Chief Justice by instrument under his hand.

(3) All such orders when made or any order varying or revoking such an order shall be published in the *Gazette*.

When Summary Trial to be Turned into Preparatory Examination

72. When in the course of any trial it appears that the offence under trial is from its nature or magnitude only subject to the jurisdiction or more proper for the cognisance of the High Court, or when the public prosecutor so requests, the presiding officer shall stop the trial, and the proceedings shall thereupon be those of a preparatory examination.

Return of Criminal Proceedings⁴

72A. (1) At the end of every month every Subordinate Court shall forward to

(1) Amended by Proclamation 49/1959
(2) Amended by Proclamation 42/1961

(3) Amended by L.N. 84/1966
(4) Inserted by Proclamation 42/1961

the High Court, in such form as the Chief Justice may from time to time direct, a complete list of all criminal cases decided by, pending in or brought before such court during that month.

(2) The Chief Justice may require separate lists in respect of individual judicial officers or separate lists in respect of specified classes of judicial officers.

(3) The High Court may, in respect of any case mentioned in any such list, call for the record and take any or all such steps and make such orders in connection therewith as if the case had been submitted to the High Court for review.

REMITTAL

Cases Remitted for Trial or Sentence

73. (1) In a case in which a preparatory examination was held and the accused is committed for trial or sentence, the court to which it has been remitted shall, in so far as is permitted by the Criminal Procedure and Evidence Proclamation, exercise the same powers, in respect of such offence or count to which the accused is committed, to impose a sentence in accordance with the provisions of section seventy-one as if the remittal is expressed to be under the ordinary jurisdiction of such court, or of sentence in accordance with the provisions of section seventy-two as if the remittal is expressed to be under the increased jurisdiction given by this section, as the case may be.

Jurisdiction in Respect of Punishments in Remitted Cases

74. (1) When a case has been so remitted and the remittal is expressed to be under the increased jurisdiction given by this section, the jurisdiction of the court in respect of punishments as expressed in section seventy-one shall be increased in the manner following:

- (a) A Subordinate Court of the First Class: The maximum amount of imprisonment shall be four years; the maximum amount of fine shall be R400;
- (b) A Subordinate Court of the Second Class: The maximum amount of imprisonment shall be two years; the maximum amount of fine shall be R200.

(2) The court may, in imposing a punishment of both fine and imprisonment under this section, sentence the accused to a further period of imprisonment if the fine be not paid, provided that the said maximum period of imprisonment be not exceeded.

REVIEW AS OF COURSE

Review of Sentences Imposed by a Subordinate Court of the Third Class

75. All sentences in criminal cases imposed by a Subordinate Court of the Third Class other than sentences of imprisonment for a period exceeding three months shall be subject to review as of course by an officer appointed to hold a First Class Subordinate Court in the district in which such Third Class Subordinate Court is situate; but without prejudice to the right of appeal against such sentence whether before or after confirmation of the sentence by the officer reviewing the same.

What Sentences Subject to automatic Review by the Court

76. All sentences in criminal cases in which the punishment awarded is imprisonment (including detention in a reformatory, industrial school, industrial reformatory, farm colony, work colony, refuge, resort home or other similar institution), in the case of subordinate courts of the first class for any period exceeding six months or a fine exceeding R100, and in the case of subordinate courts of the second and third class for any period exceeding three months or a fine exceeding R50 or any whipping (save in any case in which a male child under the age of eighteen years has been sentenced under the Criminal Procedure and Evidence Proclamation) shall be subject in the ordinary course to review by the High Court; but without prejudice to the right of appeal against such sentence whether before or after confirmation of the sentence by the High Court.

Submission of Records and Remarks to Reviewing Officer or Judge for Consideration

77. (1) Whenever a Subordinate Court of the Third Class imposes a punishment (other than a sentence of imprisonment for a period exceeding three months) upon any person convicted of an offence, the officer so imposing the punishment shall forthwith transmit the proceedings to a reviewing officer as provided in section *seventy-five* together with such remarks, if any, as he may desire to append thereto.

(2) Whenever a Subordinate Court imposes upon any person convicted of an offence any such punishment as in section *seventy-six* mentioned, the clerk of the court shall transmit to the Registrar of the High Court, not later than one week next after the determination of the case, the record of the proceedings in the case together with such remarks, if any, as the presiding officer may desire to append thereto, and with any written statements or arguments which the accused may within three days after the sentence supply to the clerk of the court, and the Registrar shall, with all convenient speed, lay the same before a Judge, in chambers, for his consideration.

Proceedings on Review

78. (1) If, upon considering the proceedings in the last preceding section mentioned and any further information or evidence which may, by the direction of the reviewing officer or the Judge, be supplied or taken by the lower court, it appears to the reviewing officer or the Judge, as the case may be, that they are in accordance with justice, he shall endorse his certificate to that effect upon the record thereof; and the said record shall then be returned to the court from which the same was transmitted.

(2) If, upon considering the proceedings aforesaid, it appears to the reviewing officer or the Judge, as the case may be, that the same are not in accordance with justice or that doubts exist whether or not they are in such accordance:

(a) the reviewing officer may:

- (i) alter or reverse the conviction or reduce or vary the sentence of the court which imposed the punishment; or
- (ii) when it appears necessary to do so, remit such case to the court which imposed the sentence with such instructions relative to the taking of further evidence and generally to the further proceedings to be had in such case as the reviewing officer thinks fit, and make such order touching the suspension of the execution of any sentence against the person convicted or the admitting of such person to bail, or, generally, touching any matter or thing connected with such person or the proceedings in regard to him as to the reviewing officer seems calculated to promote the ends of justice; or
- (iii) submit the proceedings to the Judge for review as if the case were one falling under section 77(2).

(b) the Judge may *to the effect of section 77*

- (i) alter or reverse the conviction or, subject to any maximum period of imprisonment or fine specified by law for the offence in question, increase the sentence to one which could have been awarded by a Subordinate Court having First Class jurisdiction or reduce or vary the sentence of the Court which imposed the punishment; or¹
- (ii) when it appears necessary to do so, remit such case to the Court which imposed the sentence with such instructions relative to the taking of further evidence and generally to the further proceedings to be had in such case as the Judge thinks fit, and may make such order touching the suspension of the execution of any sentence against the person convicted or the admitting of such person to bail, or, generally, touching any matter or thing connected with such person or the proceedings in

⁽¹⁾ Amended by Proclamation 42/1961

regard to him as to the Judge seems calculated to promote the ends of justice;

Provided that in the event of any conviction being reversed or proceedings set aside on any ground mentioned in section 82(6), the provisions of that sub section in respect of the institution of fresh proceedings shall *mutatis mutandis* apply.

(3) If in any case the Judge desires to have any question of law or fact arising in any such case argued at the bar, he may direct the same to be argued at the bar, he may direct the same to be argued by the Attorney-General and by such other person as the Judge may appoint.

(4) If in any criminal case in which a Subordinate Court of the First or Second Class has imposed a sentence which is not subject to review in the ordinary course in terms of section 76, it is brought to the notice of the Judge that the proceedings in which the sentence was imposed were not in accordance with justice, the Judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 77(2).

EXECUTION OF SENTENCES

Warrant Required for Commitment to Prison

79. (1) Any person sentenced to undergo the punishment of imprisonment shall be committed to the prison of the district for the purpose of punishment by a warrant under the hand of a judicial officer specifying any punishment to which the accused has been sentenced.

(2) Such warrant may be signed either by the judicial officer who passed the sentence or by any other judicial officer for the same district.

Execution of Sentence Suspended under Certain Conditions

80. (1) The execution of any sentence of fine or of imprisonment, whether with or without hard labour, shall not be suspended by the transmission of or the obligation to transmit the record for review unless the person sentenced shall give sufficient bail to pay the fine imposed upon him or to surrender himself in order to undergo such imprisonment (as the case may be) in case the proceedings in the case shall be approved as aforesaid and in case a written notice to pay or to surrender (as the case may be), signed by the clerk of the court, shall be served upon or for such person at some place to be mentioned in the bail bond or recognisance.

(2) Every such notice requiring the payment of the fine or the surrender of such person (as the case may be) shall be served in like manner as is prescribed by the rules in regard to the service of the summons on a defendant in a civil case.

Person Sentenced to Whipping to be Detained Pending Review

81. (1) The punishment of whipping shall in no case (except where a male child under the age of eighteen years has been sentenced under the Criminal Procedure and Evidence Proclamation) be inflicted until either the proceedings in the case have been returned with such a certificate as is in sub-section (1) of section *seventy-eight* of this Proclamation mentioned or the High Court has affirmed the sentence of the Subordinate Court.

(2) If in any case a person sentenced to receive any number of strokes shall not be also condemned to be imprisoned for such a period as shall allow time for the Judge's certificate to be received before inflicting the said strokes, such person, in case he shall not give sufficient bail to appear after being served at some place to be mentioned in the bail bond or recognisance with a written notice signed by the clerk of the court requiring him so to do, shall be detained in custody until either the proceedings in the case have been returned as aforesaid, or the sentence has been affirmed as aforesaid.

(3) In every case in which any person sentenced as aforesaid shall give bail as aforesaid, the judicial officer (should he so think fit) may take bail also for the cost and charge of serving such notice as aforesaid (if necessary), which cost and charge shall be the same as that of serving a summons in a civil case against the same person at the same place.

CRIMINAL APPEALS

Appeals

82. (1) Any person convicted of any offence by the judgment of any Subordinate Court (including a person discharged after conviction under any provision of the Criminal Procedure and Evidence Proclamation) may appeal against such conviction and against any sentence or order of the court following thereupon to the High Court. Every person giving notice of appeal to the High Court against the decision of a Subordinate Court in any criminal matter shall deposit the sum of R4: Provided that the Judge may, if he is of the opinion that the appeal was not of a frivolous nature, or for any other cause, order the deposit, or portion of it, to be refunded.

(2) Whenever a criminal summons or charge is dismissed at any stage of the proceedings on exception or on the ground that it is bad in law or that it discloses no offence, the Attorney-General may in like manner appeal against such dismissal.

(3) Any such appeal shall be noted and prosecuted within the period and in the manner prescribed by the rules; but the High Court may in any case extend such period.

(4) The High Court shall thereupon have the powers set out in sub section (2) (b) of section *seventy-eight*: Provided that, notwithstanding that the High Court is of opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity or defect in the record or proceedings unless it appears to the High Court that a failure of justice has in fact resulted therefrom or that the accused has been prejudiced thereby.

(5) When an appeal under this section is noted, the provisions of sections *eighty* and *eighty-one* shall apply *mutatis mutandis* to the sentence appealed against.

(6) Whenever a conviction and sentence of a Subordinate Court are set aside on appeal on the ground that evidence was admitted which should not have been admitted, or that evidence was rejected which should have been admitted, or on the ground of any other irregularity or defect in the procedure, proceedings in respect of the same offence to which the conviction and sentence referred may again be instituted either on the original summons or charge or upon any other indictment, summons or charge, as if the accused had not previously been arraigned, tried and convicted: Provided that such proceedings shall not be instituted before the same judicial officer who recorded the conviction and imposed the sentence set aside.

Appeal by Prosecutor

83. (1) When a Subordinate Court has in any criminal proceedings given a decision in favour of the accused on any matter of law, the Attorney-General, or if a person or a body other than the Attorney-General or his representative was the prosecutor in those proceedings then that other prosecutor, may require the judicial officer to state a case for the consideration of the High Court setting forth the question of law and his decision thereon, and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law.

(2) When such a case has been stated, the Attorney-General or other prosecutor, as the case may be, may appeal from that decision to the High Court.

(3) Sub section (3) of section *eighty-two* shall apply to an appeal under sub section (2) of this section.

(4) If an appeal under sub section (2) is allowed, the Subordinate Court which gave the decision appealed from shall, subject to the provisions of sub section (5), after giving sufficient notice to both parties, reopen the case in which the decision was given and deal with it in the same manner as it should have dealt therewith if it had given a decision in accordance with the law as laid down by the High Court.

(5) In allowing such appeal, whether wholly or in part, the High Court may itself impose such sentence upon the respondent or make such order as the Subordinate Court ought to have imposed or made, or it may remit the case to the

Subordinate Court and direct that court to take such further steps as the High Court thinks proper.

PART V
OFFENCES

Penalty for Disobedience of Order of Court

84. Any person wilfully disobeying or neglecting to comply with any order of a Subordinate Court shall be guilty of a contempt of court and shall, upon conviction, be liable to a fine not exceeding R50 or, in default of payment, to imprisonment for a period not exceeding three months, or to such imprisonment without the option of a fine.

Offences Relating to Execution

85. Any person who —

- (1) obstructs a messenger or deputy messenger in the execution of his duty;
or
- (2) being aware that goods are under arrest, interdict, or attachment by the court, makes away with or disposes of those goods in any manner not authorised by law, or knowingly permits those goods, if in his possession or under his control, to be made away with or disposed of in any such manner; or
- (3) being a judgment debtor and being required by a messenger or deputy messenger to point out property to satisfy any warrant issued in execution of judgment against such person, either —
 - (a) falsely declares to that messenger or deputy messenger that he possesses no property or not sufficient property to satisfy the warrant; or
 - (b) although owning such property neglects or refuses to point out the same; or
- (4) being a judgment debtor refuses or neglects to comply with any requirement of a messenger or deputy messenger in regard to the delivery of documents in his possession or under his control relating to the title of the immovable property under execution,

shall, upon conviction, be liable to a fine not exceeding R50 or, in default of payment, to imprisonment for a period not exceeding three months or to such imprisonment without the option of a fine.

Custody and Punishment for Contempt of Court

86. (1) If any person, whether in custody or not, wilfully insults any judicial officer during his sitting or any clerk or messenger or other officer during his attendance at such sitting, or wilfully interrupts the proceedings of the court or otherwise misbehaves himself in the place where such court is held, he shall (in addition to his liability to being removed and detained as in sub section (4) of section seven provided) be liable to imprisonment for any period not exceeding one month or to pay a fine not exceeding R40 for every such offence or, in default of payment, to such imprisonment.

(2) In any case in which the court commits or fines any person under the provisions of this section, the judicial officer shall without delay transmit to the Registrar of the High Court, for the consideration and review of the Judge in chambers, a statement, certified by such judicial officer to be true and correct, of the grounds and reasons of his proceedings, and shall also furnish to the party committed a copy of such statement.

PART VI

GENERAL AND SUPPLEMENTARY

Jurisdiction as to Plea of Ultra Vires

87. No Subordinate Court shall be competent to pronounce upon the validity of a Proclamation or Notice of the High Commissioner, and every such court shall assume that such Proclamation or Notice is valid.

Amendment of Proceedings

88. (1) In any proceedings, whether civil or criminal, the court may, at any time before judgment, amend any summons or other document forming part of the record: Provided that no amendment shall be made by which any party other than the party applying for such amendment may (notwithstanding adjournment) be prejudiced in the conduct of his action or defence.

(2) In civil proceedings an amendment may be made upon such terms as to costs and otherwise as the court may judge reasonable.

(3) No misnomer in regard to the name of any person or place shall vitiate any proceeding of the court if the person or place be described so as to be commonly known.

Review of Decisions

89. Whenever a decision is given by a Subordinate Court in a criminal case on

a matter of law, and the Attorney-General is dissatisfied with such decision, the Attorney-General may seek the ruling thereon of the High Court, and the High Court may set down the matter to be argued before it.

Savings and Non-application of Proclamation

90. (1) Nothing in this Proclamation shall be construed as affecting the operation of the Criminal Procedure and Evidence Proclamation.

(2) Nothing in this Proclamation contained shall be construed as depriving the High Court of any power to review and correct the proceedings of any Subordinate Court.

Saving of Pending Proceedings

91. (1) Nothing in this Proclamation shall affect proceedings pending in the court of any District Commissioner, Assistant District Commissioner or Cadet at the date of coming into effect of this Proclamation; and such proceedings shall be continued and concluded in every respect as if this Proclamation had not been promulgated.

(2) Proceedings shall, for the purpose of this section, be deemed to be pending if, at the commencement of this Proclamation, summons had been issued or the accused had pleaded but judgment had not been given; and to be concluded when judgment is given.

Saving Existing Custom of Summoning African Accused or African Witnesses

92. Nothing in this Proclamation contained shall affect the existing custom whereby the attendance of an African accused or witness or party to a civil action in any court in Botswana¹ may be secured through his chief, sub-chief or headman by warning, either in writing or by messenger of such chief, sub-chief or headman.

Power of President¹ to Make Rules.

93. The President¹ may from time to time, by Notice in the *Gazette*, make rules regulating and prescribing the practice, procedure, fees, costs and charges of, and the forms to be used in, Subordinate Courts; and all such rules shall have the same force and effect as if they had been contained in this Proclamation.

Administration of Oath or Affirmation

94. (1) Every officer or person entitled or appointed under section *four* to hold a court is hereby empowered to administer an oath or affirmation to any

(1) Amended by L.N. 84/1966

witness in any proceedings, whether civil or criminal, in such court, or at any preparatory examination.

(2) The oath or affirmation to be taken by any witness in any proceedings, whether civil or criminal, in any court or at any preparatory examination, shall be administered by the officer presiding at such proceedings, or by the clerk of the court (or any person acting in his stead) in the presence of the said officer, or, if the witness is to give his evidence through an interpreter, by the said officer through the interpreter, or by the interpreter in the said officer's presence.

(3) The oaths and affirmations previously administered by such officers and persons in all such proceedings and preparatory examinations are hereby declared to be valid.

Protection from Actions¹

94A. No judicial officer shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, if he at the time, in good faith, believes himself to have jurisdiction to do or order the act complained of to be done and no officer of any Subordinate Court or other person bound to execute the lawful warrants or order of any such judicial officer shall be liable to be sued in any civil court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.

(1) Inserted by Proclamation 42/1961