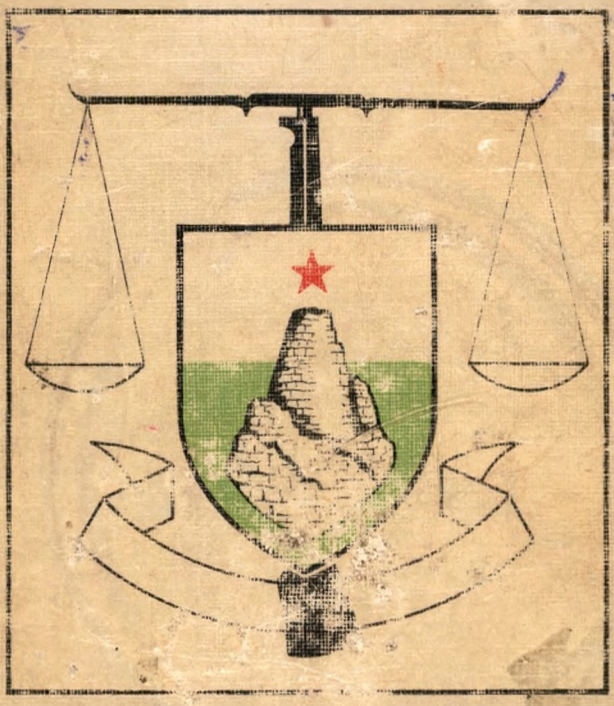

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THE ZIMBABWE LAW REVIEW

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Zimbabwe's Independence in April 1980, achieved as it was by a remarkable combination of revolutionary and legal activity, created a special challenge to Zimbabwean lawyers. Particularly significant for legal scholars at the University of Zimbabwe was the dramatic transformation resulting from the fact that a whole body of ideas and perspectives, unacceptable, unpopular or actually unlawful under the colonial state, suddenly became 'thinkable' and available to thinking Zimbabweans. Of these ideas, Marxism and Marxism-Leninism were only the most dramatic example, though by virtue of the election to government of a Party which proclaimed as its ultimate objective the achievement of a socialist order through Marxism-Leninism, they became especially relevant.

This new order was characterised then, as it remains today, five years later, by the basic elements of intellectual stimulation — contradiction, compromise, urgent demands for change and powerful claims for the retention of the *status quo*. Nowhere is this more evident than in the law, both within and around Zimbabwe, wherein is expressed in varying degrees of clarity, the tensions and tentative solutions generated by the material, social, economic and political realities of this ferment.

Thus Zimbabwean legal scholars face an agenda demanding, at a minimum, the study and awareness of the legal dimensions of, on the one hand — the articulated democratic demands of a liberated majority for justice, health, education, housing, employment and an end to poverty and dependence; and on the other hand — the equally articulate (if less rhetorical) claims of a powerful minority (as the first priority) for the retention or the minimum transformation of the capitalist economy. The legal dynamics of this contradiction must be analysed and understood in the light shed by scholars using a wide variety of perspectives.

The task also demands a thorough knowledge of the substantive elements that make up Zimbabwe's legal system. This must include a full awareness of the British-designed Lancaster House Constitution, replete with historic compromises, as well as of the inherited state machine, deeply imbued through both statute law and judicial practice, with authoritarian values and techniques. It demands the urgent study and exposition of the dense body of Zimbabwean Customary Law. Nor can it avoid a basic knowledge of Roman-Dutch Law and its deeper Romanist foundations. These provide a potential pathway to the conceptual treasury of one of the oldest legal system and to a richness of Romanist ideas developed throughout the modern world in both socialist and capitalist states which share with us this tradition. The paucity of serious scholastic exploration of Roman Law during the colonial period may be explained by the overriding imperial connection with the Anglo-Saxon Legal system. Such scholarship provides an avenue to a storehouse of knowledge and ideas, which Zimbabwean legal scholars may tread. A serious gap in our scholarship, perhaps understandable in the context of the final chauvinistic days of "Rhodesia", namely an awareness of the comparative experience

and legal knowledge of post-colonial Africa, needs to be remedied so that insights from this source can be added to the others that we must use in our efforts to make sense, for ourselves and others, of Zimbabwean legal developments at this challenging stage.

The Zimbabwe Law Review is intended as an indispensible means of meeting the above challenges. Early in 1983 the Board of the Law Department decided to work towards its publication. It also saw the *Review* as an important part of the work to evolve a contemporary and more relevant curriculum for Zimbabwean legal education. Thus readers will notice the particular emphasis given in this first issue to matters relating to Family Law, including a contribution on the subject from Tanzania, which the editors saw as requiring particular attention, The Department is also conscious of the important role the *Review* should play in an ongoing legal debate involving the Bench, the Profession, the Goverment and academics. This was one of the roles of the *Zimbabwe Law Journal* founded in 1961 as the *Rhodesia and Nyasaland Law Journal* by Professor R H Christie. The *Journal* ceased publication at the end of 1982.

As presently conceived the *Zimbabwe Law Review* will provide a vehicle not only for academics but also for students whose work merits publication. As the present volume shows, the pages of the *Review* are also open to non-Zimbabwean contributors, especially those writing on matters relevant to Africa and the Third World. This volume also demonstrates the editors' readiness to receive contributions from authors in Government and the profession, and we are particularly pleased to be able to publish here an article by the present Minister of Home Affairs. The *Review* will seek to encourage active debate on contemporary issues and thus the section entitled *Dialogue* seeks contributions on more immediate and controversial subjects in a style of presentation less rigorous than that required of other articles. It is hoped that the review of legal developments and the publication of relevant documentation will be a regular feature.

Thus the *Review* is seen as being launched in a new context, offering new opportunities and challenges to Zimbabwean and other legal writers. The objective is to respond with scholarship of the highest quality, regardless of its viewpoint. The Editors are conscious that by taking full advantage of this new intellectual freedom and opening the *Review* in this way to scholars from all ideologies they are making a fundamental break with the past. This however is not only consistent with the newly acquired academic freedom of the University of Zimbabwe, but also with the progressive order which is the national objective. Nor, it seems, will this new policy be inconstistent with the motto emblazoned on the facade of the Law Department: LEX EST ARS BONI ET AEQUI (THE LAW IS THE ART OF THE GOOD AND THE JUST)

Lastly we express the Department's gratitude to the Ford Foundation for it's assistance in the launching of the *Review*

Editor in Chief

Harare, 18th April, 1985.

THE WIDOWS LOT — A REMEDY?:
THE APPLICATION OF SPOLIATION ORDERS IN CUSTOMARY SUCCESSION

JULIE E STEWART*

INTRODUCTION

Reform is required in many areas of the law in Zimbabwe, particularly so in matters affecting family law and succession. However, the process of amending the law is often slow, particularly where change goes to the very root of the social system. Pending change, therefore there is a need to ensure that the rights of individual as they exist under current law are vigorously enforced and protected. Even if radical amendment of the law is implemented, the problem of enforcement and protection of rights will persist. Methods of enforcement may be written into amending legislation but the addition of criminal penalties to an already dispute fraught intra family situation is often more a hindrance in attaining a resolution than a help.

Existing common law remedies may provide both present and future assistance in the enforcement of both existing and anticipated rights.[1] An instance of need for reform, coupled with difficulty in enforcing not only present rights but probably even those created by future changes in the law, is the position of a widow in a customary succession[2]. There is little doubt that the rights of surviving spouses and dependants are subject to violation by the over avaricious relatives of a deceased African, and it is difficult to see how change in the law will effectively preclude the taking of pre-emptive action by such relatives. Giving a surviving spouse a share in an estate governed by customary law may escalate rather than diminish instances of "self-help".

THE PROBLEM

An African male, dies leaving a wife or wives and minor children. His blood relatives, on hearing of the death, descend upon the home he formerly occupied and remove the contents. They may harass the widow or widows over insurance policies, pensions, bank accounts or salary due to the deceased, insisting that these are or ought to be property of his blood relatives. Such attitudes are found in both urban and rural areas, although the material position of the deceased tends to be a significant incentive in such cases.[3] The blood relatives of the deceased, usually his brothers,

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1. Although this is not to eschew the need for change.
2. Such problems could also arise with testate or intestate succession under the general law of Zimbabwe.
3. See the report in *The Herald* 4/10/83 on the Chinhoyi Bus Disaster. However the problem is not by any means a peculiarly African one. See Fenton Bresler, *Second Best Bed (A Diversion on Wills)*, Weidenfield & Nicolson, London 1983, at p 54.
"Often the sorrowing relatives don't even bother to wait to hear what is in the will; they go straight in and take whatever item they have always fancied. It's more or less accepted in poorer families' says (a) young London solicitor 'that the relations go back home straight after the funeral and loot the place' ".

claim that justification for their actions lies in their being the heir or heirs[4] of the deceased or the lawful guardians of his minor children under customary law, and that they are merely securing what is rightfully theirs. An intention to support the dependants of the deceased in accordance with customary law is often asserted, an assertion which may not be honoured once the estate is secured.[5] Such offers of support, as may be forthcoming, are often conditional, the widow or widows and their dependants being required to surrender rights in insurance policies, move to the communal lands or transfer real rights in land. Children are 'abducted' under the guise of the assumption of guardianship by relatives of the deceased, the claims of the widow being completely ignored and the rights of such minor dependants of the deceased only nominally honoured in the rush to secure the 'booty' in the estate. A widow or widows[6] may find that they are subject to physical and mental harassment from the relatives and access to the matrimonial home or holding debarred.

What can the widow, aggrieved dependent or potential beneficiary do? Among the alternatives available are:-

(i) treating the matter as criminal, but, and understandably so, there is reluctance to invoke the assistance of the police in an already delicate situation, and there is official reluctance to involvement in such matters.

(ii) blindly accepting such intervention, fearing to challenge the despoilers.

(iii) regaining possession of any property removed from the estate and asserting the right to occupy immovable property (Spoliation Order) Once possession has been regained proceeding to enforce whatever remedies are available either in the law of succession under customary or general law, or by way of any ancillary remedies such as establishing an independent right to property[7] within the estate created by the partners of the marriage.[8]

THE REMEDY

Considering the above alternatives, the most effective, and least disruptive course of action would be to seek a spoliation order. Particularly as in a spoliation action regard is not had to the merits of a party's claim to possess as of right but focusses on the restoration of possession, pending the resolution of the dispute over the right to possession. It may be argued

4. As to the possibility of a number of heirs, see *Matambo v Matambo* 1969 (3) SA 717 (RAD), and also as to the widow's rights. *Jumah v Jumasi*, 1949 SRN 210.
5. Children may even be used as hostages in an effort to force the widow or widows to hand over the property and rights in the estate.
6. Nor is 'infighting' between surviving spouses in a polygamous union precluded.
7. 'Property' being used in this context in its widest form to include rights and interests in both movables and immovables, corporeals and incorporeals.
8. In *Katsidzira v Chiromo* 1981 ZLR 418 the individual capacity of a woman to acquire an estate was recognised if not conceded. See also *Jirira v Jirira* 1976 (1) RLR 7. *Rebecca & Musiyima v Vurayayi*, 1958 SRN 571 and *Guzuzu v Chinamasa* HC 818/83.

that this is a pointless exercise as the alleged spoliators are likely to be the ultimate beneficiaries in the estate and time and effort is wasted in what is at best a Pyrrhic victory. But to adopt such an attitude is to presume that the succession must be in accordance with customary law and that under such law the widow has no rights, and further, that the deceased did not leave a valid will.

A spoliation action is brought merely to determine who is to have possession of the property[9] or right pending the resolution of any dispute over the right to possess[10]. It serves to restore possession and to deter those who take the law into their own hands.[11] This is precisely what the avaricious heir does. Though he may be the ultimate beneficiary, this does not and cannot entitle him to short-circuit the normal processes of succession to the deceased estate.

In *Runsin Properties v. Ferreira*[12] a similar problem, though in relation to occupation of land pursuant to an agreement of sale was considered. The purchaser had occupied prior to the agreed date for occupation, Addleson J[13] held that:-

> "Even if the agreement is valid and enforceable by him, that did and does not entitle him as against the respondent to resist a claim that he is a spoliator".

having commented previously[14]

> "The effect of granting a spoliation order does not leave the respondent remediless. Apart from his right to sue for specific performance and or damages, it was open to him to apply, as he had originally threatened to do, to interdict the implementation of the sale between the applicant and Volkswagen".

Such restoration or protection may be only of a temporary nature but that is immaterial. Regard should not be had to the merits of the application, the only concern should be with restoration of the *status quo ante*[15] pending the lawful resolution of any dispute, and the due and

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9. In *Petersen v Petersen* 1973 RLR 270, Beck J expressed doubt as to the appropriateness of spoliation proceedings in domestic matters and here intra-family disputes might be included. However, it is submitted that, in a situation where a surviving spouse is fighting to preserve the integrity of an estate pending distribution that such reasoning is inappropriate. In a number of subsequent cases the courts have, albeit reluctantly at times, conceded that spoliation orders can be granted in domestic matters:- *Mankowitz v Loewenthal,* 1982 (3) SA 758 (AD) *Coetzee v Coetzee* 1982 (1) SA 933 (C), *Maria v Murambika* 1976 RLR 385.
10. *Mankowitz v. Loewenthal,* 1982 (3) SA 758 (AD) "Now a spoliation order is a final determination of the immediate right to possession. It may not resolve the ultimate right of the parties, but it is the last word on the restoration of possession *ante omnia*".
11. *Nino Bonino v. De Lange,* 1906 TS 120; *Setlogelo v. Setlogelo,* 1914 AD 221; *Erasmus v. Dorsyd Farms (Pty) Ltd,* 1982 (2) SA 107 (T).
12. 1982 (1) SA 658 (SECLD).
13. *Ibid* p 671.
14. *Ibid* p. 670
15. *Fredricks v. Stellenbosch Divisional Council* 1977 (3) SA 113 (C). In *Mabigwa v. Matibini* 1946 SRN 117, it was held that a widow was entitled to seek protection for her husbands estate.

proper administration and distribution of the estate. The nature of spoliation was explained in *Maria v. Murambika*[16]

> "In spoliation proceedings, the only matters of concern to the court are (a) whether the plaintiff was in possession of the articles which are the subject of the action and (b) whether they were wrongfully taken from his possession without his knowledge or consent. Once those two factors are established, then the plaintiff must succeed in recovering possession of the articles. The Court is not concerned with the ownership of the goods in question and it is no defence for the dispossessor to allege that he or she is the owner of the articles. The principle to be applied is the established one of *spoliatus ante omnia restituendus est.* A person is not allowed to take the law into his own hands and the court will make him restore the property to the person from whom he took it. Only when this has been done will the court adjudicate on the question of ownership".

A spoliation action does not call into question the justification of the acts by the spoliator. It is merely the fact of dispossession which is at issue. It has already been applied, if infrequently, in matrimonial and related cases.[17] Despite the frequency of these seizures, spoliation proceedings in succession cases are rare. The explanation may be that those adversely affected see action as futile, or are unaware of any remedy. However, in *Ncotama v. N'Cume*[18] a spoliation order was made restoring possession of *lobola* cattle which has been seized by the heirs of a deceased African from his father-in-law, on the ground that as the widow had fled the husband's kraal and was refusing to return after her husband's death, the deceased's family were entitled to the cattle as they formed part of the deceased's estate. The presiding judge found that whether the customary law recognised such action was a matter of future consideration, and that the entitlement of the deceased's heirs to the cattle was at that stage irrelevant. Buchanan J held:-[19]

> "At present . . . the main question is undecided. Our decision is simply that the cattle having been forcibly taken out of possession of the plaintiff, must be restored".

De Villiers CJ put it even more forcibly:[20]

> "The Courts of this Colony cannot recognise a custom if such a custom exists whereby the father, who has acquired the cattle peaceably and lawfully, shall be dispossessed of it otherwise than by due process".

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16. 1976 RLR 385, 388 (SR).
17. *Oglodinski v Oglodinski* 1976 (4) SA 373 (D); *Maria v Murambika* 1976 RLR 385; *Mankowitz v Loewenthal* 1982 (3) 758 (AD); *Coetzee v Coetzee* 1982 (1) SA 933 (C).
18. 1893 (10) SC 207.
19. *Ibid* 210
20. *Ibid*

In *Brasswell Kaporowodyo v Shepi Kaporowodyo*[21] in a matter similar to *Mabigiva v Matibini*[22] it was held that a widow claiming the return of $61, which appellant had forcibly removed from her alleging that it formed part of *lobola* for one of his sisters, was entitled to a spoliation order, the President of the Court added:-

> "Should the appellant now wish to dispute the Respondent's legal right to the money then it may be open to him to proceed in terms of s69 (2) of the Administration of Estates Act. However we do not feel it proper for us at this stage to express any opinion on the desirability or otherwise of the appellant taking such a course".

THE MANDAMENT VAN SPOLIE

To succeed in spoliation proceedings, the applicant must prove:-

(1) possession of the property or the exercise of an interest therein and

(2) deprivation of such possession or exclusion from exercising such interest without consent and unlawfully. As possession in spoliation proceedings is not necessarily possession in the normally accepted meaning of the word. The applicant need not establish a legal right to possession but only the fact of possession on the part of the applicant.

Although in *Meyer v. Glendenning*[23] it was suggested that the possessor had to show a beneficial interest in the property in question, *per* Van Zyl JP:

> "Although it is extremely doubtful whether a spoliation order should be granted against an owner in favour or a custodian or depository who holds without any benefit or intention to derive from such holding"[24]

The widow or widows would, in most instances be in physical

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21. 1979 SRN 27.

22. 1946 SRN 117.

23. 1939 CPD 84. A racehorse trainer obtained a spoliation order against the owner of a horse who nad removed the horse from the trainers stables without the consent of the trainer. The owner, unsuccessfully, tried to rely on the existence of an agreement purportedly permitting removal at any time. See also *Van Rooyen & Another v Burger* 1960 (4) SA 356, 362-3 (O):-
> "As has often been said by our courts, the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself . . . All that the *spoliatus* has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted"

24. For further discussion of the whole problem of criteria in relation to spoliation orders, see 'Three Cases on the *Mandament Van Spolie*' 1983 S A L J 689. It is to be hoped that a circumspect approach to the issue of justification will be taken, for it is but a short step from there to investigations of the merits, and whereas matters of public safety may justify a denial of a spoliation order, that is a matter distinct from the merits of the application.

possession or occupation[25] of the property prior to spoliation, and though not legally recognised as the owner, lessee, hirer or holder of the right at the deceased's death they would be possessors. The provisions of s22 of the Administration of Estates Act vests custody of the deceased estate in the surviving spouse. Thus, until such time as the actual form of succession can be settled, and the administration of the estate commenced, it would appear that s22 should be applied to all deceased estates prior to the commencement of administration under s24 or s69 (1) whichever is applicable. In terms of the Act, the widow or widows could be properly described as having the interim custody of the estate, and thus possession. Similarly, the widow could argue that she was retaining possession prior to giving custody of the estate to the appropriate members of the deceased's family, such as the senior aunt, as required by customary law, and that despite claims of the relatives of the deceased that their action is consistent with their ultimate rights under customary law, she is preserving the integrity of the estate. Alternatively if s22 is held not to be applicable, it might be argued that the widow is retaining possession pending a resolution on the division of the assets of the estate as between those accumulated by the deceased and those which represent her independent estate[26].

LOSS OF POSSESSION

Where possession is lost through violent action, little difficulty arises. However, possession may be lost in a multiplicity of ways and often the spoliator will allege that consent to the removal, loss of the property or right was given. The classical definition of spoliation was loss of possession by 'stealth or violence'[27]. Subsequently this definition was expanded:-

> "In the course of time the principles on which the courts have a remedy by way of interdict were widened and it was not necessary to prove force or secrecy as long as the person who interferred with the possession did so illegally"[28]

The current position would seem to be that the alleged spoliator must be able to point to some positive power to appropriate the property precisely in the manner employed and that such power permitted, unequivocally, the right to removal. In *Sterling and Mockford v Bensusan*[29] it was held that the term 'shall take' did not empower a

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25. Spoliation orders are available to those deprived of a right of occupation, locked out in matrimonial disputes, deprived of occupation and even the loss of some of the benefits of occupation:- *Nino Bonino v De Lange* 1906 TS 120; *Lunn v Kretzmer* 1947 (3) SA 591 (W); *Mpunga v. Malaba* 1959 (1) SA 853 (W); *Yeko v Quana* 1973 (4) SA 735 (AD); *Oglodinski v Oglodinski* 1976 (4) SA 273 (D); *De Beers v. Firs Investments* 1980 (3) SA 1087 (W); *Maria v. Murambika* 1976 RLR 385.

26. *Jirira v. Jirira* 1976 RLR 7; *Katsidzira v Chiromo* 1981 ZLR 418 It is submitted that an analogy can be drawn between the wording of s24 and s69 (1) which only operate for the purposes of determining the succession to and administration of the estate and have no effect on matters relating to the interim custody of an estate.

27. *Voet* 43. 1. 6

28. *Anderson v Anderson* 1919 EDL 57, 60. See also, *Sithole v Native Settlement Board* 1959 (4) SA 115 (W)

29. 1930 WLD 236

creditor to take possession of a debtor's property on insolvency where the debtor refused to effect delivery. The only recourse was to the courts to enforce compliance. In *Erasmus v Dorsyd Farms*[30] even an express agreement purportedly authorising removal, was not sufficient, as it amounted to a prior agreement of self-help. To be effective, consent must be given at that time of removal.

Where dispossession is carried out in a manner strictly consistent with a prescribed legal form, spoliation will be deemed not to have taken place. In *Sillo v. Naude*[31], as the provisions in the Pounds Ordinance were fully complied with it was held that spoliation had not taken place. However, in *Magadi v. West Rand Administration Board*[32] a restrictive interpretation of legislation purporting to give a summary right of possession was adopted. The task of the courts is made comparatively easy in cases such as *Fredricks v. Stellenbosch Council*[33] where failure to serve due and proper notice on squatters was fatal to the position of the council. The squatters may have been acting illegally but, nonetheless, the Council was compelled to follow the prescribed procedures, per Diemont J.[34]

> "This court is not concerned with the nature of the applicant's occupation. What it is concerned with is that the respondent should not take the law into his own hands and act without regard to the applicant's rights under the Squatter's Act".

Where the consent of the possessor to the removal is alleged, it must be real and informed. Thus fraud on the part of the Spoliator will negate both apparent legality and consent. Where the holder is induced to part with possession or occupation on spurious grounds a spoliation order will be granted despite the apparent voluntaty parting with possession as in *Donges v Dadoo*[35] and *Van Eck* and *Van Rensburg v Etna Stores.*[36] The onus of proof, it would seem, is on the spoliator, who alleges the consent of *'the spoliatus'* [37] to the removal. It must be established that the *spoliatus* did give informed consent to the removal.[38] Similarly the use of duress or undue influence would negate consent. If consent can be established, then there has been no spoliation. A spoliated party is estopped if agreement existed as to who should retain possession pending resolution of a dispute.[39] Similarly, if an agent of the alleged *spoliatus* permits the

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30. 1982 (2) SA 107 (T)
31. 1929 AD 21
32. 1981 (2) SA 352 (T) and also see the earlier case of *Sithole v Native Settlement Board* 1959 (4) SA 115 (W).
33. 1977 (3) SA 113 (C).
34. *Ibid* at p. 117. See also, *De Jager & Others v. Farah & Nestadt* 1947 (4) SA 28, 35 (W), Where Millin J said:-
> "What the court is doing to insist on the principles that a person is in possession of property, however, unlawful his possession may be, and however exposed he may be to ejectment proceedings, cannot be interferred within his possession except by due process of law".
35. 1950 (2) SA 321 (AD)
36. 1947 (2) SA 984 (AD)
37. *Noncingane v. Mbini & Garcia* 1913 EDL 412.
38. *Hoosen v. Bourne & Co Ltd* 1962 (3) SA 182 (N)
39. *Otto v Viljoen* 1891 (4) SAR 45.

removal of the property, then subject to the qualifications previously discussed, there is no spoliation.[40] An agent must be both competent to part with such possession, [41] and act as a result of bona fide[42] request by the respondent.

Thus, apparent acquiescence in removal of property by an occupant of the premises on which they are situated is not per se sufficient to negate a claim of spoliation. A widow or dispossessed family member would not, therefore, be precluded from obtaining a spoliation order if they agreed, under pressure or in reliance on a misrepresentation of their rights to the removal of the property, or where an unauthorised third party gave permission the removal.

DEFENCES

There remains the possibility, however, that the 'spoliator' may be able to defend such action alleging:-

(i) genuine ignorance of the *spoliatus's* claim to possession and that therefore there was no intention to deprive the *spoliatus* of possession. As spoliation presupposes a dispute between the parties, there is little point in effecting restoration of possession in such cases. In *Miller v. Harris*[43] the alleged spoliator took into possession a cow and her calf, being unaware of the claim of the applicant to the animals. The court held that no purpose would be served by the restoration of possession where the possessor was a *bona fide* possessor;

(ii) that the apparent spoliation was carried out for the purpose of ensuring the preservation or protection of the property or right, as in *Industrial and Commercial Workers Union v. Ranch*[44] where a building, which was in danger of damage during a period of civil unrest, was locked and the keys appropriated. This act was held not to be one of spoliation as it was justified in the circumstances.

An heir who assumed control of the property, being ignorant of the possession of others, would not therefore be a spoliator, as such an action,

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40. Consent will not be in the appropriate form if it is nothing more than prior authorization of self help, it must be active at the time of removal *Erasmus v Dorsyd Farms (Pty) Ltd* 1982 (2) SA 107 (T). Thus, a widow who, at an earlier time, agreed to deceased's family having the estate, would probably be held not to have given consent to its subsequent removal.

41. *Martin v Ingle* 1920 NLR 1. See also *Wicomb v. Rosen* 1936 CPD 502, 504, where a lodger who cleaned, on a minimal basis, the premises of the householder was held not to be an agent for the purpose of authorizing the removal of a piano by a Hire Purchase Company.

42. One not tainted with fraud or deceit as in cases such as *Donges v. Dadoo* 1950 (2) SA 321 (AD).

43. 1912 CPD 203: See also *Armitage v Govindal* 1906 (27) NLR 587.

44. 1929 NPD 192. See also *Meyer v Le Granger* 1952 (2) SA 55 (N), where the alleged spoliator genuinely, but erroneously, believed that the cattle he seized were being stolen. Similarly the party spoliated against may institute immediate self help measures such as repossessing the goods or changing locks, providing such an act was an immediate counter spoliation carried out in the 'heat of the moment' as a reaction to an act of spoliation; *Sitshele v Fana* 11 EDC 73 and *De Beers v Firs Investments* 1980 (3) SA 1087 (T).

if genuine, would be consistent with the protection and preservation of the property, Where, also the widow or putative possessor is ill or absent at the time of the deceased's death, and such illness or absence preclude the proper protection of the property then any person taking or assuming possession of the property would not be considered a spoliator.[45] Although a mere vague apprehension of danger to the property would not suffice. There is little doubt, that the action taken would have to be reasonable under the circumstances.

PROCEDURE

Although the merits of either party's claim to possession are immaterial to the granting of an order, this does not mean that return of possession can be summarily ordered, both sides must be given the opportunity of a hearing. As Van den Heever J said in *Coetzee v Coetzee*[46]

> "Mr Lenhoff argues that, whatever the merits of the dispute between the spouses as to the ownership of the car, it is common cause that the wife was in possession and that the husband deprived her of such possession, knowing that she had earlier refused to hand the car over to him. *Ergo* — so the argument runs — the husband is guilty of spoliation, and the court is obliged summarily to restore the *status quo ante* with costs . . . (1) wish to express doubt as to the propriety of obtaining an order in terms of paragraph 5[47] . . . in the matter brought *ex parte*. There are usually two sides to every quarrel: and barring one of the parties from being heard until he has (albeit temporarily) surrendered, seems to me to be a negation of the *audi alteram partem* principle".

Thus, a rule nisi is usually issued once the applicant establishes on the balance of probabilities that she had possession and was unlawfully dispossessed. On the return day, the rule, if made absolute, may be for the restoration of possession or perhaps even a restriction against alienation.[48] Even where a widow finds difficulty in establishing an unequivocal right to a spoliation order, the alternative of a prohibition against alienation may suffice pending further action.

Although third parties are normally immune to spoliation proceedings, knowledge of a dispute over possession will negate such immunity, protection is available only to *bona fide* transferees.[49] The fact therefore that property has passed to others will not be per se exclude the granting of an order. A difficulty may arise where the subject matter of

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45. *ICWU v Ranch* 1929 CPD 192, the action could be regarded as that of a *negotiorum gestor*.
46. 1982 (1) SA 933, 934 (C).
47. Paragraph 5 read:- "That the respondent shall not be entitled to file any opposing affadavit prior to his returning the motor car to the applicant".
48. *Mankowtiz v Loewenthal* 1982 (3) SA 758 (AD); *Hill-Kloof Builders (Pty) Ltd v Jaconelli* 1972 (4) SA 228 (D). An approach which seems eminently sensible where the question of who was the possessor and who the dispossessor is difficult to assess.
49. *Harris v Unihold* 1981 (3) SA 144 (W) 80; *Jivan v National Housing Commission* 1977 (3) SA 890 (W)

the order has been lost or destroyed,[50] but the courts have not accepted that such a situation is necessarily a bar to compliance with order[51]. Particularly where it is occupation, or the facilities required for effective occupation,[52] which have been interferred with, the court will order restoration by way of substitute materials[53], or even perhaps accommodation. Such an approach is easy to justify in the light of the purpose of the order; namely to place the parties in the position they were in prior to the act of spoliation. Nor ought a spoliator be able to rely on the thoroughness of his action in destroying property as a defence to the obligation to restore.[54] A spoliation order ought not to be conditional in nature[55] nor dependant upon conditions precedent to effective restoration. In *Malan v. Dipenaar*[56] the court ordered the restoration of property, held by apparently innocent third parties, on the assumption that the lease held by them could be readily terminated. The proper approach, ought to have been an order precluding any further dealing in such property until the issue was resolved by way of a vindicatory action.[57]

JURISDICTION

s11 (1) and (2) of the *Customary Law and Primary Courts Act* provides that neither a Village Court nor a Community Court shall have jurisdiction in any case where the claim is not determinable by customary law.[58] s12 (1) (c) of that Act, does empower a primary court to order restitution of movable property, however this must be read subject to the provisions of S11, and is therefore only effective pursuant to a determination of rights under customary law. The exceptions to the rule are not such as to embrace a spoliation order[59]. Thus spoliation orders can only be obtained from the High Court or a Magistrates Court.[60]

As there is no equivalent remedy for restoration of possession under customary law, it could be argued that spoliation proceedings are inapplicable in a matter which will in all probability be determined by customary law. However, when a spoliation order is sought it would, in

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50. *Fredericks v Stellenbosch Divisional Council* 1977 (3) 113 (C) Although in *Potgeiter v. Davel* 1966 SA 553 (O), it was held that restoration of possession to grass huts could not be restored as the grass was no longer available.
51. *Tshabalala v West Rand Administration Board* 1980 (2) SA 520 (W).
52. *Naidoo v Moodley* 1982 (4) SA 82 (T).
53. *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113 (C).
54. *Fredericks Case* supra and *Tshabalala v. West Rand Administration* Board 1980 (2) SA 250 (W).
55. *Yeko v. Quana* 1973 (4) SA 735 (AD).
56. 1969 (2) SA 59 (O)
57. Vindication, see *inter alia Hefer v Van Greuning* 1979 (4) SA 952 (AD); *Chetty v Naidoo* 1974 (3) 13 and *Oakland Nominees v Gelria Mining* 1976 (1) SA 441.
58. See J.S. *supra 15.*
59. In both *Maria v. Murambika* 1976 RLR 385 and *Kaperowodyo v. Kaperowodyo* 1979 SRN 27 the action was commenced in a DC's court, which was empowered to exercise jurisdiction under both customary and general law.
60. If the magistrates court is the more appropriate forum and adverse award of costs may be made if the application is made to a higher court, s53 High Court Act 29/81.

most instances, be too early to determine[61] the form that any succession might take, thus any choice of law question is precluded. As the court is not concerned with the merits[62] of either party's case, but whether dispossession, in a form giving rise to a spoliation order, has taken place, the question of choice of the law appropriate to the final resolution of the dispute is irrelevant. Further, the discretionary provisions of s3 of the Customary Law and Primary Courts Act, permit the court to depart from the strict application of customary law, in appropriate circumstances.s3 (1) . . . provides:

> "Subject to the provisions of this section and of any other enactment *unless the justice of the case otherwise requires*[63] customary law shall be applicable in any civil case . . ."

Even though the succession to a deceased estate may fall to be determined under customary law,[64] the actual administration and distribution is carried out through the Community Courts,[65] any dispute which arises over the succession being settled not by the Community Court presiding officer, but as prescribed under s69 (2) of the Administration of Estates Act:

> "If any controversies or questions arise among (the deceased's) relatives or reputed relatives regarding the distribution of the property left by him, such controversies shall be determined in the speediest and least expensive manner consistent with real and substancial justice according to African usages and customs by the provincial magistrate of the province in which the deceased ordinarily resided . . "[67]

Thus, it is general law which prescribes the procedure, if not the form of succession, indicating that the application of ancillary general law remedies is at least consistent with the law as a whole.

POSITION OF THE HEIR

A presumed heir or beneficiary in a deceased estate is not entitled to pre-empt the due and proper administration of the estate[68] they must await either the final liquidation and distribution account[69] or the

61. Spoliation proceedings are not treated, *per se*, as matters of urgency, see *Mangala v. Mangala* 1967 (2) SA 415 (E). Nonetheless the sort of delay which might be necessary to determine the form of succession would be unjustified when such a determination is irrelevant to the unterm restoration of possession.

62. See, *inter alia, Ncotama v. N'Cume* 1893 (10) SC 207; *Maria v. Murambika* 1976 RLR 385; *Fredericks v. Stellenbosch Divisional Council* 1977 (3) SA 113 (C).

63. Underlining supplied. There is no statutory provision which affects this area of the law and therefore the justice clause would prevail.

64. S69, Administration of Estates Act, Cap. 301.

65. S69 (1) and (5) of the Administration of Estates Act, Cap 301 as read with SI 638/81.

67. Thus, recourse to the Magistrates Court in spoliation proceedings relating to the deceased estate in consistent with the general pattern of succession. There is always the possibility that the magistrate who grants the spoliation order may be the same one who makes the determination in the dispute governed by the provisions of s69 (2) of the Administration of Estates Act, but this would not cause the same conflict of interest as would be the case with a presiding officer, who is acting in the capacity of a 'quasi' executor to such deceased estate.

68. Disinheritance might also have taken place unbeknown to the beneficiary. *Moyo v Moyo* 1959 SRN 641

69. s53 Administration of Estates Act, Cap 301.

appropriate ceremony, such *kurora guva*[70] when the rights in the estates are settled. Thus, the heir[71] regardless of the form of succession has no more than a *spes* in the deceased estate at the time of the deceased's death. Innes C J described the beneficiaries position, in *CIR* v *Crewe*[72] as:-

> ". . . (f) or what is vested in the heirs is the right to claim from the deceased's executors at some future time after confirmation of the liquidation and distribution account satisfaction under that account. The right to make such a claim no doubt vests in the heirs on the death of the deceased and they may be said to have dominium of this right, although it is not immediately enforceable".

This would apply, it is submitted, in a customary succession as in a non-customary succession, for the liabilities of the estate must be met with the attendant possibility of insolvency precluding the heir's interest maturing as anticipated.[73]

Regardless of the ultimate form of succession, be it testate or intestate, customary or not, the administration of the estate may only be carried out by an executor,[74] or in a customary succession, the appropriate family member[75] acting in a manner analagous to that of an executor. Where there is an intestacy, it cannot be presumed that the provisions of s69 (1) of the Administration of Estates Act[76] automatically apply. The administration of the estate may fall under the more rigorous provisions of the Act, and even if it could be distributed under the provisions of s69 (1) those persons concerned in the distribution of the estate may request the appointment of an executor dative, as permitted by s69 (5). Restraint on the part of the interested parties to a deceased estate is essential, as the provisions of s42 (a)[77] of the Act are designed to protect the integrity of the estate prior to distribution.

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70. s69 (1) refers to the distribution being carried out in accordance with the 'customs and usages of the tribe or people to which he belonged', a process which may involve an interval of up to a year after the death. See also *Gideon v. Twadzadza* 1945-7 SRN 108; *Pisira v Enoki Sonokele,* 1954 SRN 446, *Guzuze v Chinamasa* NO HC 818/83

71. Or beneficiary.

72. 1943 AD 656, 692

73. An heir is not, except in exceptional circumstance, liable for the civil debts of the deceased. *Child* (The History and Extent of Recognition of Tribal Law in Rhodesia), divides the obligations of the heir into two distinct categories (a) those incurred under Customary Law, of which he says at p. 105:-

> "The obligations of an heir are not limited to the value of the estate when he adiates, he is responsible for his late father's obligations incurred under African Law".

and (b) those incurred under the general law of Zimbabwe, which he deals with thus, at p 106:-

> "If the deceased contracted a debt under the civil law of Rhodesia his heir is only liable up to the value of the assets in the estate at the time of death".

74. *Segal v Segal* 1976 (2) SA 531 (C); *George Municipality v Freysen* 1976 (2) SA 945 (AD); *Nyati v Minister of Bantu Administration* 1978 (2) SA 224 (E).

75. *Matambo v Matambo* 1069 (3) SA 717 (RAD). See also *Raguma v Chief Mangwende* 1940 SRN 116 where the importance of citing the correct party in respect to the the estate was emphasised.

76. If the deceased was married according to the provisions of the Marriage Act, Cap 37, or is the child or such a union, s69 (1) does not apply as it is confined to:-

> "Any African who has contracted a marriage according to African law or custom or who, being unmarried, is the offspring of parents married according to Arican law or custom".

77. It is presumed that the provisions of 42 (a), thought not directly applicable are similar to the protection of the estate under customary law. As the unlawful removal of possession precludes the taking of inventories which safeguard the position of the heir, in respect to estate liabilities.

Thus, an heir[78] who presumes an inheritance at customary law might find an unwelcome degree of personal liability being substituted for the coveted inheritance.

A further factor which should cool the avarice of the relatives is the increasing recognition by the courts of the capacity of an African woman, during the subsistence of the marriage, to build up an estate of her own, as was held in *Jirira v Jirira.*[79] A court may also determine that, regardless of the Customary practice as to guardianship of the minor children and the custody of the estate it should exercise its power to make such awards in accordance with the best interests of the children[80] and the customary law itself appears to recognise such right of variation, as discussed in *Matambo v Matambo*[81]. The "heir" may therefore in such circumstances be removing the property not only of the deceased, but of the widow and possibly even third parties. The increasing use of hire purchase schemes and appliance rental, means the property of others may be seized, action which may invoke vindicatory proceedings by the owner of such property.

CONCLUSION

Although the use of spoliation proceedings will not rectify the currently unsatisfactory state of the law of succession, in Zimbabwe; it may ameliorate some of the more unsatisfactory aspects of the current situation, pending a full review and hopefully a reform of the law.

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78. This would also include any person who considered themselves the likely guardian of an heir who was a minor.

79. 1976 RLR 385; see also *Rabecca & Musinjima v. Vurayayi* 1958 SRN 571.

80. *Jeremiah v Salome* 1932 NAC 43, *Pemha v Joshua Patrick Zuichema,* 1972 SRN 9. s3 (4) of the Customary Law anc Primary Courts Act placed emphasis on the interests of the child being the paramount consideration. The corollary to this is that the estate will follow the children where the custody of such children is awarded, in their interest to their mother, *Jamu v Jim & Takazuneiju* 1939 SRN 49, 51; *Mabigwa v Matibini* 1946 SRN 117, 121. Further, the provisions of s52 of the Administration of Estates Act requires the payment of funds, due to minors to be made to the Guardian's Fund.

81. 1969 (3) SA 717 (RAD).