SELECTED DECISIONS

of the

NATIVE APPEAL COURT

(NATAL AND TRANSVAAL)

FOR THE PERIOD

JULY 1930, to DECEMBER, 1931

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LIST OF LITIGANTS.

SUBJECT INDEX.

Exception .....

NATIVE APPEAL COURT.

NATAL AND TRANSVAAL DIVISION

SELECTED JUDGMENTS.

CASE NO. 1.

ALINA MAOBA VS. JACK MAOBA.

Pretoria, August 21, 1930. Before E.T. Stubbs, President, C.H. Blaine and C.N. Manning, Members of the Native Appeal Court (Transvaal and Natal Division).

NATIVE APPEAL CASES - Native Law and Custom - Guardianship - Estate of deceased brother - Government Notice No. 1664/1929 - Administration of Estate - Locus standi in judicio of peregrinus.

Appeal from the decision of the Native Commissioner, Krugersdorp.

In this matter the evidence disclosed that Respondent Jack Maoba is a Mosutho residing at Leribe in Basutoland and the surviving brother of one Charlie alias Daniel Maoba, who died at Krugersdorp in February of this year, and is survived by a widow and minor children of the customary union entered into with her. Under Sesutho custom Respondent claims to be the natural guardian of his deceased brother's estate, which includes the widow, children, and such loose assets as have been found to exist. Owing to a dispute having arisen between himself and the widow of his brother, Respondent invoked the intervention of the Native Commissioner at Krugersdorp, in terms of the regulations published under Government Notice No. 1664 dated the 20th September, 1929, framed under Section 23 of Act 38 of 1927. On the evidence adduced the Native Commissioner held that Respondent was the guardian of the said estate according to Native Custom and entitled to take the same over in trust until the heir is of age. Appeal is brought on the grounds that Respondent had no locus standi in judicio in the Native Appeal Court in that he was a peregrinus domiciled in Basutoland, and as such could not administer an estate in the Transvaal nor take the assets out of the Union in the administration of such estate, and that assuming he had such a right, there was no guarantee as to what would become of the minor heir outside the Union, and further, that under Native Law and Custom and our Law the widow of the deceased must remain in possession, and that the judgment was contra bonos mores.

Section 23(4) of the Act (supra) makes it clear that in a dispute of this nature the test of competency both as to the disputants themselves and the Native Commissioner or

Magistrate.....

Magistrate to determine the dispute is the district in which the deceased ordinarily resided, that is to say, competency is not affected by the residence of Respondent in Basutoland outside the Union, but is determined by the place where Respondent's deceased brother ordinarily resided and where the cause of dispute arose. Up to the time of his death he had resided for twelve years in the district of Krugersdorp in the Transvaal and there the dispute arose.

The Native Commissioner in the course of the enquiry in which he gave the finding now appealed against, admitted in evidence three documents marked 'A', 'B' and 'C' given to Jack Maoba by officials in Basutoland.

One of the grounds of appeal is that the Native Commissioner had no right to admit these documents as they are secondary evidence (if evidence at all) and only primary evidence can be admitted.

One of the documents objected to is a letter from an Assistant Commissioner in Basutoland addressed to the Native Commissioner, Krugersdorp, introducing Jack Maoba as the brother of the deceased and stating that according to Native custom he is deemed to be the guardian of the family.

Another is a permit from an Assistant Commissioner in Basutoland to allow Jack Maoba to introduce cattle into Basutoland.

The third is a letter from Jack Maoba's Chief to the Assistant Commissioner, Leribe, asking for Jack Maoba to be given a letter "certifying that he comes from you and me to the Commissioner of where the deceased died, and (a letter) certifying that he (Jack Maoba) has the right to fetch these children and keep them".

This is endorsed by the Assistant Commissioner to the Superintendent, Native Affairs Department, Johannesburg, "Referred to you. The details given above are correct to my knowledge".

The proceedings in this matter are in the nature of an administrative enquiry and not judicial. Special provision is made under the regulations for the award of costs by the Native Commissioner in his discretion and for an appeal to lie to this Court against his finding. The parties should not be regarded as plaintiff and defendant (cf. Isaac Sodwele vs. Matshalaza and Mamdingezweni, 1929, N.A.C. (C. & O.) 15 Prentice-Hall R.22).

In Government Notice No. 2257/1928 it was specifically stated (Regulation 3) that the procedure to be adopted in these enquiries should be that laid down in the Rules for Courts of Native Commissioners.

In the substituted Regulations published under Government Notice No. 1664/1929, that provision has not been re-embodied. A new provision has been made to the effect that in conducting any enquiry the Native Commissioner "may" impose an oath or solemn declaration upon any person whom he deems it necessary to examine, and shall summarily and without pleadings

hear and determine the issue.

These facts taken together indicate that it was the intention of the Legislature that these enquiries be conducted without such strict compliance with the rules of procedure, relevancy and admissibility of evidence as is demanded in the conduct of ordinary civil or criminal trials.

In an enquiry of this sort where the Native Commissioner acts in an administrative capacity, there is no reason why letters should not be admitted as evidence vouching for the identity and bona fides of the applicant for the enquiry.

In any event the admission of the documents does not appear to have caused any prejudice - the only statement of any relevancy contained in them being that Jack Maoba is the guardian of the estate. Jack Maoba stated on oath at the enquiry that he was the legal guardian and the Native Commissioner found this to be a correct statement of the position on the evidence before him.

"The enquiry must be fair and impartial and not depart from or violate the fundamental principles of Justice. There may possibly be cases where a wrong admission or exclusion of evidence may render the hearing unfair, or may amount to a disregard of a term of the statute, but the Court would then intervene because of the result, not because a rule of evidence had been disregarded". (cf. Barlin vs. Cape Licensing Court 1924 A.D. 472 at p.480. Babner vs. S.A.R. & H. 1920 A.D. at p.598).

The deceased, whose estate is the subject of this dispute, contracted a customary union with the appellant about the year 1910 at Heilbron in the Orange Free State.

He removed to and thereafter died in Krugersdorp on the 11th February, 1930, leaving a widow or partner, the present appellant, two minor children and some movable property.

It is common cause that the estate has to be administered under Native law and custom in terms of sub-section (d) of paragraph 2, Government Notice No. 1664/1929.

After taking evidence on oath from the interested parties the Native Commissioner gave a finding in the following terms:- "That Jack Maoba is the guardian of the Estate of the late Charlie or Daniel Maoba according to Native custom and that the property of the Estate in the Transvaal be taken over by him (Jack Maoba) in trust until the heir John Maoba is of age".

Against this finding the appeal has been brought on the following grounds - the one as to admission of the documents from Basutoland has been disposed of above.

"(1) .....

"(1) That the respondent has no locus standi in Judicio in this Court, [illegible] a Peregrinus domiciled in Basutoland where he has sworn to reside.

(2) That being such Peregrinus he cannot administer an Estate in the Transvaal nor can he take the assets out of the Union in the Administration of an Estate of the Transvaal Province and the Court had no right to make such an order. That an Estate of the Union must be administered in the Union.

(3) That even if the respondent otherwise had the right (which he has not) to take the Estate from the Union and allege to keep it in his possession in Basutoland until the heir attains the age of 21 years, there is no guarantee what would become of the Estate of the minor Heir outside the Union.

(4) That under Native custom and our law the widow of the deceased must remain in possession with the children of the Estate in order that she will maintain herself and the said children from such Estate, especially as the said Estate is comprised of stock, wagon, cart and furniture, otherwise what is to become of them (the woman and children);

(5) That letters and documents marked 'A', 'B' and 'C' had no right to be admitted as they are secondary evidence (if any evidence at all which the appellant denies) and only primary evidence can be admitted.

(6) That the judgment is contra bonos mores, contrary to law and contrary to evidence."

That a Peregrinus has no locus standi in judicio in the Courts of this Province is a novel doctrine which only needs to be stated to carry its own refutation.

The Courts of the Union are open to everyone, perigrina as well as incola.

The former may be ordered to give security for costs if so required before being allowed to proceed with an action, but that in no way affects his capacity to demand justice in the Courts of the land.

There is nothing to prevent a peregrinus from administering an Estate in the Transvaal because all persons, male as well as female, are competent to be executors, except the Master of the Supreme Court; minors and persons of full age who are themselves under guardianship or curatorship (Sections 31 and 113, Act 24/1913; Maasdorp "Institutes of Cape Law" Vol. I p. 238 5th Ed.), but if the executor, even if appointed by will, happens to be or reside outside the Union the Master may refuse to grant letters of administration to him until he finds sufficient security for his due and faithful administration of the Estate and chooses domicilium citandi et executandi within the Union (Section 32 Act 24/1913), and the finding of security is provided for in our Regulations.

Even foreign letters of administration are of force and effect in the Union if certain formalities, such as being signed and sealed by the Master, are complied with (Section 41 Act 24/1913).

The Native Commissioner in this matter made no order permitting Jack Maoba to take the assets in this Estate out of the Union, therefore that portion also of the ground of appeal falls away.

Ground (3) of appeal is answered in the preceding paragraph.

Ground (4): The father of the deceased is dead. Under Native law therefore the deceased's eldest brother becomes the head of the house and guardian.

He acts as a sort of Executor and administers the Estate in trust for the heir until he comes of age.

When that event occurs he must hand over the Estate and account for his administration. On the evidence we see no reason to differ from the Native Commissioner's finding that Jack Maoba is the legal guardian.

There is no provision in the Act or the Regulations for the issue of a writ or a warrant for enforcing the finding (cf. Isaac Sodwele vs. Matshalaza and Mamdingezweni, 1929 N.A.C. (C. & C.) 15 Prentice-Hall R.22).

All that the finding amounts to is a declaration as to who is entitled to administer the Estate in the Transvaal and as such it is binding.

This Court therefore must uphold the Native Commissioner's finding but although not disposed to interfere with the Respondent's rights as guardian we do not consider that it would be desirable in the interests of the Estate and the children that he should remove them from the Union.

After all, the so-called rights are more or less confined to the cattle accruing when the girl gets married which in any case would devolve in accordance with Native law and custom.

We therefore have decided to amplify the Native Commissioner's finding by adding thereto the following words:-

"..... subject to the said Jack Maoba obtaining from the Native Commissioner, Krugersdorp, a certificate in terms of Regulation 4(1), Government Notice No. 1664 of 1929 and furnishing security in terms of Regulation 4(3), Government Notice No. 1664 of 1929 in respect of all the estate property to the satisfaction of the said Native Commissioner."

The judgment as so amplified is upheld and the appeal dismissed with costs.

CASE NO. 2.

MAXIM QUABE VS. ANDRIES SEBANDE.

Pretoria, August 22, 1930. Before E.T. Stubbs, President C.H. Blaine and C.N. Manning, Members of the Native Appeal Court (Transvaal and Natal Division).

NATIVE APPEAL CASES - Native Law and Custom - Damages for adbuction - Lobolo and breach of Native Moral Code.

An appeal from the decision of the Acting Native Commissioner at Krugersdorp.

Where the Plaintiff claimed damages from Defendant in that Defendant unlawfully harboured and lived with Plaintiff's wife and caused her to lose affection for him. And where Attorney for Defendant claimed that if Plaintiff wanted damages he should have claimed the lobolo cattle as the parties were married by Native custom. And where the Acting Native Commissioner awarded damages in favour of Plaintiff and fixed a reasonable amount.

The Acting Native Commissioner only decided after the case for Respondent (Plaintiff in the Court below) was closed, under what principles of law the proceedings were being heard and it would have been more in keeping with the observations of this Court in the case of Jacob Ntsabelle vs. Jeremiah Poolo 1930 N.A.C. (T & N) had he announced his decision sooner, which was possible shortly after the evidence of Plaintiff commenced. However, as was rightly decided, the case has to be dealt with under Native law and custom but the summons might have been drawn up to indicate more exactly on what part of this system the claim is based.

This Court does not consider that in itself the harbouring by a Native of another's wife, - unless with immoral intention, - or that causing her to lose affection for her husband entitles the latter to compensation but since it is also alleged that Appellant has been "unlawfully living with" Respondent's wife, a sufficient cause of action is disclosed and, until rebutted, such an act clearly points to adultery which in general Bantu Law is an actionable wrong and despite certain ambiguous statements by Respondent under cross-examination it is obvious from his evidence as a whole that he claims damages from the alleged wrongdoer which would be his correct course to take before the question of lobolo need be discussed with anyone, if at all.

The customary union between Respondent and Sophia had never been dissolved nor had Respondent repudiated this woman and it is not shown that they had permanently separated. Even if Appellant did not in the first instance entice Sophia or were ignorant of her position, by receiving and living with her he took the risk of an action for damages and, under original Native law, severe punishment besides. He could not absolve his liability by offering to replace the lobolo nor, as suggested by his attorney, by referring the injured husband to the woman's father or other lobolo-holder before making full reparation.

As .....

As lobolo constitutes a principal rite in a properly sanctioned union it is entirely separate from any question of damages for a breach of the Native moral code and in any event the payment of compensation does not break a customary union.

In this case there is direct and corroborated evidence to show that Appellant cohabited with Respondent's wife and was seen in bed with her several times. It is also clear that he knew quite well that the woman was Respondent's wife and even threatened him when endeavouring to get her back.

No evidence at all has been given or called by Appellant who, moreover, admits in his plea that the woman is living with him in the same house. It is therefore difficult to follow the argument of Appellant's attorney recorded at the close of Respondent's case, that as far as Appellant's living with the woman is concerned the evidence is utterly contradictory. This contention is again referred to in the grounds of appeal with other points with which, as already indicated in the previous remarks, this Court does not agree.

The Acting Native Commissioner correctly awarded damages and fixed a reasonable amount.

The appeal is dismissed with costs.

CASE NO. 3.

SIMON TSELE VS. STEPHANUS MOEMA.

Pretoria, August 25, 1930. Before E.T. Stubbs, President, C.H. Blaine and C.N. Manning, Members of the Native Appeal Court (Transvaal and Natal Division).

NATIVE APPEAL CASES - Defective summons - Exception - Power of Chief to sue member of tribe for liquidation of tribal debts - Government Notice No.1384/1924 - Native Taxation and Development Act No.41/1925 - Exception upheld - Costs.

An appeal from the decision of the Native Commissioner, Hamanskraal.

In the Court below Plaintiff claimed from Defendant in his summons £17, being the balance of Defendant's pro rata share of the purchase price and costs of a certain farm due by Defendant to Plaintiff as Headman of the tribe and co-purchasers of the said farm.

Defendant's Attorney, being dissatisfied with the particulars furnished to amplify the claim in the summons, took exception to the summons on the ground that it disclosed no cause of action and that no legal grounds were set out as to how the Plaintiff could make his claim and that therefore

there .....

there was no claim to meet. He further contended that Plaintiff in his capacity as Chief had no locus standi, that a Chief could not sue a member of his tribe for a contribution towards the liquidation of tribal debts as such contribution is a levy and no levy can be imposed unless sanctioned by the Governor-General under statutory authority. The Native Commissioner held that the claim was sufficiently laid out in the summons as amplified by the further particulars to enable the Defendant to know the action he had to meet and ordered the case to proceed, justifying the dismissal of the exception on the ground that in Native Commissioners' Courts the rules make no provision for exceptions or objections. Appeal is brought against this decision.

Respondent claims in his summons £17 being the balance of defendant's pro rata share of the purchase price and costs of the farm Wildebeestkuil 8 due by defendant as one of the co-purchasers of the farm Wildebeestkuil.

He states in his claim that he is headman of the Bakgatla-ba-Motcha Tribe of Natives who have purchased portion "A" of the said farm.

The Appellant's Attorneys, on behalf of Appellant after receipt of the summons wrote Respondent asking for further particulars, asking inter alia:-

(a) Whether it is alleged that the said farm was purchased by the tribe or by the members individually and receiving the answer: "By the Tribe".

(b) Upon what ground or cause of action do you as Chief claim from the defendant a share of the purchase price to which the reply was: "As Headman of the Executive Committee of Buyers duly authorised".

(c) On what date the alleged purchase of portion "A" of Wildebeestkuil took place?
Reply: "Negotiations for purchase commenced during 1925".

(d) Do you claim to have paid the £17 on behalf of Simon Tsele?
Reply: "Yes".

Not being satisfied with the particulars the Attorneys wrote again asking for the legal ground or cause of action upon which Plaintiff alleged defendant owes him the money in his capacity as Chief. No reply was sent to this query.

On the 12th June, 1930, the matter came before the Assistant Native Commissioner for trial and the record shows that the summons was read.

In answer to the summons Mr. Findlay, for the Defendant, took an exception to the summons on the ground that it disclosed no cause of action and that no legal grounds are set out as to how the claim for £17 can be made and therefore there is no claim for him to meet.

Further .....

Further Mr. Findlay contended that Plaintiff in his capacity as Chief has no locus standi ; that a Chief cannot sue a member of his tribe for a contribution towards the liquidation of tribal debts as such contribution is a levy and no levy can be imposed unless sanctioned by the Governor-General under statutory authority.

In the present matter there is no allegation that the amount claimed is a levy and that it has been imposed by law.

The Native Commissioner held that the claim was sufficiently laid out in the summons as amplified by the further particulars, to enable the Defendant to know the action he had to meet and ordered the case to proceed.

It is against this decision that the Defendant now appeals.

The Native Commissioner justifies his dismissal of the exception on two grounds:

(I) That the rules of Native Commissioner's Courts make no provision for exceptions or objections and that it is not incumbent on him to apply the provisions of the procedure applicable to a Magistrate's Court which is merely a creature of statute as is a Native Commissioner's Court.

(II) That in this case the summons in substance sets out a cause of action and contains sufficient information to enable Defendant to identify the claim.

The Rules (No.25) say that an action shall be commenced by the issue of a summons in the form prescribed setting forth in "concise terms the nature of the claim" etc.

It is true that no provision is made for exceptions or objections but it is a fundamental principle of all systems of jurisprudence that the Defendant should know what case he has to meet.

If, to the summons served upon him, the obvious and only answer that he can make is "I have no case to meet, your summons discloses no cause of action", such an answer can legitimately be made under Rule 26(a) and whether it be called an exception or a plea it is a good answer to the summons if it can be substantiated, as has already been held in this Court (Cf. Maria Rankune vs. Hendrik Rankune 1930 N.A.C. (N & T)).

Such an answer has been made and called an exception and dealt with as such in the Native Appeal Courts without comment e.g. see William Singe vs. John Cetana 1929 N.A.C. (C & O) 14 Prentice-Hall R2, in which an "exception" was taken that the summons disclosed no cause of action and Barnett Ndingi vs. Percy Ngande 1929 N.A.C. (C & O) 14 Prentice-Hall R14, in which an "exception" was taken to a plea to the effect that it disclosed no defence.

The Native Commissioner in the Court of first instance upheld the exception and gave judgment for the Plaintiff and his judgment was upheld by the Appeal Court.

Ndevu .....

Ndevu Mbolo vs. Kwaga Mamandi 1929 N.A.C. (C & O) 15 Prentice-Hall R1, in which the Appeal Court held that the Native Commissioner's Court had rightly upheld an exception that the summons disclosed no cause of action. James Solomon vs. Kalisile Faba 1929 N.A.C. (C & O) 15 Prentice-Hall R9 and R68; Simon Ngcobo & Bernard Nyuswa vs. Steshi Ngcobo 1929 N.A.C. (T & N) 15 Prentice-Hall R15.

The exception taken in this case is merely the Defendant's answer to the Plaintiff's claim as required by Rule 26(a) and if it can be substantiated, disposes of the claim unless the claim is amended under Rule 27.

That brings us therefore to a consideration of the question which is the one for decision in the case: "Does the summons disclose a cause of action?"

The summons claims "£17 being the balance of your pro rata share of the purchase price and costs of the farm Wildebeestkuil No.8 due by you as one of the co-purchasers".

In answer to a request for further particulars Plaintiff stated that he claimed to have paid this amount on behalf of Defendant.

There is nothing to indicate under what circumstances he paid on behalf of Defendant - no allegation for instance that he paid it at his special instance and request nor is there any reason given to indicate that he paid it in such circumstances as to enable him to obtain a refund from Defendant.

The Native Commissioner states in his reasons that the summons states that the Defendant is "a co-purchaser and is in default with his pro rata share of the cost of the farm".

Prima facie on that the person entitled to sue the Defendant for his pro rata share of the purchase price is the seller of the farm. An exception that the summons discloses no cause of action raises a pure question of law on the contents of the [illegible] amplified by further particulars supplied independently of anything else. There is nothing to indicate what right the Plaintiff has to sue, except the statement in his summons that he sues as "Headman of the Bagatla-ba-Motcha tribe of Natives who have purchased portion "A" of the farm Wildebeestkuil No.8 and Defendant is in default with his pro rata share of the purchase price".

The tribal resolution referred to in the further particulars and a copy of which is attached to the record carries the matter no further because it contains no mandate to the Headman to collect the pro rata shares due by the signatories.

As defendant is described in the summons as "of Wildebeestkuil No.8" it is a legitimate inference to draw that he is one of the tribe of Natives who has purchased the farm.

There is nothing to indicate in the summons or particulars a contractual relationship between the Respondent and Appellant therefore one must determine whether Respondent

in .....

in virtue of his Headmanship has the inherent right to enforce payment of a pro rata share of the purchase price of a farm from a co-purchaser who is a member of his tribe.

This is the view that the Native Commissioner has evidently taken, for he points out that in Mathibe vs. Tsoko A.D. 1924 (the correct reference is 1925 A.D.105), it was held that the imposition of a levy by a Chief was entirely in accordance with Native custom and that such custom was not inconsistent with the principles of civilisation.

In the case of Malasi vs. Matlaba 1920 T.P.D. 389 it was strongly doubted by Wessels J.P. and Mason J. whether a Native Chief had the power by Native custom to levy on the members of his tribe and definitely stated that he had no such right by Common law.

In Mathibe vs. Tsoko (supra) at p.110 Solomon J.A. said: "the evidence in this case establishes that according to Native custom a Chief is entitled by means of levy to raise money for legitimate tribal purposes; that the payment of a debt incurred in the purchase of land for the use of the tribe for such a purpose does not admit of doubt".

Under Native custom therefore it is clear that a Chief had power to raise money by a levy. If he had that power then a fortiori he had the power under Native custom to enforce payment of the levy.

But in the same case (Mathibe's), it appears that the method of enforcing such a levy was by confiscation of property without regard to the property seized. As to that Solomon J.A. said (p.110):

> "Such a method of raising money has, however, "been rightly held in the Transvaal Provincial Division "to be contrary to the general principles recognised "in the civilised world (Molusi vs. Matlabes 1920 T.P.D. "389)".
>
> "If, then, the Native custom of enforcing a "levy is no longer open to a Chief, it follows that some "other method of enforcing it must be devised".

Now the legislature stepped in and provided that method and that was done by the promulgation of the Regulations contained in Government Notice No.382 of 1921, which were subsequently repealed and substituted by Government Notice No.1348 of 1924 dated the 18th August, 1924.

In these Government Notices, which were promulgated under Law 4 of 1885 certain methods of procedure were laid down for the imposition of tribal levies i.e. the tribal resolution had to specify:

(1) Its rate and incidence.

(2) The person to whom it should be paid, and

(3) .....

(3) The date, or if in instalments, the dates upon which it shall be paid,

and be confirmed by the Governor-General.

The case of Mokhalle vs. Bogofane 1926 T.P.D.348 dealt with Government Notice No. 1348 of 1924 and found that the Notice was a regulation intra vires Section 4 of Law 4 of 1885 and did not, as Mr. Hutchinson contends, decide that no tribal resolution was essential to the validity of the levy, but that the Native Commissioner's certificate that the levy had been properly imposed was all that was required as evidence of the levy having been lawfully imposed.

On the 1st January, 1926, the Native Taxation and Development Act 41 of 1925 came into force and under that Act by Section 15 further provision was made for the imposition of tribal levies at the instance of the tribe and provides that such levies shall be recoverable as if it were a tax imposed under the Act.

For the collection of such levies Regulations were published under Government Notice No. 349 of 1927, Government Gazette of the 4th March, 1927, providing for the collection by the District Officer, i.e. the Native Commissioner.

The summons in this case states that Plaintiff sued as Headman of the tribe - there is no allegation either that there was a lawfully imposed levy under which Defendant owes the £17 now claimed from him, nor any allegation that the Plaintiff was the person entitled to recover such a levy - "as Headman of the Executive Committee of Buyers duly authorised" does not indicate that a levy which Plaintiff is authorised to collect has been sanctioned by the Governor-General. Without the allegation that the £17 is owing under a lawfully imposed tribal levy or under contract, the summons is defective and discloses no cause of action.

For these reasons, as it is common cause that the cause of action arose on the 11th November, 1926, when Government Notice No. 1348/1924 applied, the exception should have been upheld. The appeal is upheld with costs and the Native Commissioner's judgment is set aside and altered to one upholding the exception in the Court below with costs.

CASE NO. 4.

AMOS TSHONGWE VS. MARY TSHONGWE.

Pretoria, September 12, 1930. Before E.T. Stubbs, President of the Native Divorce Court (Transvaal and Natal Division).

NATIVE APPEAL CASES - Jurisdiction of Native Divorce Court - Illegitimate child of Native by European - Status - Definition of the word "Native" - Interpretation of Statutes.

In the District of Pretoria.

Where from the general appearance and the evidence of the Defendant, a woman, the Court *suo motu* raised the question of its competency to determine the action, it being established

by evidence that the Defendant was an illegitimate child of a Swazi woman by a European and married to a Swazi under Law 3, 1897 (T). And where it was further established that all her associates and friends are of the Bantu race and that she lived in the Bantule Urban Location and that her tongue is that of a Zulu.

This is an action for restitution of conjugal rights failing which divorce on the grounds of malicious desertion.

The defendant in her plea denies that she maliciously deserted plaintiff; on the contrary, that he ordered her to leave his premises, insulted her, accused her of infidelity and beat her, and because of his gross insults, foul language and continuous threats to kill her, her life with him has become intolerable and dangerous and she counter-claims for:

"(a) A Decree of judicial separation from bed and board.

"(b) Custody of the five minor children born of the marriage.

"(c) Maintenance for the said minor children and herself in the sum of £5 per month.

"(d) Division of the joint estate.

"(e) Costs of suit.

"(f) Alternative relief."

The plaintiff denied the defendant's allegations whereupon the onus was cast upon her to show that the desertion was not wrongful and malicious. She accordingly went into the witness box but as her general appearance and her long smooth hair raised doubt as to whether or not she was a Native, the Court suo motu raised the question of its competency to determine the action. It was therefore necessary to hear her evidence and this is what she says:

"My father was a European. My mother told me that he was a white man. They were not married. I do not know where he is. My husband is a Swazi. We married at Pretoria. I was born in Pretoria, Brooklyn, my mother was working for Europeans and I was born while she was in service. My mother was living in the Pretoria Location when I was born. I first met my husband in the Pretoria Location. I was at that time living with my prospective sister-in-law in the Location. When we married we lived in the Pretoria Location. We were married in Church by a Native Minister. I have five children by my husband. (Boy ten years old in Court). All my children have the same feature characteristics as the one in Court. All my associates and friends are of the Bantu race and I live in the Bantule Location. I cannot say whether circumcision rites are practised. My tongue is that of the Zulu."

The evidence establishes that the defendant is an illegitimate child of a Swazi woman by a European and married to a Swazi under Law 3/1897 (T).

The question reserved for argument and consideration was whether or not the Court has jurisdiction to hear the action.

The Court is established under the Native Administration Act 38 of 1927 by an amending Act No. 9 of 1929 "to hear and determine suits of nullity, divorce and separation between "Natives domiciled within its area of jurisdiction".

"Native" (as defined) "shall include any person who is a member of any aboriginal race or tribe of Africa provided that any person residing in an area proclaimed under section 6(1) under the same conditions as a Native shall be regarded as a Native for the purpose of this Act".

The purpose of this Act according to the preamble is "to provide for the better control and management of Native Affairs".

The woman (defendant) in this action does not fall under the proviso to the definition of "Native" in the Act as the areas referred to therein are the areas known as the "scheduled Native areas" under the Natives Land Act 27 of 1913.

In the Natives Land Act, 1913, "Native" is defined as "any person, male or female, who is a member of an aboriginal race or tribe of Africa; and shall further include any company or other body of persons, corporate or unincorporate, if the persons who have a controlling interest therein are Natives".

These definitions are interesting because they clearly indicate that it was not the intention of the Legislature to confine the operation of the Acts to full blooded or pure Natives only, but also to include within their scope other persons living in Native areas under the same conditions as Natives or "gone Native" as we say.

In recent Native Legislation when privileges have been interfered with, the Legislature has made special provision for the exclusion of "Coloured Persons" from the operation of the Act, e.g. vide the Native Urban Areas Act 21/1923.

This is important because it is a rule of construction that the words of a Statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the Legislature has in view (see Maxwell - Interpretation of Statutes, VI Ed. p.95).

If it is held that this woman is a "Native" for the purpose of the Act no question arises of ousting or restricting the jurisdiction of the Supreme Court of the land (cf. Maxwell Chapter V) because such jurisdiction is specially maintained in the Statute (Section 10(7) Act 9/1929) and too, the Native Divorce Court is established as a Court of first instance, an appeal therefrom lying to the Provincial or Local Division of the Supreme Court having jurisdiction.

The intention of the Legislature in establishing this Court was to enable Natives to have a forum of their own in which at very little expense they could obtain remedy for their wrongs and relief from "the terrors of matrimony" (cf. Gregorowski J. in Relomell vs. Ramsay 1920 T.P.D. at p.387).

If.....

It would be defeating the objects of the Legislature therefore, if a too literal or restricted interpretation were given to the word "Natives" as used in Section 1C - rather an extended meaning should on the other hand be given to the word.

If there are circumstances in the Act showing that the phraseology is used in a larger sense than its ordinary meaning, that sense may be given to it (Maxwell p. 123).

The "larger sense" is apparent here from the fact that the Statute seeks to provide for divorce etc. between Natives and for "the purposes of the Act", even coloured persons or Europeans, may be treated as Natives if they live in Native areas under the same conditions as Natives.

This woman is, so far as her Status is concerned, a Native by birth for she follows that of her mother being an illegitimate child and also she is a Native by virtue of her marriage to a Native aboriginal, for a woman on her marriage acquires the status of her husband.

By blood this woman is a Native and under Native Law she would be, while single, a member of the tribe of her mother and in the power of the head of her mother's house.

In International Law she would, while single, belong to the state of her mother.

She married under Law 3 of 1897, a Law passed for regulating the marriages of Coloured people within the South African Republic.

The original definition of coloured person in that law was "any person belonging to, or being a descendant, of any Native race in South Africa and persons being descendants of one of the races mentioned in Act 1 Law 3/1885, (i.e. any of the Native races of Asia, including the so-called Coolies, Arabs, Malays and Mohammedan subjects of the Turkish Dominions).

The original definition was amended by Ordinance 39/1904 to "include any person who is manifestly a coloured person and whose marriage on that account cannot be solemnised under Law 3 of 1871".

In the marriage law all persons not white are treated as coloured persons and provision is made for their divorce suits which had, prior to the passing of Act 9/1929, to be brought in the same Court and in the same manner as if the parties thereto had been white persons (see Transvaal Proclamation 25 of 1902 which remains unrepealed by both the Native Administration Act 38/1927 and amending Act 9/1929).

Under Act 9/1929 however, Divorce Courts were established for the hearing of suits between "Natives" or persons who are to be regarded as Natives for the purposes of the Act.

Marriage gives rise to a "Status" or Civil institution in which two contracts are practically involved, namely the express contract between the parties and a tacit contract

between them on the one hand and the State on the other, providing that they shall not have the power of dissolving the union formed between them before the death of one or the other of them and that the State alone shall have the right of dissolving it through its tribunals in accordance with certain fixed principles of policy and justice (Maasdorp Book I Chapter II).

The Native Divorce Courts are therefore Courts which have to deal with the "Status" of parties and the Status of defendant is clearly that of a "Native" both by virtue of her illegitimate birth and by virtue of her marriage to a Native.

If any further proof as to her "Status" is required there is the fact that she calls herself a Swazi, that she speaks the Zulu language fluently, that her children are in appearance pure Bantu, that she lives in a Native Location and that all her friends and associates are Natives, also that her features are Bantu, only her hair serving to distinguish her from a full blooded Native.

Bell's Legal Dictionary, Second Edition, page 526, gives the following definition of Status:

"STATUS, state, condition or rank, defined by Savigny (Private International Law, Section 362) as a person's "capacity to have rights and capacity to act", and by Story (Conflict of Laws, Section 51) as "capacity, state and condition", such, e.g. as minority, emancipation, and power to administer one's own affairs. In Roman Law "the technical term for the position of an individual regarded as a legal person was status, and the constitutive elements of his status were liberty, citizenship, and membership in a family" (Sandars' Justinian, 12th Ed. p. xxxvi). "Status is the position which a person occupied in the eye of the law (ibid. p. 14). See Mahludi vs. Rex, 26 N.L.R. at 303. It is a general rule of private international law, subject to certain exceptions, that a person's status is determined by the law of his domicile (De Bruyn's Opinions of Grotius, pp.72-76).

The maintenance of the status which is conferred by the contract of marriage on those who enter into it is considered so important by the law that the parties themselves cannot by agreement put an end to it (per de Villiers C.J., in King vs. Gray, 24 S.C. at p. 557).

The Native Divorce Court was established for the purpose of assisting persons like the defendant, and it would be doing an injustice and give rise to an absurdity if she, because her mother was colour blind, could not avail herself of the privileges intended to be given her of suing in this forum.

I come to the conclusion therefore that this Court has jurisdiction.

CASE NO. 5.

KARL MONTOEL VS. REUBEN KOMANE.

Pretoria. 7th November 1930. Before E.T. Stubbs, President, C.H. Blaine and C.N. Manning, Members of the Native Appeal Court (Transvaal and Natal Division).

NATIVE APPEAL CASES - Domicile of Defendant - Exception to jurisdiction of Native Commissioner's Court - Invalid Service - Rule 25(2) Government Notice No. 2253 of 1928 - Rescission of judgment - Rule 30(2) Government Notice No. 2253/1928 - Jurisdiction of Native Commissioner's Court, Section 10 Act 38/1927 - Local limits - Wasted costs.

An appeal from the decision of the Native Commissioner at Brits (Pretoria).

The original summons was served on Appellant in Rustenburg District by Respondent of the same District, demanding payment of a certain sum. On the day of hearing Appellant was in default notwithstanding service of summons upon him in terms of Rule 25(2) Government Notice No. 2253 of 1928. To obtain the evidence of one of Respondent's witnesses the matter was postponed. At the subsequent hearing Appellant was again in default whereupon a default judgment as prayed was entered against him and a writ of execution issued attaching certain of his goods. Appellant then caused a summons to be issued praying for rescission of the default judgment on the grounds that no valid service of the original summons was ever effected upon him in that the exigency thereof was not explained to him, that the Court of the Native Commissioner for Pretoria at Brits had no jurisdiction as Appellant had left Brits in 1929 since when he had been resident and domiciled in Rustenburg District outside the jurisdiction of the Court of the Native Commissioner at Pretoria and that in any case Appellant had a good defence on the merits.

The Native Commissioner found that there had been a valid service of the summons and dismissed the application for rescission with costs. Against this decision appeal is brought. As Appellant had the opportunity to raise the question of jurisdiction at the inception of the proceedings the matter of wasted costs has also to be decided.

This is an appeal against a refusal by a Native Commissioner to rescind a default judgment granted by him in the Court of the Native Commissioner of Pretoria, at Brits, on the 8th April, 1930.

The summons was dated 8/12/29 and was addressed to Karl Montoel of Bethanie in the Rustenburg District calling upon him to answer the claim of Reuben Komane also of Bethanie for the return of the sum of £6.2.6 deposited with the defendant by plaintiff as purchase price and railage of a kitchen dresser, in the Court of the Native Commissioner at Brits (there was also a claim for 10/- money lent which is not in issue as the Court

subsequently.....

subsequently rescinded the default judgment in respect of that item).

On the day of hearing, 11/2/30, defendant was in default and plaintiff gave evidence of service of the summons upon defendant in terms of Rule 25(2) for Courts of Native Commissioners stating that the summons had been served upon defendant at Bethanie.

The matter was then postponed for the evidence of plaintiff's witness which was given on the 8th of April, 1930, defendant (Appellant) again being in default.

Default judgment as prayed was therefore entered, and a writ of execution, it appears, was issued under which certain of defendant's goods were seized at Bethanie.

The defendant, now Appellant, says that that was the first time he knew of judgment having been given against him. It has been contended on Appellant's part that the nature and consequences of the summons were not explained to him. This is not sine qua non under the Rules although this Court considers it desirable where the Messenger of the Court serves the summons or where the Plaintiff elects personally to do so, he should explain to the Defendant the reason thereof and nature of the claim as well as the place and date set down for appearance.

There is nothing on the record to show upon what date the writ was issued or executed, but upon the 22nd April, 1930, after issue of the writ defendant (Appellant) caused a summons to be issued praying for rescission of the default judgment on the following grounds:-

(1) That no valid service of the summons was ever effected on defendant.

(2) That the Court of the Native Commissioner for Pretoria at Brits had no jurisdiction in the case as defendant (then Applicant) had left Brits in April, 1929; since when he had been resident and domiciled at Bethanie outside the jurisdiction of the Court of the Native Commissioner for Pretoria.

(3) That defendant had a good defence on the merits.

The Native Commissioner heard the evidence of the parties and found as a fact that there had been a valid service in terms of Rule 25(2), and there is no ground upon which that finding can be disturbed, - the Applicant's own evidence is to the effect that he received the summons but took no notice of it - he "awaited events".

When his goods were attached he issued the summons for rescission, he never submitted to the jurisdiction of the Court of Native Commissioner at Brits - he did not institute the original action.

The power of rescission of a judgment is contained in Rule 30 and can be exercised in certain sets of circumstances viz:-

(1) in the absence of the party against whom it was granted.

(2) when [illegible] obtained by fraud, or mistake common to the parties.

(3) in a matter in respect of which no appeal lies.

(4) in respect of any person affected by the judgment who was not a party to it, etc.

Of the above, (1), (3) and (4) do not apply nor was the judgment obtained by fraud or by mistake common to the parties.

The rule is silent on the point but the person applying for rescission of a judgment must allege in his application and be prepared to establish a good and sufficient cause before his application can be entertained.

Courts of Native Commissioners are established under section 10 of Act 38 of 1927 for the hearing of any civil causes and matters between Native and Native only, and the local limits within which they shall have jurisdiction shall be prescribed by the Governor-General by proclamation in the Gazette.

By Proclamation 298/1928 dated the 16th November, 1928, the Governor-General established a Court of Native Commissioner for the [illegible] with jurisdiction over the Magisterial Districts of Pretoria and Brits and certain farms in the Waterberg District, and at the same time a Court of Native Commissioner at Rustenburg with jurisdiction over the Magisterial District of Rustenburg.

There is no provision in the Act or in the Rules, similar to Section 28 of the Magistrates' Courts Act 32 of 1917 defining persons in respect of whom the Court shall have jurisdiction save and except a proviso to Section 10(3) Act 38 of 1927, which states "When the parties to any proceedings do not both reside in the same area of jurisdiction of any such Court, the Court of Native Commissioner (if any) within whose area of jurisdiction the defendant resides shall have jurisdiction in such proceedings".

The jurisdiction of a Court of Native Commissioner is therefore territorial, residence being the test - the place where the cause of action arose not being material.

It has already been held in this Court that, being in a district for mere casual employment is not residence, and consequently is not sufficient to give a Native Commissioner jurisdiction, Shonkwend vs. Joe Zoutvaye 1930 N.A.C. (N & T) 16 Prentice-Hall, R.97.

The Native Commissioner trying this case has found as a fact that the two parties are clearly domiciled in the Rustenburg District and further that Appellant, that is the original defendant, was "clearly temporarily residing in the Brits area at the time the agreement was entered into". At the time the summons was issued however he was residing in the Rustenburg District, and at that time so was the then plaintiff, now Respondent.

Clearly therefore, the Court having jurisdiction was the Court of the Native Commissioner at Rustenburg and not that at Pretoria or Brits.

The Court of the Native Commissioner, Pretoria, had no jurisdiction in the matter and its judgment was therefore a nullity - void ab origine and should have been rescinded under Rule 30(2) Government Notice No. 2253/1928.

The Native Commissioner has found as a fact and the evidence establishes that Appellant duly received the summons to appear in the Court at Brits and did nothing but "awaited events", instead of making some tangible effort to apprise the plaintiff of his reason for ignoring what he must have known was a document emanating from a Court of Law.

The question therefore arises as to whether he should not be held liable for any costs incurred through his inaction as had he appeared timeously and taken the point of no jurisdiction, no further costs would (or should) have been incurred. We think that justice will be done by applying the general rule laid down in this Court in the case of Hendrik Mekgoe vs. Stoffel Mekgoe, 1930 N.A.C. (N. and T.) Prentice-Hall R.114, viz: "The general rule is that where a party asks the indulgence of the Court, he must pay the costs to which his opponent is put in resisting the application."

These costs were asked for at the inception of the rescission proceedings but disallowed and further costs were incurred in failing to raise the question of jurisdiction at the proper time, such only having been done after the merits had been gone into.

The appeal is upheld with costs, all costs prior to the judgment of the 17th June refusing to rescind the default judgment, however, to be paid by the Appellant, the original defendant.

CASE NO. 6.

EMMANUEL ZULU AND ELEANOR ZULU VS. SAMUEL MEAGER.

PRETORIA. 11th November 1930. Before E.T. Stubbs, President, C.H. Blaine and C.N. Manning, Members of the Native Appeal Court (Transvaal and Natal Division).

NATIVE APPEAL CASES - Defamation - Provocation - Appeal on inadequate assessment of damages - Summons by wife and husband married out of community of property - Rules 26(a) and 28 Government Notice No. 2253/1928.

An appeal from the decision of the Native Commissioner at Johannesburg.

Appellants are husband and wife legally married out of community of property. On an alleged defamatory statement by Respondent two summonses were issued, one by the husband and one by the wife assisted by the husband claiming damages for £200. The Native Commissioner gave judgment for Appellants and assessed the damages at £10. Appeal was brought on the ground that this assessment was inadequate.

It further appeared from the evidence led that Appellants and Respondent were on friendly terms when the alleged defamation occurred which indicated that some provocation was given to Respondent. No plea of rixa was advanced.

The Plaintiffs (Appellants) are husband and wife legally married out of community of property.

First Appellant and Respondent are members of the Alexandra Health Committee and at a meeting of this Committee held on the night of 2nd July, 1930, the Respondent uttered words in the Zulu language to the following effect towards Appellant and in the presence and hearing of other members of the Committee and of some members of the Public:

"You dog. Your wife has been taken by a Shangane man to Nancefield. You are also a liquor seller"; the innuendo in both cases being that the wife had been taken by a certain man to Nancefield for immoral purposes.

Both Appellants claimed £200 damages, but the Native Commissioner awarded them £10.

Two summonses were issued - one by the husband and one by the wife assisted by the husband and at the trial it was agreed that the two actions should be heard together. There is no objection to such a procedure under the circumstances disclosed in the case but we think it essential in view of the provisions of Rule 28, Government Notice No. 2253/1928 dated the 21st of December, 1928, for the Native Commissioner to enter an appropriate judgment in respect of each summons instead of only entering one judgment for the two actions, more especially as the two Appellants are married out of community of property.

No appeal has been entered against the form of the judgment, however, the appeal is merely brought by Appellants on the ground that the amount of damages granted to them, viz. £10, is inadequate; it is evident from the Native Commissioner's reasons for judgment that he assessed the damages at £5 for each Plaintiff.

There is no cross appeal.

The male Appellant says he has been a member of the Alexandra Health Committee for thirteen years and that he is assistant Treasurer in the African National Congress. He says he is a Zulu and belongs to the Ponsakubusa House which is next in succession to the Royal House.

He admits having been before the Court for being in possession of liquor.

The Respondent is a Minister of the Ethiopian Church in Zion. He has been a Minister since 1919.

Appellant (Emanuel) says he only claimed £200 from Respondent because he knows he is a poor man.

In his defence Respondent alleged that at the meeting in question Plaintiff first of all insulted him by saying that he should not be allowed to speak because he was only a loafer and a bribber and that he fed his wife on food obtained from bribery.

In this statement he was supported by two other members of the Committee, both of whom, however, seem to have been in opposition to the Appellant over certain matters prior to the 2nd July, 1930. Appellant stated that Respondent was not a liquor seller when giving evidence.

No plea of rixa was advanced which probably accounts for the fact that no cross examination of Appellant was directed to the

alleged....

alleged provocation given by him to Respondent; nor was any serious attempt made apparently to rebut Respondent's allegation and the Native Commissioner has not dealt with the point.

As Appellant admits that prior to this meeting he and Respondent had been on friendly and on visiting terms, it would seem to indicate that some provocation was given to Respondent to cause him to speak in such a defamatory and derogatory way of his old friends, the Appellant and his wife.

If a Defendant receives provocation and retorts - in certain circumstances which are, however, not wholly present in this case as they were in the case of Katrina Tubana vs. Malatzie Moguni (1929) 1 N.A.C. (T & N) 79 - he is - even without a plea of in rixa - in view of the terms of the last paragraph of Rule 26(a) Government Notice No. 2253/1928 (Native Commissioner's Court), absolved entirely from liability.

In any circumstances if it can be shewn that the words complained of are used after provocation it tends to mitigate the amount of damages because all the circumstances under which the defamatory words are uttered must be considered in assessing the damages (cf. Tothill vs. Foster 1925 T.P.D. at p. 865).

The position in life of the Plaintiff and all the circumstances must be considered and it is only in cases where the award of the lower Court is grossly excessive or inadequate that an Appeal Court will interfere; a Court of Appeal will not lightly interfere with the discretion of a Native Commissioner in awarding damages.

An Appeal Court has the power, however, to increase the amount of damages awarded if the amount is "palpably insufficient and clearly disproportionate to the circumstances of the case" (Hluckman v. Peltz 1928 T.P.D., Justice Circular November and December 1928, or "manifestly inadequate" (Sutter vs. Brown 1926 A.D. at p. 171).

In the case before us technically there are two actions based on the words used at this meeting by Respondent, one action at the instance of the husband for being called a liquor seller and the other at the instance of the wife in respect of the allegations against her character but the fact remains that the two actions brought are in reality only one to re-establish the wife's reputation and with it the husband's self respect as is evident from the fact that the husband in his summons repeats the words used about his wife and claims damages for himself also in respect of those words.

Whether he is entitled to recover damages for those words in an action for defamation as well as the wife we do not consider it necessary to decide as in any event he is entitled to a judgment in respect of having been called a liquor seller.

Even if this Court, had it been sitting as one of first instance, had been inclined to assess the damages somewhat higher, it does not feel that under all the circumstances the award of £10 is "palpably insufficient and disproportionate" or "manifestly inadequate" to the circumstances of the case.

The appeal is therefore dismissed with costs but the Native Commissioner's judgment is amended to "For Plaintiff for £5 and costs" in respect of each action.

MANNING .....

MANNING (Member of Court):

I would add that in my opinion it has not been shown that either of the Appellants sustained specific damage through the defamatory words found to have been used by Respondent though the first Appellant alleges that he has suffered in his own reputation and this assertion is apparently based to some extent on his being "a proper Zulu belonging to the Ponsakubusa House which is next to the Royal House". Against this consideration it is observed that he is married according to European law and has for thirteen years been living as a member of a Native Township in an industrial area of the Transvaal and is thus not affected by Zulu tribal life. Moreover the proceedings do not purport to have been heard in accordance with Native law and custom therefore the statement that "as far as we Zulus are concerned we look upon the Shangaan tribe as an inferior race" rather weakens than strengthens his claim since it merely indicates a general contemptuous attitude towards Natives of another tribe and even though the evidence for the defence to the effect that Appellant first used insulting language to Respondent be disregarded, it is common cause that the trouble commenced with and was in incident at the meeting of the Alexandra Health Committee when Appellant raised the question of the registration of Stand No. 126 in which Respondent was concerned and had personal interest.

The Native Commissioner had to form his own estimate as to what would be reasonable general damages on the claims and I see nothing to justify this Court in finding that his award was palpably inadequate, having regard also to the fact that Appellants' characters were fully vindicated by the judgment in open Court.

CASE NO. 7.

LUSIZA MNCWANGO VS. DHLANGILE MPUNGOSE.

Pietermaritzburg, March 19, 1931. Before E.T. Stubbs, Esq., President, H.B. Wallace and E.N. Braatvedt, Members of the Native Appeal Court (Transvaal and Natal Division).

NATIVE APPEAL CASES - Rule 8(3) of Government Notice No. 2254 - Notice of appeal - Withdrawal of security - Security an essential of noting appeal.

An appeal from the decision of the Native Commissioner at Vryheid.

An appeal was noted on the 20th December, 1930, Appellant's Attorneys gave security to the satisfaction of the Clerk of the Court in the sum of £5 in terms of Rule 8(3) of the Court for the payment of the costs of the other party. On the 3rd of February, 1931, the Appellant by notice to the Clerk of the Court withdrew the security of £5 and the Clerk of the Court notified the Respondent and the Registrar of the Appeal Court of this withdrawal.

On the 14th March, 1931, the security was reinstated, more than two months after the expiration of the time for noting of the appeal.

Respondent's Attorney took exception and contended that the reinstatement of the security after the time had expired did not revive the appeal and that the appeal was therefore not before the Court. Appellant's Attorney argued that there had been no prejudice, and that the Clerk of the Court wrongly allowed the withdrawal.

STUBBS .....

STUBBS, P:

Counsel for the Respondent takes the preliminary objection that the appeal in this matter is not properly before the Court in as much as the appeal in terms of Rule 8 was noted with the Clerk of the Court at Vryheid on the 20th December, 1930, but that on a subsequent date, 3rd February, 1931, the Appellant's Attorney withdrew the security of £5 whereupon the Clerk of the Court notified the Respondent and the Registrar of this Court of the withdrawal of the security

On a subsequent date, however, namely the 14th March, 1931, the security was reinstated more than three months after the expiration of the time within which appeal should have been noted. The contention therefore is that the reinstatement of the security after the time had expired did not revive the appeal and that the appeal is not before the Court. Counsel for Appellant in reply argues that as there has been no prejudice and the Clerk wrongly allowed the withdrawal of the security, the matter is properly before the Court.

We are of the opinion that the rules are clear that the withdrawal of the security - which is an essential of the noting of the appeal - operates as a notice of withdrawal, and that as the Clerk of the Court gave notice to the Respondent and to the Registrar which was all that he was required to do in terms of the Rule (supra), the reinstatement of the security subsequent to the expiry of the time within which to appeal, could not of itself revive the appeal.

The only way in which the difficulty can now be overcome if the Appellant is desirous of bringing the matter in appeal to this Court is for him to make formal application for an extension of time within which to note such appeal.

The objection having been upheld, the Respondent is entitled to the costs.

CASE NO. 8.

FLORENCE MDHLALOSE VS. BENJAMIN MABASO.

Durban, March 27, 1931. Before E.T. Stubbs, President, B.W. Martin and F.W. Ahrens, Members of the Native Appeal Court (Transvaal and Natal Division).

NATIVE APPEAL CASES - Exempted Natives - Jurisdiction of Native Commissioner's Court - Interpretation of Act 38/1927, Section 17(4) - Law 28/1865 - Magistrate's jurisdiction ousted.

An appeal from the decision of the Native Commissioner at Newcastle.

The Defendant in the Court below, Appellant in appeal, is an exempted Native. In appeal the point was taken whether the Native Commissioner had jurisdiction to try the case and whether exempted Natives in Natal fall under the purview of section 10 of Act 38 of 1927, Courts of Native Commissioners being constituted under this section of the Act "for the hearing of all civil cases between Native and Native only".

By consent of Counsel for the parties and before argument on the merits of the appeal the point was taken whether in view of the Defendant in the Court below being an Exempted Native, the Native Commissioner had jurisdiction to try the case. Mr. Shepstone for Appellant intimated that Mr. Darby would argue the legal ground on the preliminary point. In essence Mr. Darby contends:

A.

"The difficulties to be overcome are the definition of "Native" in the Native Administration Act and the provisions of section 10 of that Act.

B.

The Interpretation Act 5/1910 section 13 preserves all accrued rights, obligations, etc., unless amending legislation specifically deprives the citizen of these rights. There is nothing in the Native Administration Act which does deprive anybody of any accrued rights.

C.

The Native Exemption Law 28/1865 section 19, clearly provides that an exempted Native shall be deemed and reckoned as exempt from the provisions and operation of Native Law and shall be deemed subject to the ordinary laws of the Colony.

D.

Prior to the passage of the Native Administration Act an exempted Native could only be sued in a Magistrate's Court or in the Supreme Court subject, however, to the provisions of section 5 of the Court's (Native) Act 1898.

E.

If a Commissioner's Court has jurisdiction over an exempted Native then a Magistrate has no jurisdiction, section 17(4) Act 38/1927. This deprives an exempted Native of a very real right because prior to the 1st of January, 1929, he could sue in the Supreme Court, thence again to the Appellate Division and in special circumstances to the Privy Council which, in theory, is an appeal to the King in person.

F.

Again if the definition of "Native" in Act 38/1927 is to prevail an exempted Native will be precluded from making a will in terms of section 23(1) and (2) of Act 38/1927.

G.

Section 31 Act 38/1927 contemplates exemption from that very Act.

H.

It is very difficult to determine from the record and the Native Commissioner's reasons for judgment whether the matter was dealt with at Common Law or Native Law; it would, however, seem that eventually Common Law was applied.

Whether .....

Whether the one system of law or the other was applied, the Native Commissioner had no jurisdiction".

The point for decision therefore is: do exempted Natives in Natal fall under the purview of section ten of the Native Administration Act, No. 38 of 1927?

Courts of Native Commissioners are constituted under section 10 of that Act "for the hearing of all civil causes and matters between Native and Native only".

The Act specifically lays down certain matters over which the Court shall not have jurisdiction, none of which exceptions refer to the personal jurisdiction but merely to the subject matter of the dispute.

Native means any person who is a member of any aboriginal race or tribe of Africa and any person residing in a scheduled Native area under the same conditions as a Native.

As from the date of the constitution in any area of a Court of Native Commissioner under the Act, a Magistrate's Court shall cease to have jurisdiction in that area in respect of any civil suit arising under section 10 of the Act (section 17(4) Act 38/1927). In terms of that section a Court of Native Commissioner has been constituted for the Magisterial District of Newcastle and this case comes to us in appeal from that Court.

Under sub-section (1) of section 31 of the Act, the Governor-General may grant to any Native a letter of exemption exempting the recipient from such laws as may be specified in such letter.

It is further provided (sub-section (3) section 31) that any letter of exemption issued under any law included in the schedule to the Act, shall be deemed to have been granted under sub-section (1).

Letters of exemption in Natal prior to the coming into force of Act 38/1927 were issued under the provisions of Law 28 of 1865, a law "for relieving certain persons from the operation of Native Law".

Law 28 of 1865 (the whole) figures in the schedule to the Native Administration Act 38/1927, therefore any letter of exemption issued under Law 28 of 1865 must be deemed to have been granted under sub-section (1) of section 31 of Act 38 1927.

The form of exemption given under Law 28 of 1865 reads "..... shall be and is hereby declared to be exempted from and taken out of the operation of Native Law and shall be and is henceforth subject to the ordinary laws of the Colony" and this is in conformity with the section under which it is issued, viz., section 19 which says a Native to whom a letter of exemption has been granted "shall be deemed" and reckoned as exempted "from the provisions and operations of Native Law and shall thereafter be deemed subject to the ordinary laws of the colony".

In the case Lutayi vs. Tsheli 16 N.L.R. 26 (22/1/95), Gallway, C.J. commenting on the words "shall be deemed subject to the ordinary laws of the Colony", said "but that can only affect the Native man himself; it threw him out of the operation of Native Law but it did not, in my opinion, clothe him with the same rights in regard to past operations as it did to white men who had dealings with the Natives ..... He is made subject

to .....

to the ordinary laws of the Colony and those are that the cases of any person, except a Native under Native Law, must be tried in the duly constituted Courts of this Colony".

But in considering this interpretation it must be borne in mind that the learned Judge doubtless had in view the provisions of Law No. 26/1875, which conferred jurisdiction upon Administrators of Native Law only in respect of Natives living under Native Law, and that this decision was given three years before the coming into operation of the Natal Courts Act 49 of 1898.

That case has, however, been overruled by the case of Nxaba vs. Nxaba 1926 N.P.D. 29 in which it was held that where married Natives are taken out of the operation of Native Law and placed under Law 28 of 1865, the change extends to their property rights and community of goods is established between them.

In the case of Zwalakap vs. Jardine 13 N.L.R. 226 an action against an exempted Native, the question was raised but not decided as to what law would be applicable to transactions occurring before the issue of letters of exemption.

In the Natal Courts Act (supra) "Native" is defined as "all members of the aboriginal races or tribes of Africa, South of the Equator. A Native exempted from the operation of Native Law shall be deemed to be a Native within the meaning of this Act for the purposes of a civil case involving rights under Native Law, to which he is a party, but save as aforesaid, the word Native as used in this Act shall not include a Native who is exempted from Native Law".

"Native Case" means a civil case in which all the parties are Natives and (section 25) the Native High Court is given jurisdiction over all Natives subject to the provisions of the Act to the exclusion of the Supreme Court (section 26).

By section 17 of the Native Administration Act 38/1927 jurisdiction in civil matters was taken away from the Natal Native High Court and vested in the Native Appeal Court in so far as the matter was one coming within the jurisdiction of the Appeal Court and where not in the Natal Provincial Division of the Supreme Court.

The Native Appeal Court is constituted for the hearing of appeals in proceedings from Courts of Native Commissioners (section 13(1)) and Native Commissioners' Courts are constituted for the hearing of all civil causes and matters between Native and Native only.

Exempted Natives in Natal fall today into two classes:

A. Those exempted subsequent to the coming into operation of Act 38/1927. (There are at the moment none such).

B. Those exempted under Law 28 of 1865 prior to the coming into operation of Act 38/1927.

The law defines "Native" as being a member of an aboriginal race or tribe of Africa and if he got a dozen letters of exemption he still would be a Native and the law says that Courts of Native Commissioners shall have jurisdiction in all civil cases between Natives.

Exemption does not give the exempted Native the full status and rights of a European. The exempted Native is still subject to those laws which apply only to Natives and are not

part.....

part of what is called Native Law. The exempted Native is still disentitled to exercise the electoral franchise, just as much as the unexempted Native is, he is not allowed to carry firearms, is not allowed to obtain liquor.

For exemption from these and other laws to which I have alluded, it is still necessary for them to be relieved either by enactment or by the special authority of the Governor of this Colony and whenever the exemption from the provisions of any of these special laws is given, it is always an exemption which applies only to the individual and not the members of the family (per Beaumont and Dove-Wilson,J.J. in Application of Ephraim Mahludie 3/5/1905, Supreme Court of Natal), and he is still subject to the provisions of section 1 of the Immorality Act 5 of 1927.

The tendency of all legislation in recent years has been segregation - to keep Native and European apart and prevent promiscuous intercourse, e.g. Natives Land Act, 1913, Native Urban Areas Act 1923 and now the Native Administration Act 38 of 1927 providing separate Courts for the hearing of civil causes between Natives. The policy of the law seems therefore to have clearly contemplated and intended the dividing line set up by section 10 of the Act (supra).

C. Natives exempted under Law 28 of 1865 (N).

Here it would seem the decisions of the Courts have been that the effect of the words "shall thereafter be deemed subject to the ordinary laws of the Colony" is to confer a benefit upon the exempted Native and make him subject only to the European Courts.

Letters of exemption issued under that Law are by section 31(3) Act 38/1927 deemed to have been issued under section 31(1) of Act 38/1927. Law 28 of 1865 is specifically repealed by section 36 Act 38/1927. Letters of exemption under Law 28 of 1865 conferred certain rights. Those rights are maintained by section 31 Act 38/1927, e.g. subject to the ordinary laws of the Colony except in Native Cases (section 5 Act 49/1898).

Sections 55 and 68 Act 49/1898 provided for appeals from Magistrates in Native cases and from judgments of Chiefs and those sections have been specifically repealed by section 36 Act 38/1927.

The Native Administration Act is not "Native Law". It is a part of the statutory law of the land affecting in certain respects Europeans as well as Natives - vide sections 25, 27, 29 and 30. Further, Courts of Native Commissioners must administer the ordinary laws of the land, with the proviso that it is in the discretion of such a Court in suits or proceedings between Natives involving questions of customs followed by Natives to decide such questions according to the Native Law applying to such questions except in so far as it shall have been repealed or modified.

It has been suggested that a distinction should be drawn between Natal Natives exempted under the Natal Law 28 of 1865, before the Act of 1927, and those exempted subsequent thereto. The argument is that exempted Natives in Natal had prior to 1927 a vested right to have their disputes settled by European Courts under the principles of European law, and a right of appeal to the Provincial Division, the Appellate Division and in a proper case to the Privy Council, under sections 83 of the Natal Native Courts Act, which vested right must be deemed to survive the Act in the absence of express words or necessary implication.

This argument is open to objection on two grounds. First, the changes effected by the Act of 1927 are changes in procedure only. Different Courts are provided for the determination of the same rights and disputes as arose prior to the Act of 1927. No substantive rights are conferred to taken away. And it is

clear that no person can be said to have a vested right in any course of procedure. (See Maxwell on Interpretation of Statutes, 6th Ed. p. 400. See also In re Hale's Patent, 1920, 2 Ch. 377, per SARGANT, J., at p.386). If in reply to this it is contended that the Natal exempted Native is affected not only as to matters of procedure, but also in his status, which is a vested right, the answer I think is this, that as already stated, under the Act Native Commissioners administer the ordinary laws of the land, and that even prior to the passing of the Native Administration Act an exempted Native in Natal was under the Courts Act No. 39 of 1898 (N) liable to be dealt with under Native Law in any civil case, to which he was a party, involving rights under Native Law - vide section 4 of that Act, and the Court of Native Commissioner would in the exercise of its discretion under section 11 of the Native Administration Act apply the appropriate Law. There is thus no alternation or change in his position and no derogation of a vested right. The changes effected by the 1927 Act relate only to the forum, not to the law to be applied to exempted Natives.

Secondly, the only sense in which a vested right to a given form of procedure, or to have a case heard by a given Court, or to have a right of appeal to a further specific Court, can arise, is where legal proceedings in a given Court have actually been incepted by the issue of a summons out of that Court. Then it may be said that the litigant has a vested right to the course of procedure appertaining to that Court and appeals therefrom up to the end of those proceedings. Such a case is covered by sub-section (5) of section 17 of the Act which is a provision relating to the transitional period.

In the face of these considerations there does not seem to be any sufficient reason for not giving the words of section 17(4) read with section 10(1) and the definition of "Native" in section 35 of the Act, their natural meaning. This is that all Natives, exempted and unexempted alike, are subject to the jurisdiction of Native Commissioners in all cases between Native and Native, and that the jurisdiction of Magistrates' Courts is ousted.

Having so decided, it remains for the Court to deal with the second point taken by Mr. Darby by consent, viz., whether the action was rightly brought by Plaintiff assisted by her guardian or whether it should have been brought by her kraal head in terms of section 208 of the Code?

This point is governed by the principle laid down in the case Bafana Zuma vs. Mpazima Sokele 1929 N.A.C. (T & N) 159 and in terms of the ruling given in that case we are of the opinion that in the circumstances of the case before us the exceptions should have been upheld and the summons dismissed with costs.

The cross appeal is sustained on the point and the Native Commissioner's judgment is altered to one dismissing the summons with costs.

F. AHRENS dissenting.

Whilst concurring with the learned President and my brother Martin in regard to the second point raised by Mr. Darby, I do not share their views in connection with the question of jurisdiction.

Appellant was granted his exemption under Law No. 28 of 1865 "For relieving certain persons from the operation of Native Law" which Law has now been repealed by Act 38 of 1927, under section 31 whereof such letters of exemption are being perpetuated, but they may be cancelled by the Governor-General at any time without assigning any reason therefor.

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In the case of Mahluda vs. Rex (1905N.L.R.298) it was held that "the exemption granted to Natives under Law 28 of 1865 is a change of status but is personal and is not transmissible to the children except where so provided in this Statute". In this same case on page 312, Beaumont, J. when reading the judgment on behalf of himself and Dove-WilsonJ. says, "The greatest exemption and the one which most nearly brings the Native to the same status or condition (we do not see any distinction between the terms) as the European, is conferred by the Native Exemption Law, Law 28 of 1865.... To anyone knowing Native customs, usages and modes of litigation, the truth and expedidence of these words is at once apparent. They seem clearly to indicate that the intention of the legislaturewwas to limit the operation of the Law to such persons only as should be found to be specially qualified, and personally designated; and this intention appears to be emphasised throughout the Law".

It falls to be considered how this status or condition acquired by a Native exempted under Law 28 of 1865 is affected by Act 38 of 1927. Would there be a ucrtailment of rights if it were held that the Native Commissioner's Court and not the Magistrate's Court is the proper forum before which Appellant should appear? This question to my mind must be answered in the affirmative because if he were to go before a Native Commissioner's Court an appeal would lie only to this Court - which is a Court of final appeal- and no further except with the consent of the Appeal Court, vide section 18, whereas if his forum is to be the Court of the Magistrate, it would be open to him to go on appeal to the Supreme Court and from that tribunal, ordinarily, to the Appellate Division and in certain cases even to the Privy Council. There would therefore be a curtailment of rights.

Act 5 of 1910 section 13(2) reads as follows:

> "Where a law repeals any other law, then, unless the "contrary intention appears, the repeal shall not.... "(c) affect any right, privilege, obligation or liability "acquired, accrued or incurred under any law so repealed".

Prior to the coming into force of Act 38 of 1927 an exempted Native went on appeal from the Magistrate's Court to the Supreme Court and not to the Native High Court, save and except in cases where rights under Native Law are involved (see section 5 Act 49 of 1898) and by forcing him before the Native Commissioner's Court in cases where no rights under Native Law are involved, his accrued rights would be affected. Section 5 of Act 49 of 1898, for some reason or other, has not been repealed.

I do not agree, however, with Mr. Darby when he contends that even in cases involving rights under Native Law to which an exempted Native is a party, the Native Commissioner has no jurisdiction. This to my mind would mean that he would be placed in a better position than he was in when Act 38 of 1927 came into force.

The question arises whether this case involves rights under Native Law. Appellant claims from Respondent £200 in respect of alleged seduction and reserves to herself the right of action in regard to lying-in expenses and maintenance of the child. She herself sues, duly assisted by her guardian. Under Native Law the seduction of a girl gives to her kraal head or guardian, a civil claim in damages against the kraal head of the seducer (section 208 of the Code). The kraal head or guardian did not sue in this case. She elected to sue herself and by so doing she ignored Native custom and adopted Common Law procedure. The usual claim under Native custom is two head of cattle and only under special circumstances may a third beast be awarded. Appellant claims £200 which is equivalent to about 45 head of cattle, and, in addition,

she .....

she reserves to herself the right to claim lying-in expenses, which claim is foreign to Native Law and Custom. The question must therefore, be answered in the negative.

In the case of Natal Native Trust vs. Ngcobo (1928 N.P.D.293) it was held:-

(1) "That Act 38 of 1927, section 31(3) implied a recognition "of the continued validity, after the whole Act had "come into operation, of every letter of exemption "issued under a scheduled law, and that the actual "terms of such letters of exemption must therefore speak "for themselves, there being nothing in the Act to show, "either expressly or by necessary implication, an in- "tention to vary them.

(2) "That the intention of Act 38 of 1927, was that all "pre-existing letters of exemption should continue "valid after the laws under which they were granted "had been repealed by the coming into operation of "Section 36 and notwithstanding this repeal, subject "to the Governor-General's right to cancel them "under section 31(4)."

This case went on appeal to the Appellate Division (1929 A.D. 293) where it was held that the definition of the word "Native" in Law 14 of 1888 is not applicable to Law 49 of 1903, and the word Native in the latter Law does not mean a Native other than an exempted Native but includes exempted Natives as well as unexempted Natives, but otherwise the decision of the Natal Supreme Court has not been dissented from. It is significent that not once has reference been made to Act 38 of 1927 in the judgment of the Appellate Division.

A liberal construction was placed on Law 49 of 1903 by the Appellate Division in favour of the exempted Native and thereby rights were affirmed which it had been sought to deny him.

Matthews, J. in the judgment of Natal Native Trust vs. Ngcobo (supra) aptly remarks in reference to Act 38 of 1927 that "it is a cardinal principle of the construction of any statute that it is not to be interpreted as abrogating or varying a right or privilege granted under a prior statute unless the abrogation or variation is in express language or, unless a necessary implication must be drawn from the language used that an abrogation or variation was intended."

It must be observed that sub-section (2) of section 31 of Act 38 of 1927 empowers the Governor General to grant exemptions subject to any conditions he deems to impose therein. Law 28 of 1865, the law under which letters of exemption were granted, had no such provision. Any curtailment of rights enjoyed by him had to be effected by special legislation, such as the Arms and Ammunition Act, Liquor Law, etc.

Under sub-section (4) of the present Act the Governor-General is empowered to cancel any letter of exemption granted under Sub-sections (1) and (3). This power of cancellation in itself is an express abrogation of rights and privileges and the inference must be that no other abrogation or variation is intended. It will be noticed that a distinction has been drawn in sub-section (4) between letters of exemption granted under sub-section (1) and those referred to in Sub-section (3).

It is true that the definition of the word "Native" under Act 38 of 1927 includes any person, even a European living in a proclaimed Native area under the same conditions as a Native, but this to my mind does not mean that such European would be for ever denied the privilege of a European forum in such area. He may discard his barbaric habits and return to living under civilised conditions.

I think, for the reasons stated above that the Native Commissioner had no jurisdiction.

CASE NO. 9.

ZIBI NYATIKAZI VS. NONGUTSHA BHENGU.

DURBAN. 21st July, 1931. Before E.T. Stubbs, President, F.W. Ahrens and E.N. Braatvedt, Members of the Native Appeal Court (Transvaal and Natal Division).

NATIVE APPEAL CASES - Return of lobolo - Native Divorce Actions - Remarriage - section 169 of Schedule to Law 19 of 1891 - inadequate award of cattle - Costs.

An appeal from the decision of the Native Commissioner at Pinetown.

Appellant sued Respondent for divorce which the Native Commissioner refused to grant. In appeal the Appeal Court ordered that the appeal be sustained, that the divorce be granted and directed the Native Commissioner to make an order in terms of the provisions of section 169 of the Code. The Native Commissioner thereupon having heard the evidence ordered that the Respondent remain under the control of her brother or guardian until she remarries and that upon herremarriage the Appellant is entitled to the return of 5 head of cattle. It was ordered that the child remain in the custody of Appellant. Against this decision appeal is brought. The record discloses that at least 30 head of cattle had been paid as lobolo for Respondent, that the parties had been married for about nineteen years and that the woman on remarriage would be lobola'd for about 8 head of cattle.

It appears from the record that Appellant originally sued Respondent for divorce which the Native Commissioner, Pinetown, refused to grant. His judgment was appealed against and this matter came before the Native Appeal Court on the 14th of October, 1930, when the judgment of the Native Commissioner was reversed. The judgment of the Native Appeal Court on that date was as follows:-

> "The appeal is sustained with costs and the divorce "is granted and the case referred back to the Native "Commissioner to make an order in terms of the "provisions of section 169 of the Code".

The Native Commissioner on the 27th October, 1930, after hearing the evidence of the Respondent made the following order:-

> "That the Respondent remains under the control of "her brother and guardian Sinandi until she remarries. "Upon her remarriage the Appellant is declared to be "entitled to the return of five head of cattle. The "girl Nomambuka to remain with her father, the "Appellant".

The Appellant not being satisfied with the order has again appealed on the grounds set out in his notice of appeal.

It is clear that the Native Commissioner erred when he stipulated that only upon the remarriage of Respondent would Appellant become entitled to a return of the five head of cattle, and in his reasons for judgment he admits that he was wrong "in putting in the word remarriage". In point of fact the words "upon her remarriage" should have been omitted from the order and his judgment should, therefore, be amended accordingly (See Nceda Mapumulo vs. Libazi Mapumulo 1930 N.A.C. (T & N) Vol. II 165.

The question which remains to be decided is whether the number of cattle (viz. five) to be returned is, in the circumstances, adequate? Section 168 of the Code provides that in cases of dissolution of marriage there shall be a return of cattle or their equivalent by the father or guardian of the woman to the husband. Section 169 requires the Court granting a decree of divorce to direct and order the number of cattle to be given back by the woman's father or guardian.

There is nothing in the Code to indicate the number of cattle to be returned, and it seems, therefore, that the matter is left entirely to the discretion of the Court. In such circumstances, the Court must exercise its discretion in a judicial manner and it will, therefore, be necessary to examine the facts in order to ascertain whether the Native Commissioner has exercised a judicial and reasonable discretion in the present matter.

The record discloses that at least thirty head of cattle and probably thirty-five head were paid as lobolo for Respondent. It also appears that the parties were married for nineteen or twenty years, though the Appellant alleges that, according to the evidence in the divorce case, the Respondent lived with Appellant for fourteen years. Unfortunately, we have not now seen the record of the divorce proceedings. The Native Commissioner states that the woman to-day is about forty-five years of age and would be worth eight head of cattle upon remarriage. The divorce was granted on the application of the husband, so that the woman (Respondent) was the guilty spouse. There is one daughter of the marriage alive to-day of whom the Appellant has the custody. The Respondent alleges that there were four other children, all of whom are dead. Appellant states that there was only one child born of the marriage.

Taking all the circumstances into consideration, the award of five head of cattle by the Native Commissioner is, in our opinion, inadequate. The Appellant is entitled to at least ten head of the lobolo paid by him and the Native Commissioner's order is varied accordingly. The appeal is upheld, and as Appellant has substantially succeeded in his appeal he is entitled to the costs.

CASE NO. 10.

ZIBI NYATIKAZI VERSUS SINANDI BHENGU.

Durban, July 21, 1931. Before E.T. Stubbs, President, F.W. Ahrens and E.N. Braatvedt, Members of the Native Appeal Court (Transvaal and Natal Division).

NATIVE APPEAL CASES - Native Divorce Actions - Guardian's liability as to costs - Schedule to Law 19/1891, Sections 166 and 168 - Costs.

An appeal from the decision of the Native Commissioner at Pinetown.

Where in the Court below Plaintiff (Appellant) sued and obtained judgment with costs against his wife in an action for divorce. The woman was duly assisted by her guardian. In pursuance of the judgment the Plaintiff issued a writ of execution

directing the Messenger to attach certain five head of cattle the property of the woman's guardian. The guardian (Respondent) thereupon applied to the Native Commissioner for an order to set aside the writ on the ground that he, as guardian, was not a party to the suit but only assisted the Defendant therein according to Law as guardian ad litem, and that until the divorce was granted the woman (Defendant) was otherwise under the legal guardianship of Plaintiff and the guardian's legal liability in respect of this status as guardian of Defendant under the Code did not arise in Law until the marriage was dissolved by the Court. The Native Commissioner ordered that the cattle attached be released and returned to the guardian. Appeal is brought against the Native Commissioner's order.

It must be presumed from the nature of this application and the remarks of the Native Commissioner that the Appellant sued and obtained judgment with costs against one Nongutsha Bhengu in an action for divorce. Nongutsha Bhengu was duly assisted in that action by her guardian Sinandi Bhengu, the Respondent in this appeal. In pursuance of this judgment the Appellant issued a writ of execution directing the Messenger to attach the property of Respondent. Certain five head of cattle belonging to Respondent were attached, whereupon he applied to the Court of the Native Commissioner for an order to set aside the writ on the following grounds:-

"(1) Applicant was not a party to the suit but assisted the Defendant therein according to Law as a guardian ad litem.

"(2) That until the Divorce was duly granted Defendant was otherwise under the legal guardianship of Plaintiff and Applicant's legal liability in respect of this status as guardian of Defendant under the Code did not arise in law until the marriage between Plaintiff and Defendant was dissolved by the Court."

The Native Commissioner held that the father or guardian of a woman in a divorce suit is not a party to the action and does not become liable for any costs that may be awarded against the woman. He, therefore, ordered that the cattle attached be released and returned to the Applicant (Respondent). The Native Commissioner in making his order relied on the case Johannes Kwela vs. Maria Ndelu 1913 N.H.C. 145. We have been unable to obtain the full text of the judgment in this case and unfortunately the excerpt contained in Bisset and Smith does not deal with this question.

The Plaintiff in the Court below has appealed against the Native Commissioner's order on the grounds set out in the notice of appeal.

In this matter Native Law applies, so that it will be necessary to consider the relative provisions of the Code.

Under Common Law there are exceptions to the general rule that a married woman has not the legitima persona standi in judicio, one of which is that she may sue or be sued unassisted in divorce proceedings. According to Native Law a woman can never have locus standi in judicio unless she be a kraal head. In actions for divorce where she is Plaintiff, it is expressly provided that she must sue duly assisted by her father or guardian (Section 165 of the Code) and it is the duty of the father or guardian to see that the action is instituted, but only after he and the Chief have attempted to reconcile the parties and failed. It seems to us that the father or guardian is bound by the terms of this Section and must

institute the action. It is quite clear that the father or guardian must maintain his daughter pendente lite.

In section 167 provision is made for a woman who is destitute, seeking divorce, or where the relatives whose assistance she could legally claim are absent or refuse to assist. In such case the Court may, upon application, appoint a guardian for the purposes of the case, who shall act in accordance with the provisions of section 166. What is the position where the husband sued for divorce? Section 168 lays down that he must notify his intention to the Chief and father or former guardian of his wife.

There is no express provision requiring the wife to be assisted by her father or guardian where the husband sues. The Code merely provides that he must notify his intention to his Chief, and to the father or former guardian of his wife.

Mr. Shepstone argues that until the divorce has been granted the husband, in such a case, continues to be the woman's guardian and that it is not necessary that she should be assisted in the action by her father.

It is not necessary to decide the point in the present case because the father of the woman was summoned to appear and to assist his daughter in the suit brought against her by her husband, and did so appear. The question for decision is only whether, under such circumstances, he is liable to pay costs.

It must be presumed that the wife is innocent of misconduct until the husband proves her guilty. The point is decided only at the conclusion of the case. As the code does not stipulate that the woman must return to her father's kraal and seek his protection where she is the Defendant in a divorce action it seems clear that she can insist on remaining in her husband's kraal under his protection and guardianship until the conclusion of the case. The words of section 166, viz. "A husband seeking a divorce must notify his intention to his Chief, or to the father or former guardian of his wife", indicates that the law at that stage still regards the husband as her guardian.

In the same section when reference is made to an action instituted by the woman against her husband it is provided that "her father or his representative or her guardian shall etc." In such case her father is regarded as her guardian whereas in a case brought by the husband his guardianship continues until the conclusion of the case.

The Respondent in the present case was cited with his daughter in all probability because section 226 of the Code provides that no civil action can be brought before any Court of law by or against a female (unless she be a kraalhead) except in the name of and as duly assisted by her guardian. The woman's father in a divorce action where she is Defendant cannot be regarded as her legal guardian. He has not been responsible for the woman's misconduct which has taken place while she was under the control and guardianship of her husband. He has been brought into the case merely to supply the legal requirement that a woman must be assisted. It would be inequitable to hold that he would be responsible for costs under such circumstances.

In an adverse judgment against a woman in a divorce action her father, in the ordinary course, would be obliged to make refund of the lobolo cattle. It seems manifestly unfair and unreasonable that he should also be mulcted in costs in respect of a delinquency

on the part of his daughter after she had passed out of his guardianship, and under the marital control of her husband.

The view we take in this matter is supported by the case of Johannes Kwela vs. Maria Ndelu 1913 N.H.C. p.134 which although dealing witha marriage by Christian rites covers the same principle.

The appeal is dismissed with costs. Costs to be calculated on the higher scale.

CASE NO. 11.

NDUNA MAZIBUKO VS. TSHALI ZUNGU.

Durban. July, 22 1931. Before E.T. Stubbs, President, F.W. Ahrens and E.N. Braatvedt, Members of the Native Appeal Court (Transvaal and Natal Division).

NATIVE APPEAL CASES - Jurisdiction of Native Commissioner's Court - Residence and domicile - Act 38/1927, section 10, sub-section 3 - Act 32/1917, Rule 28.

An appeal from the decision of the Native Commissioner, at Durban.

In the Court below Defendant in his evidence stated that his home was in Eshowe, that he paid tax in Eshowe, that he was unmarried, and that his father was his kraalhead. The Additional Native Commissioner dismissed the summons with costs on the grounds that his Court had no jurisdiction to try the case the Defendant not being a resident of the District of Durban. On appeal the Native Appeal Court set aside the ruling and directed the Native Commissioner to take evidence in respect of Defendant's "residence" and to decide on such question of residence and consequent jurisdiction, as "residence" should not be confused with "domicile". When the case was reopened in March, 1931, it transpired in evidence that the Defendant was a police constable in the South African Police, and that he had been stationed at Overport, Durban, since May, 1930. It further transpired that his enrolment was for one year at the end of which he again signs on, and that he last visited his home in 1929. After hearing this evidence the Additional Native Commissioner held that the Defendant was not resident in the Durban District, and that therefore his Court had no jurisdiction to try the case in view of the meaning which appears to have been assigned to the word "residence" in the case of Shonkweni alias Johannes Zikali vs. Joe Zondwayo (1930) 2 N.A.C. (T. & N.) 163.

The Appellant sued Respondent in September, 1930, in the Court of the Additional Native Commissioner at Durban for the sum of £10.18.6 damages for an alleged assault.

Defendant in evidence stated that his home was in Eshowe and that he paid tax in Eshowe, that he was an unmarried man and that his father was his Kraalhead.

The Additional Native Commissioner thereupon dismissed the summons with costs on the grounds that his Court had no jurisdiction to try the case, the Defendant not being a resident of the District of Durban.

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On appeal this Court set aside that judgment and ordered the Native Commissioner to take evidence in respect of Defendant's "residence" and to decide on such question of residence and consequent jurisdiction, as he seemed to have confused residence with domicile (1931 N.A.C. (T. & N.)).

The case was reopened on the 12th March, 1931 when Defendant was again called to give evidence and stated that he was a constable in the S.A. Police and had been since he was enrolled in Durban in May, 1930, in which District he was stationed, viz., at Overport where the summons was served upon him.

He further stated that his enrolment was for one year at the end of which he again signs on and so on each year - that he last visited his home in Eshowe in 1929.

After hearing this evidence, the Additional Native Commissioner held that the Defendant was not a resident of Durban district and, in consequence thereof, his Court had no jurisdiction to try the case in view of the meaning which appears to have been assigned to the word "residence" in the case of Shonkweni alias Johannes Zikali vs. Joe Zondwayo 2 N.A.C. (T. & N.) 163.

Now in that case no meaning was assigned to the word "residence". All that case decided was that on the facts present in the particular case ex facie the record itself, it was clear that the Natives concerned resided in Mtunzini, Zululand, and were in mere casual employment at the Point, Durban, and that therefore in no sense could they be said to reside in Durban for the purpose of giving the Native Commissioner at Durban jurisdiction. Their stay was merely one governed by the exigencies of their casual employment at Durban and no more.

The word "residence" has a variety of meanings according to the statute in which it is used, and is one capable of bearing more than one meaning, and the construction to place upon it in a particular statute must depend upon the object and intention of the Act (Bell's Legal Dictionary 2nd Ed. p.483).

The jurisdiction of a Court of Native Commissioner is territorial, only residence being the test, the place where the cause of action arose not being an ingredient (Karl Montoel vs. Reuben Komane 1930 N.A.C. (T. & N.)), in which case this Court held that a Native Commissioner had no jurisdiction over a Defendant who was merely "temporarily residing" in his district, he having a permanent residence and domicile in another district.

In Brown and Daniel Mongane vs. Stephen Booi (1931 N.A.C. (C. & O.) 1931 (1) P-H R.32) on the other hand it was held that the Court of Native Commissioner in whose district Defendant had been living for eleven years as a member of the Police Force had jurisdiction, notwithstanding that Defendant's kraal and domicile were in the district of Victoria East, in which district too, took place the act of seduction by his son, an inmate of his kraal, in respect of which he was being sued.

De Villiers, C.J. said in Beedle & Co. vs. Bowley 12 S.C.401, "when it is said of an individual that he resides at a place, it is obviously meant that it is his home, his place of abode, the place where he generally sleeps after the work of the day is done".

The fundamental principle contained in section 28 of the Magistrates Court Act 32 of 1917, in which the word "resides" is also used with reference to jurisdiction (see Pattisons Stores vs.

v.d. Venter 1919 C.P.D.21) is, that a person should be sued in the forum of the district in which he resides and not in that of the Plaintiff and that is all that the proviso to sub-section 3 of section 10 of the Native Administration Act 38 of 1927 means.

Shonkweni's case which appears to have caused the Additional Native Commissioner some difficulty, merely decided that mere casual employment in a place does not constitute residence as the word is used in the section.

Stephen Booi's case again was one in which there was permanent employment and long residence.

In this case the sojourn has been (at date of summons) from before May, 1929, (we do not know for how long before) to September, 1930, due to Defendant's employment in the Police Force. The Native Commissioner says that, Defendant being a Police Constable, is liable to transfer elsewhere at any time, and thereby renders his stay at any Police Station one of impermanency.

There is no evidence to support such a statement - our experience is rather to the contrary, i.e. that Native Constables are frequently kept at one station, or at any rate in the same District, for as long as possible.

In any event, it is clear that Defendant's employment is not of a casual nature but is "permanent employment", not necessarily for the rest of his life or for his employer's life, but for an indefinite period terminable by either party (cf.Begbie & Co. vs. Hartman 1925 (T.P.D. 5 P-H A.17), and his employment is certainly not one of a casual or temporary nature, (Langenhorst vs. Hofmeyer N.O. 1927 9 P-H J.24), and this fact alone distinguishes the present case from Shonkweni's.

The question whether a person "resides" in any particular place has to be decided upon the facts in any given case.

In this case the Native Commissioner does not find as a fact that Defendant resides in the district of Eshowe, and from the evidence it is clear that Defendant does not, although his "domicile" may be in that District - Defendant himself even speaks of "visiting" his home at Eshowe in 1929.

If one accepts the Native Commissioner's conclusion that because Defendant is a Police Constable he is liable to transfer elsewhere from Durban at any time, that does not strengthen his argument - one might as well say that because a person is liable to die at any time, therefore he does not reside in the place in which he is living. In any event the question of jurisdiction depends upon whether a person leaves one place for another for temporary purposes or whether he does so to take up permanent residence beyond the district. (Blom vs. Swart 8 E.D.C.105).

If Defendant had actually been transferred about from place to place it would merely have made him a "rover", when it seems he would be subject to the jurisdiction of the Court of the Native Commissioner, Durban, (cf. cases quoted on p.27 Buckle and Jones 2nd Ed. and 24 and 25 Cohen and Blaine).

In our opinion the evidence in this case clearly establishes that Defendant at the time summons was served resided in the District of Durban and that therefore he was subject to the jurisdiction of the Court of Native Commissioner for that District.

The appeal is upheld.

CASE NO. 12.

NKANI LANGA VS. MNAMBITI LANGA.

DURBAN 23rd July 1931. Before E.T. Stubbs, President, F.W. Ahrens and E.N. Braatvedt, Members of the Native Appeal Court (T. & N. Div.).

NATIVE APPEAL CASES - Kraalhead's liability to assist inmates of his kraal with lobolo - Kraalhead under a moral but no legal obligation.

An appeal from the decision of the Native Commissioner's Court at Empangeni.

The matter came before the lower Court as an appeal from a Chief's Court and the Native Commissioner altered the Chief's judgment in favour of appellant for 2 head of cattle, 2 goats, 2 sheep and £6 to one for 2 head of cattle only. The rest of the judgment being set aside for want of sufficient evidence.

In his grounds of appeal to the Appeal Court, Appellant contended that as an inmate of Respondent's kraal he had paid over all his earnings to Respondent as kraalhead; that he was prepared to abandon the money claim but urged that according to custom Respondent should have paid and was liable to pay the lobolo paid by Appellant on the occasion of his first marriage.

At the outset we desire to say that all we have from the Native Commissioner, who tried this case, as his reasons for judgment is the cryptic and anaemic remark: "I gave judgment for the Respondent for these two head of cattle. The rest of the claim failed for want of satisfactory evidence".

Rule 12(1)(b) of the Native Appeal Court Rules is clear and explicit. It reads as follows:-

"(b) The grounds upon which he arrived at any finding "of fact specified in the notice of appeal as "appealed against."

It is abundantly clear from the grounds of appeal that the Native Commissioner has in no sense complied with the rule (supra).

The parties are half brothers, having the same mother, but different fathers. The Appellant is a son of an "ukengena" union. Respondent is the kraalhead. On the marriage of Appellant the Respondent lent him four head of cattle to pay his lobolo. Subsequently Respondent sued Appellant for the four head of cattle and obtained judgment in Chief Mhawu's Court. Appellant thereupon sued Respondent for seven head of cattle and £90. The Chief gave judgment in Appellant's favour for two head of cattle, two goats, two sheep and £6. Respondent appealed to the Native Commissioner who altered the Chief's judgment to one in favour of Appellant for only two head of cattle or their value £9. The

Native Commissioner set aside the Chief's judgment for two goats, two sheep and £6.

In regard to the two head of cattle for which judgment was given by the Native Commissioner, the Respondent himself admits liability for one head, and as far as the second beast is concerned the Chief Mhawu who heard the cases stated that Appellant bought it from him and that subsequently Respondent borrowed it from Appellant in Mhawu's presence and paid it to him (Mhawu) as lobolo.

The Respondent denies the Chief's story, and his witness Johnny Mtiyane corroborates him, but the Native Commissioner had the witnesses before him, and there is no ground for finding that he was wrong in accepting the Chief's evidence. There is, therefore, no reason for disturbing the Native Commissioner's judgment in regard to the two head of cattle.

As for the rest of the claim, the issue is resolved by the Appellant's fatal admission in paragraph (4) of his grounds of appeal, inasmuch as he signifies his abandonment of the claim for money made by the Appellant and relies upon the ground that, according to custom, Respondent should have paid and was now liable to pay the lobolo which Appellant had himself provided on the occasion of his first marriage.

It is clear law that whilst in certain circumstances the kraalhead is morally obliged to render assistance to inmates of his kraal in the payment of their lobolo, he is under no legal obligation to do so.

The appeal is dismissed with costs.

CASE NO. 13.

MAGAYEZWE KANYILE VS. CHIEF SIDUNU KANYILE.

Durban, July 27, 1931. Before E.T. Stubbs, President, F.W. Ahrens and E.N. Braatvedt, Members of the Native Appeal Court (Transvaal and Natal Division).

NATIVE APPEAL CASES - Seduction - Responsibility of a kraalhead for the criminal actions of minor inmates of his kraal - Schedule to Law 19/1891, Sections 73 and 208, reflecting Zulu custom.

An appeal from the decision of the Native Commissioner at Nkandhla.

Appellant, a kraalhead, claimed the release of two head of cattle attached in satisfaction of a fine of £5 imposed by the Chief upon his son for seducing a girl before marriage. The seduction was admitted. The Native Commissioner refused the application. The point at issue was whether at Native Law the kraalhead is liable to pay the fine imposed by the Chief on a minor inmate of his kraal in respect of an offence committed by such inmate. Appellant contended that, as the seducer had been dealt with criminally by the Chief for the act of seduction, he was not liable for his son's criminal act.

It seems to us that the point we have to decide in this case is whether at Native Law the kraalhead is liable to pay the fine imposed by the Chief on the minor inmate of his kraal in respect of an offence committed by such inmate.

The.....

The Zululand Code has been repealed by the Native Administration Act No. 38 of 1927 and there is to-day no Code applicable to Zululand. This case comes from Nkandhla which is in Zululand. We must therefore have recourse to the Native Law of Zululand in determining the point.

The weight of authority is in favour of the view that the kraalhead in the circumstances of this case would not be liable. This view also finds support in section 208 of the Natal Code which we think must be taken to correctly reflect principles of Native Law on the point. It reads: "Seduction of a girl gives to a kraalhead or guardian a civil claim in damages against the kraalhead of the seducer irrespective of any criminal liability of the seducer. This clearly contemplates that the seducer apart from the liability of the kraalhead in a civil claim in damages is liable personally in respect of a criminal action and must personally face the consequences.

In the case before us the seducer was dealt with criminally by the Chief for the act of seduction and a beast the property of the seducer's father (kraalhead) was laid in attachment and the father has challenged the legality of the attachment on the ground that he was not liable for his son's criminal act. Section 73 of the Natal Code lays down that: "Kraalheads are responsible to their Chiefs and to the Supreme Chief for the good conduct of the inmates of their kraals, and are civilly liable for contracts entered into by, and for fines imposed upon, or injuries committed by, and such inmates when acting as their agents, or under their instructions, or for their benefit, whether such inmates are of the kraalhead's family or mere retainers". This again may be regarded as properly reflecting Native Law as obtaining in Zululand. It cannot be argued that the seducer acted as the agent or under the instructions or for the benefit of the kraalhead so as to make the latter liable.

The appeal is sustained with costs.

CASE NO. 14.

JOHN NZALO VS. LYDIA MASEKO.

Pretoria, September 14, 1931. Before E.T. Stubbs, President, C.H. Blaine and C.N. Manning, Members of the Native Appeal Court (Transvaal and Natal Division).

NATIVE APPEAL CASES - Judicial discretion of Native Commissioner to try action by Native Law or Common Law - Breach of Promise - Maintenance of child born out of wedlock - Damages - Costs.

An appeal from the decision of the Native Commissioner at Germiston.

Respondent had lived with Appellant for five years as his wife without concerning herself about marriage. As a result of a quarrel an action was brought for breach of promise and for the maintenance of the child born as the result of their intercourse. The Native Commissioner granted 30/- per month for three months on the claim for maintenance of the child, and costs, and £30 on the claim for damages for breach of promise to marry.

Plaintiff in her summons elected to have the case tried at Common Law. Appeal is brought against this judgment on the ground that the claim should have been dealt with under Native Law, that the woman had no locus standi in judicio, and that the maintenance claim was not in accordance with Native Law, that even under Common Law the amount of 30/- was excessive as maintenance for a Native child, that the award of £30 as damages was excessive, and in view of Respondent's character she has not suffered such damages.

Respondent, a Native woman, sued Appellant in the Native Commissioner's Court for:-

(a) A statement of account in respect of rent of houses alleged to have been collected by Appellant on her behalf or £200.

(b) Maintenance of £4 per month for a child, the issue of their intercourse, and for respondent herself.

(c) £50 damages for breach of promise of marriage.

Claim (a) at the close of the case was withdrawn, but Respondent obtained judgment on 24/2/31 in respect of claims (b) and (c) as follows:-

CLAIM (B):

30/- per month for the months November, December and January and costs.

CLAIM (C):

The sum of £30 and costs.

Appeal has been noted on the following grounds:-

Claim (B).

(1) That the claim should have been dealt with under Native custom and not under Common Law and that

(2) Plaintiff (Respondent) as a woman not assisted by her guardian has no locus standi in judicio.

(3) The award of 30/- per month as maintenance is not in accordance with Native custom and an award of damages only should have been made if the woman could legally bring such claim without assistance.

(4) If the above grounds fail that 30/- per month is excessive for a Native child and should be reduced to 10/- per month or 30/- in all for the three months covered by the judgment.

Claim (C).

(1) That the judgment is against the weight of evidence.

(2) Plaintiff's refusal to return to or marry the Defendant (Appellant) precludes her from obtaining a judgment for damages for breach of promise of marriage.

(3) .....

(3) Under the circumstances disclosed the award of £30 is excessive, as in view of Plaintiff's character and position she has not suffered such damages.

Plaintiff (Respondent) in her summons stated that her claims were based on common law.

The Native Commissioner in his reasons for judgment says that in regard to "B" he heard arguments as to whether this claim should be tried under Common Law or Native Custom and decided to apply Common Law for the following reasons:-

(a) That Plaintiff would have the same remedy under Native custom - under Native Custom only "Sondhlo" could be claimed.

(b) That as the parties had agreed to the other two claims being tried under Common Law, he considered that all the claims should be tried under the same law. Further there was some connection between claims "B" and "C" and that the portion of Claim "A" which claimed maintenance for the Plaintiff (Respondent) herself was withdrawn during the hearing.

In regard to the system of law to be applied - Section 11(1) of Act 38 of 1927 reads:-

"Notwithstanding the provisions of any other law, it shall "be in the discretion of the Courts of Native Commissioners in "all suits or proceedings between Natives involving questions "of custom followed by Natives, to decide such questions "according to the Native law applying to such customs except "in so far as it shall have been repealed or modified" etc. -

In the case Charles Solomon Muguboya vs. William Mutato (1929) 1 N.A.C. (N. & T.) 73; 15 Prentice-Hall R13, it was said that the Native Commissioner has a discretion to choose whether he will try the action by Native law or by common law. If, in his view, by the former the aggrieved party would be without redress, but by the latter would have redress, he should apply the law which provides the remedy.

And in Jacob Ntsabele vs. Jeremiah Poolo (1930) 2 N.A.C. (N. & T.) 13; 15 Prentice-Hall R.62, that the discretion is a judicial one, and should be exercised accordingly.

In the Cape and O.F.S. Division of the Appeal Court it has been held (Nganoyi vs. Mangoloti (1930) N.A.C. (C. & O.); 15 Prentice-Hall R.73), that Roman Dutch Law must be primarily applied and Native Law only invoked in matters peculiar to Native custom falling outside the principles of Roman Dutch Law.

The claims by Respondent in this case are for maintenance of a child of which she alleges Appellant to be the father and for breach of promise of marriage.

Neither of these causes of action necessarily "involve questions of custom followed by Natives" nor are they in respect of matters "peculiar to Native custom".

Natives .....

Natives, too, living in large industrial centres as these do and having become detribalised and adopted standards of living and outlook of the more enlightened classes are to be regarded in a light wholly different to the primitive order of society of the kraal (cf. Jacob Monageng vs. Rebecca Konupi (1930) 2 N.A.C. (N. & T.) 89). (See these cases quoted in Native Courts Practice, pp. 31 and 32, by Blaine and Manning).

This case is for maintenance of a child and for breach of promise of marriage, neither of which causes of action in the circumstances disclosed, involve questions of customs followed by Natives, indeed claims for breach of promise of marriage are unknown at Native Law.

The Native Commissioner in whose discretion the decision lay was, therefore, perfectly entitled to decide the issues before him under common law.

Nowhere is it pleaded or suggested that Respondent is incapacitated from suing in her own name (except because of her being a woman and under Native custom), and incapacity cannot be presumed. Therefore, all grounds of appeal against the judgment in claim "B" fall away, except as regards the amount of maintenance awarded, viz. 30/- per month for a minor child.

The award of maintenance for a child of five for three months at the rate of 30/- per month is no doubt higher than usual in such cases but the Appeal Court will not lightly interfere with an award of damages unless the award is grossly excessive etc. (See cases quoted at p. 55 - Blaine and Manning).

This Court does not consider that the award in this instance - having regard to the circumstances - warrants interference.

The appeal on this claim is therefore dismissed with costs.

In regard to Claim "C", Damages for breach of Promise, it appears that Respondent and Appellant have been living together in Respondent's house as man and wife for the past seven years and have had children, and that about two years ago Appellant asked Respondent to leave her house and come and live in his, saying that he would marry her, but he failed to do so.

From the evidence of a Native Minister, it seems that Appellant decided to remove from Respondent's house as the woman's people were causing trouble.

Respondent did not care to do so, but on Appellant saying he would marry her, she agreed. Appellant failed to keep his promise which was made in June or July 1929 after the parties had been living together as man and wife for five years and had had children.

Ordinarily, the damages awarded to a Plaintiff by reason of breach of promise are general. If, however, there is any specific loss of property or pecuniary disadvantage suffered this will constitute special damage.

Under the head of general damages would come the loss suffered by the Plaintiff by reason of deprivation of the prospective advantages of marriage, i.e. of the expectations of

marriage, including loss of position, wealth or other advantages. (See Law of Damages in S.A. by Nathan and Schlosberg p.178 and Radloff vs. Ralph 1917 E.D.L. 158).

The Plaintiff, in this action lived for five years with Defendant without concerning herself about marriage until after she and Defendant quarrelled and parted company voluntarily as is evidenced by the fact that they divided up the furniture.

The first letter of demand dated 11th November, 1930, was simply for rents and maintenance, and only on the 2nd December, 1930, was a demand made (Exhibit B) for damages for breach of promise of marriage.

Under all the circumstances, we cannot see that the Plaintiff has suffered any damages on account of the breach of promise to marry if there was one, certainly no special damages have been proved.

The appeal on this count is, therefore, upheld with costs and the judgment altered to one of absolution from the instance with costs.

CASE NO. 15.

KOOS PHAKA VS. ELPHIUS MOHALI AND ANOTHER.

Pretoria, September 16, 1931. Before E.T. Stubbs, President, C.H. Blaine and C.N. Manning, Members of the Native Appeal Court (Transvaal and Natal Division).

NATIVE APPEAL CASES - Transfer of venue of trial of action by consent - Jurisdiction of Native Commissioner's Court outside prescribed areas - Act 38/1927, Section 10 sub-section (3) and Section 2, sub-section (2).

An appeal from the decision of the Native Commissioner at Pretoria.

Defendant's case came on for hearing in the Native Commissioner's Court at Nylstroom, District Waterberg, Defendant being described in the summons as being of the Waterberg District. After Defendant's plea and counterclaim were heard and various exceptions and objections taken, the Court adjourned to enable the legal representatives of the parties to discuss the matter of getting the venue of the trial of the action transferred to Pretoria where all documents, accounts, etc., were kept and could be more conveniently produced and at less cost.

The Native Commissioner by consent of parties granted an application for the transfer of the further hearing of the case to the Native Commissioner's Court at Pretoria. The case was duly transferred and heard to its conclusion before the Native Commissioner at Pretoria who granted judgment in favour of the Plaintiff and dismissed the counterclaim with costs. Appeal was thereupon noted.

At .....

At the opening of the hearing before the Appeal Court this Court of its own motion raised the question as to whether the Additional Native Commissioner of Pretoria District had jurisdiction to hear the case in view of the consent of the parties to the transfer of the hearing thither.

The Plaintiffs (Respondents) claimed from Defendant an account, shewing how he had disposed of the proceeds of certain 781 bags of mealies in which they were jointly interested, grown upon the farm de Hoop, 994, District Waterberg, or £307.10.0.

It is alleged in the summons that there was an agreement that Defendant (now Appellant) should sell the crop and with the proceeds pay off a bond on this farm due by Plaintiffs and Defendant to one Lombard.

The case came on for hearing in the Court of the Native Commissioner at Nylstroom, District Waterberg, on 23/6/30, Defendant being described in the summons as of portion 5, de Hoop No. 994, District Waterberg.

Defendant on appearing, through his Attorney admitted a duty of accounting to Plaintiffs, said he had done so, and that as the transaction was not yet closed there was no duty on him to pay over any proceeds. He further claimed to be entitled to set off sums of money exceeding anything that might be due to Plaintiffs.

To this plea and counterclaim various exceptions and objections were taken.

At this stage the Court adjourned, to enable the legal representatives of the parties to discuss the matter of getting the venue of the trial of the action transferred to Pretoria where all documents, accounts, etc., are kept and can be more conveniently produced and at less cost.

The Court eventually granted the application for the transfer of the further hearing of the case to the Native Commissioner's Court at Pretoria, and it came up for trial in the Court of the Additional Native Commissioner, Pretoria, on the 11th August, 1930.

After a very protracted hearing, the Additional Native Commissioner, Pretoria, gave a lengthy judgment in which he thoroughly reviewed all the evidence and gave judgment in favour of the original Plaintiff, dismissing the counterclaims with costs.

Against this judgment an appeal and cross-appeal have been noted.

The first question which obtrudes itself upon one's notice, although it has not been raised by the parties, is whether the Court of the Additional Native Commissioner of Pretoria District had any jurisdiction in the matter, because, if not, such jurisdiction can not be conferred upon it by the consent of the parties (Courts of Native Commissioners being creatures of Statute and deriving their authority from the Statute creating them).

Courts of Native Commissioners are constituted by Proclamation of the Governor-General by virtue of the powers vested in him by Section 10 of the Native Administration Act 38 of 1927.

Sub-section 3 of this Section provides that the Governor-General shall prescribe the local limits in which such Courts shall have jurisdiction, provided that, when the parties to any

proceedings do not both reside in the same area of jurisdiction of any such Court, the Court of Native Commissioner (if any) in whose area of jurisdiction the Defendant resides shall have jurisdiction in such proceedings.

By Proclamation 298/28 dated 14/11/28, Gazette dated 21/12/28 as amended by Proclamation 67/29, Gazette dated 22/3/29 the Governor-General constituted Courts of Native Commissioners for the Districts of Pretoria and Waterberg amongst others.

The local limits of the Pretoria Court includes certain farms in the Waterberg District which fall within the jurisdiction of the Hamanskraal Court. In the same Proclamation these farms are specified and de Hoop 994 is not one of them.

Again, by the same Proclamation the Native Commissioner's Court of Waterberg is deprived of jurisdiction over those Waterberg farms which fall under the Hamanskraal area.

Wherever the Plaintiffs in this case reside (and they too, it seems, reside in the area of jurisdiction of the Court of the Native Commissioner, Waterberg,) the Defendant is described in the summons as of de Hoop 994, District Waterberg, and the evidence establishes that his house and residence is on de Hoop, District Waterberg.

It has been pointed out several times already by this Court that a Native Commissioner derives his jurisdiction as to persons and things from section 10 of the Act, read with the Proclamation prescribing the local limits within which he shall have jurisdiction.

"In regard to persons residing outside the local limits, he clearly has no jurisdiction", e.g. SHONKWENI VS. JOE ZONDWAYO (1930) 2 N.A.C. (T. & N.) 162; 16 Prentice-Hall R.97, and other cases quoted by Blaine and Manning on p. 18, Native Courts Practice.

The proposition that the Additional Native Commissioner, Pretoria, in trying this action was functioning as an officer of the Waterberg Court cannot be sustained in view of the provisions of sub-section (3) section 10 of Act 38 of 1927. Again Additional Native Commissioners may only preside over Courts assigned to them by the Minister in terms of sub-section (2) section 2 of the said Act.

The Additional Native Commissioner, Pretoria, had no jurisdiction to try this action and this Court of its own motion is therefore entitled to take cognizance of the defect and should do so.

The proceedings before the Native Commissioner, Pretoria, and his judgment are void as a civil action between Natives, but as the parties consented to his hearing their disputes, possibly the proceedings before him may be held to be perfectly valid as an arbitration and we trust his decision will be accepted as such an award by the parties, without the necessity of the same being made an order of Court.

As the Native Commissioner had no jurisdiction to try the action, his judgment is of no force and effect and must be set aside in toto, including the Order of the Acting Native Commissioner, Waterberg, transferring the case for further hearing to the Native Commissioner's Court for the District of Pretoria.

There will be no order as to costs.

CASE NO. 16.

SOMFONGO NGCOBO VS. MZENZE NGCOBO.

DURBAN. 14th October, 1931. Before E.T. Stubbs, President, H.B. Wallace and J.T. Braatvedt, Members of Court.

NATIVE APPEAL CASES - Native Custom - lobolo loaned to assist younger brother in obtaining a second wife - obligation of kraal-head -absence of public declaration at time of loan - costs.

An appeal from the decision of the Native Commissioner at Ndwedwe.

Appellant sued respondent for the return of 16 head of cattle being cattle loaned to Respondent to pay lobolo of Respondent's second wife. The parties were brothers, Appellant being the heir to the Estate of their late father. Appellant stated in evidence that he paid lobolo for Respondent's first wife. He was not claiming the return of the cattle for the first wife but laid claim to a return of the cattle paid for the second wife. From the evidence it is clear that there was no public declaration at the time the payment was made that an obligation had been laid on the house established to repay the loan.

In this matter the Appellant sued the Respondent in the Court of Chief Mandhlakayise for sixteen head of cattle, being cattle loaned to Respondent by Appellant to pay the lobolo of Respondent's second wife. The Chief gave judgment for Respondent and Appellant took the matter on appeal to the Native Commissioner, Ndwedwe who dismissed the appeal with costs. The Appellant, still not satisfied, has now noted an appeal to the Native Appeal Court. No grounds of appeal are set out in the notice; the Attorney for Appellant states merely that "the Appellant, who was not represented by Counsel in your Court, appeals against the whole of the judgment". It is unfortunate that he has not done so as the Appeal Court has no knowledge beforehand of the points which will be raised on the hearing of the appeal. The attention of Appellant's Attorney should be directed to the case Gabriel Nkomana vs. Joel Moeketsi 1930 2 N.A.C. (N. & T.).

All that can be done at present in this case is to discuss the points raised in the pleadings and evidence.

After a careful perusal of the record we have come to the conclusion that this is a matter which must be decided on credibility of evidence, but there are certain legal aspects which must be considered.

The parties are brothers, Appellant being the heir to the estate of their late father. He (Appellant) states in his evidence that he paid lobolo for Respondent's first wife. He is not claiming the return of the cattle but says, "I am claiming the lobolo on the second wife". His evidence to say the least of it is scrappy, and it is difficult even after reading it carefully to gather exactly what Appellant is claiming. In his summons he claims sixteen head of cattle. At the commencement of the action in the Court of the Native Commissioner he said his claim was for thirteen head of cattle and £3, and later in evidence he stated that he claimed seven head of cattle and £40. Simakade, Chief Mandhlakayise's induna says that Appellant claimed eight head of cattle and £40 - this agrees with the claim in the summons. At that trial Appellant was unable to bring any evidence to support his claim. On being asked by the Chief who was present when he (Appellant) paid out the cattle on behalf of the Respondent, Appellant stated that his two witnesses Menzwamkulu and Singololo

were.....

were both dead. He added however that his wives knew of the payment. These women on being called by the Chief denied all knowledge of the matter. They gave similar evidence before the Native Commissioner. The three brothers of the parties, Sinkwasomtu, Mkehlungana and Mangadila, were not told by the Appellant when he made the alleged payment of lobolo. It is significant that the only two persons who he says knew of the transaction are dead.

The legal position appears to be that if a kraal head pays the lobolo for the second or subsequent wife of a younger brother he may recover the amount paid. Section 139 of the Code provides that the kraal head is under an obligation to assist the male inmates of his kraal in the matter of lobolo for their first wife, and it has been held that any such lobolo paid by the kraal head is not recoverable unless there is a public declaration to the contrary at the time that the lobolo was paid.

In the present action there is no proof that Appellant assisted the Respondent in the payment of lobolo for the latter's second wife. The probabilities are against his having done so in view of the fact that he did not inform the inmates of his kraal at the time and publicly declare that the payment was a loan and would have to be returned.

For this reason alone the Appellant cannot succeed and the appeal is dismissed with costs.

CASE NO. 17.

MHAMBI MBOKAZI VS. NOMAKATANGA KUMALO.

DURBAN. 16th October, 1931. Before E.T. Stubbs, President, H.B. Wallace and J.T. Braatvedt, Members of Court.

NATIVE APPEAL CASES - Native customary union - Validity of marriage - presumption - lobolo - section 4 Zululand Code.

An appeal from the decision of the Native Commissioner at Mtunzini.

In this matter plaintiff in the Chief's Court (now Appellant) sued Respondent for eleven head of cattle being the dowry of his sister, Nengiwe, who was born after the death of Appellant's father when Nengiwe's mother was living with Respondent. Respondent admitted having received the dowry but alleged that he was entitled to it as she was born while he was married to her mother. The Chief gave judgment in favour of Appellant for the cattle claimed. Defendant the present Respondent then appealed to the Native Commissioner. It appeared from the record that Nengiwe's mother left Respondent after a quarrel and that before that time Nengiwe had gone to live at Appellant's kraal. It was clear from the evidence that Respondent paid no lobolo for Nengiwe's mother. Appellant contended that the marriage of Nengiwe's mother to Respondent was not a valid customary union and that therefore Nengiwe's dowry should have reverted to him and that the living of Nengiwe's mother with Respondent could not have raised presumption of marriage.

The Native Commissioner after hearing evidence for both parties reversed

the Chief's judgment and entered judgment for Respondent with costs. Against this judgment the Appellant has noted an appeal. No grounds have been stated in the noticebeyond that "the judgment is against the law and the evidence" but since then a full statement of the grounds of appeal has been put in and filed of record.

It is common cause that Mbuyiseni, father of Appellant, married Cwayeni and that she, Cwayeni, gave birth to Nengiwe some time after the death of Mbuyiseni (how long after is not very clear from the record); that when Cwayeni gave birth to Nengiwe she was living with Respondent; that some considerable time after this Cwayeni and Respondent quarrelled and Cwayeni left him; that before they separated Nengiwe left Respondent and went to live with Appellant - (Respondent says "I admit the girl grew up at your - Appellant's - kraal. She left me before her mother and went to live at your kraal)" and that Cwayeni subsequently married Mjikijelwa who paid five head of cattle as lobolo for her. Nengiwe had married and Respondent received her dowry. It is this dowry which is the subject matter of this dispute.

Appellant alleges that when Cwayeni went to live with Respondent she was pregnant by her late husband and that it was very soon afterwards that she gave birth to Nengiwe. Respondent says Cwayeni had been living with him for three months before she became pregnant and the woman herself states it was eighteen months after she went to live with Respondent that she gave birth to Nengiwe. The Native Commissioner accepted this statement and I see no reason to disagree with the Native Commissioner's finding. Cwayeni is the mother of the child and should know better than anyone when she became pregnant.

Regarding the question as to whether there was a marriage between Respondent and Cwayeni the latter in her evidence states "I was not divorced from Respondent. There is no necessity for a divorce if no wedding has taken place. I merely lived with Respondent when my husband died". She admits however that Respondent paid £10 in cash to Appellant for her. Appellant denies having received this amount. The Native Commissioner in his reasons for judgment says "It appears fairly certain that lobolo was paid for her, but it is uncertain but not conclusive that a marriage ceremony took place, the presumption is in favour of marriage". It is not clear how he arrives at this conclusion in view of his finding of facts. He is not convinced that lobolo was paid and he apparently finds that the evidence shows that there was no marriage ceremony rather than that one took place. He is very indefinite on these most important points, and yet he says "the presumption is in favour of marriage". In this we cannot agree with him. The only fact which can possibly support the Native Commissioner's contention is that the Respondent and Cwayeni lived together for a number of years. But this in itself does not justify the Court in coming to the conclusion that proof of that fact raises a presumption of marriage. This may be a rule of Common Law in certain circumstances, but here we are dealing with Native law. In Jim Nsele vs. Ndabambi Sikakane (1929) 1 N.A.C. (N. & T.) 123 it was held that the main essentials of a marriage where the woman is marrying for the first time are:-

1. The right of the woman's father or guardian to claim lobolo.

2. The consent of the woman's father or guardian.

3. The holding of a marriage feast.

Section 4 of the Zululand Code provides that it is essential to the marriage of a widow ..... that in addition to some consideration the official witness shall publicly enquire from her as to her free consent to the proposed marriage at some time between the engagement of the husband to the intended wife and the marriage. In Jim Nsele vs. Ndabambi Sikakane (supra) the Court

went....

went on to say that for some unexplained reason no steps were taken by the Zululand Administration to enforce the provisions of the Code and marriages continued to be regulated in accordance with unwritten Native Law under which the essentials of a marriage are the same as stated above in respect of a woman marrying for the first time. The further provisions of the Code in regard to such a marriage were (a) the presence at marriage of duly appointed official witnesses and (b) the registration of the marriage. The Court also held that it was not possible for the Natives of Zululand to observe these last two essentials owing to such official witnesses not having been appointed by the Government. In the present action the woman whose alleged marriage is in issue was a widow when she went to live with Respondent. Therefore it would seem that all that need be proved in order to show that a valid customary union existed between Respondent and Cwayeni is that "some consideration" passed between Respondent and Appellant. No doubt this means payment of lobolo. From the wording of the latter part of the section, however, we have no doubt that something more than mere payment of dowry must take place. The words "at some time between the engagement of the husband to the intended wife and the marriage" pre-suppose that some public declaration of the fact of the intended marriage has been made i.e. that the fact is known at least to the members of the families concerned.

It is clear from the evidence that the woman went of her own accord to live with Respondent, presumably without the knowledge of her guardian or relatives. In any event, we are not satisfied that Respondent paid any lobolo - his evidence on this point is very unsatisfactory - and the probabilities are against any such payment having been made, in view of the fact that when he alleges he paid the £10 the woman was then living with Mjikijelwa, who had already paid five head of cattle for her. In the circumstances we think the Native Commissioner was wrong in reversing the Chief's judgment. There is an overwhelming weight of evidence in support of the Chief's judgment which should, we think, be restored.

The appeal is allowed with costs. The judgment of the Native Commissioner is set aside and the Chief's judgment restored.

CASE NO. 18.

FALAZA NKIKE VS. NKWEBU TUNSI.

PIETERMARITZBURG. 22nd October, 1931. Before E.T. Stubbs, President, H.B. Wallace and J.T. Braatvedt, Members of Court.

NATIVE APPEAL CASES - Damages for adultery - section 209 of Schedule to Law 19 of 1891 - Detention in Leper Institution - Costs.

An appeal from the Native Commissioner at Himeville.

Plaintiff claimed from the Defendant the sum of £15 damages for adultery alleged to have been committed by Defendant with Plaintiff's wife during the time the latter was under detention as a patient at a Leper Institution. After having heard Plaintiff's evidence and without hearing the Defendant, the Native Commissioner dismissed the claim with costs, relying on section 209 of the Code, in that no action lay as Plaintiff and his wife were living apart at the time the alleged adultery took place. This Court is called upon to decide whether the Plaintiff would be entitled to succeed in an action against a person alleged to have committed adultery with his wife during his enforced stay at a Leper Institution.

This matter comes in appeal from the Court of the Native Commissioner at Himeville, wherein the Plaintiff claimed from Defendant the sum of £15 being in respect of damages for adultery

alleged.....

alleged to have been committed by Defendant with Plaintiff's wife, during the time the latter was under detention as a patient at the Amatikulu Leper Institution.

After Plaintiff had concluded his case the Native Commissioner, without calling upon the Defendant to give evidence informed the Plaintiff that no action lay as he and his wife were living apart at the time the alleged adultery took place, and relying on the provisions of section 209 of the Schedule to Law 19 of 1891 he dismissed the claim with costs.

It is from this decision that the Plaintiff now appeals on the following grounds:-

"The Native Commissioner wrongly dismissed Plaintiff's claim against Defendant with costs by holding that section 209 of the Schedule to Law 19 of 1891 precluded him from succeeding in his action".

The Native Commissioner's reasons for judgment are as follows:-

"The parties being Natives subject to Native Law, the Court refers to section 209 of the Schedule to Law 19 of 1891 and dismisses the claim with costs".

It seems fairly obvious from the Native Commissioner's findings of fact at paragraph 5 that he has not found as a fact that Defendant had committed adultery with Plaintiff's wife; properly, then, his judgment should have been one of absolution from the instance. But as he elected to take his stand on section 209 of the Code this Court is called upon to decide whether the Plaintiff (now Appellant) would be entitled to succeed in an action against a person alleged to have committed adultery with his wife during his enforced stay at the Leper Institution.

The Native Commissioner has held that as Appellant was not living with his wife at the time the alleged adultery was committed, he is not entitled to succeed.

Section 209 reads as follows:

"Any Native committing adultery with a married woman living with her husband shall, irrespective of any criminal liability, be liable in civil damages against the kraal head of the injured husband: Provided that upon proof of the connivance of such husband, no such civil action will lie".

It is clear that when the alleged adultery between Defendant and Appellant's wife took place, Appellant and his wife were not actually living together. His absence from his home was one enforced by the authorities because he happened to fall a victim to a malady (leprosy) which necessitated his removal under Law or Regulations for detention at an Institution. The circumstances in which his conjugal relationship with his wife was suspended were entirely beyond his control. Such being the case can it be said that if the wife during his enforced absence became a prey to the wiles and guiles of the Defendant seeking to play the role of husband to her, he is without remedy?

It is true to say there are at the present time tens of thousands of Native husbands in Zululand and Natal engaged in service at the various Mines and other centres of industry away from their kraals, whose wives have remained at home and there is not as between them a living together in the physical sense. Are their wives therefore at liberty to commit adultery with any man that may happen along? Are their husbands to be denied any recourse to Law? Would such denial not be tantamount

to .....

to opening the door to immorality? Is this Court to say that living with a husband virtually means that his wife must be "chained" to him and, should he be absent from his kraal say for a few nights only, and his wife during such absence happens to commit adultery with another man he is without remedy?

If the answers to these questions are to be in the affirmative a premium would be placed on adultery which is still a crime under Native Law and an absence of the husband in the circumstances detailed above would place the wrongdoer beyond the pale of the law both civilly and criminally: to us an impossible proposition!

The enforced absence of Appellant at the Leper Institution for curative treatment was but temporary. There was no intention that the true relationship between him and his wife should be broken and there is no evidence on the record that their relationship was interrupted by any disagreement or other indication of an intention to live apart. On the contrary, Emma continued to live in their home in the kraal of her husband's father.

We think it is reasonable to find that Plaintiff (Appellant in this Court), owing to his temporary absence from his kraal in circumstances over which he had no control was at least constructively still living with his wife and is therefore entitled to succeed in an action for adultery on the part of his wife, if proved against the adulterer.

The appeal is upheld with costs. The judgment of the Native Commissioner is set aside and the case is referred back to him to be tried out.

CASE NO. 19.

MZIYONKE MNGADI VS. MQANJELWA MNGADI.

PIETERMARITZBURG. 22nd October, 1931. Before E.T. Stubbs, President, H.B. Wallace and J.T. Braatvedt, Members of Court.

NATIVE APPEAL CASES - Allocation of daughters by kraalhead - Native custom - legal effect of such allocation.

An appeal from the decision of the Native Commissioner at Mapumulo.

Appellant is the eldest son and heir to his late father's Estate. Respondent is his brother. It is alleged by Respondent that their sister's property rights were allotted to him before his father's death.

Appellant as the eldest son and heir disputed this and obtained judgment in his favour for nine head of cattle before the Chief.

In appeal to the Native Commissioner's Court the judgment was reversed. Appellant now appeals the lower Court's judgment on the grounds that the alleged allocation was not public as required and was therefore not legal according to Native Law.

The parties in this case are brothers. The matter originated in the Court of Chief Madwata Mabaso. In that Court the Appellant sued Respondent for certain nine head of cattle being the lobolo paid for Mqini, the sister of the parties,

which.....

which the Appellant claims by reason of the fact that he is the eldest son and heir to their late father. The Chief gave judgment in favour of Appellant and Respondent appealed to the Court of the Native Commissioner, who after hearing evidence upheld the appeal and reversed the judgment of the Chief. It is against the Native Commissioner's judgment that the present appeal has been lodged.

It appears that the late Mkondo, father of the parties, had two sons (the parties) and three daughters one of whom is named Mqini, whose lobolo is the subject of this dispute. It is alleged by Respondent that Mkondo during his lifetime allotted the eldest daughter Tofoza to the Appellant and Mqini to Respondent, the third daughter remaining unallotted.

After perusing the record and the Native Commissioner's reasons for judgment we have come to the conclusion that there is ample evidence to support the Native Commissioner's finding that the late Mkondo, allotted Mqini to his son the Respondent.

The question which must now be discussed is: What is the legal effect of such an allotment? There appears to be no doubt that the custom of allotting girls to their brothers was and is recognised and observed by Natives in Natal and Zululand. In the case Habana vs. Dulela 1900 N.H.C. 17 where the father of the parties had three sons and five daughters, all being of the same house, and in which he allocated three daughters to his eldest son and one each to his younger sons, it was held that it was competent for a father to make such an allocation. The father was of course merely indicating the sources from which each of his sons might expect to get cattle and was not dealing with any girl as a chattel. In Matshuba vs. Fogoti 1908 N.H.C., Boshoff, J. at page 16 says "I have found that..... it has been the law in Zululand for so far back as can be remembered for a father to allocate his daughters to his sons" and in Rolindaba vs. Mdinwa 1922 N.H.C.31 it was ruled that the Appellant was entitled to the lobolo of his full sister unless there were some strong grounds to show that she has been allocated or awarded to someone else. The conclusion which one must draw from this decision is that a daughter may be allocated to some person other than the heir, but that the burden of proof is on the person alleging such to be the case.

In view of these decisions there is no doubt that the property rights in a girl - not the girl herself - may be allotted by a kraal head to his younger son. However in the event of a dispute arising, in regard to such allotment, between the heir and younger son, the onus is on the latter to prove the allotment. We are satisfied that the younger son, in this instance the Respondent, has discharted the onus.

The Native Commissioner is clear and definite in his finding upon the facts and we see no reason for disturbing his judgment. The appeal is dismissed with costs.

CASE NO. 20.

WILLIAM MAGUGA VS. INGWANE SCOTCH.

PRETORIA. November 1931. Before E.T. Stuss, President, J.M. Richards and F.W. Ahrens, Members of Court.

NATIVE APPEAL CASES - Native Law - Inheritance - Heir liable for debts of deceased contracted before death - not opposed to principles of public policy and natural justice.

An appeal from the decision of the Native Commissioner at Sibasa.

Plaintiff

Plaintiff instituted an action against Defendant for £197. 4. 6 being an amount alleged to have been paid to Defendant's late father for Plaintiff's four sisters and which amount was wrongfully and unlawfully appropriated by Defendant for his own use instead of paying it over to Plaintiff's father or to Plaintiff, who was the heir to the estate. Plaintiff succeeded substantially as the claims on the lobolo for three sisters were granted in his favour. Appellant (Defendant) lodged an appeal against this decision on the grounds that the judgment was against the weight of evidence and bad in law, in that the matter was decided upon the Lative Law of Inheritance which Law is opposed to the principles of public policy and natural justice. Appellant contended that he could not be made liable for debts incurred by his deceased father before his death where he (Appellant) did not consent or reap any benefit, and maintained that the deceased's creditors should have been limited to the assets in the Estate. Appellant further contended that if the Court found that according to Native custom the eldest son as heir was responsible then such a custom or Native Law is opposed to public policy and natural justice notwithstanding the proviso to section 11 of Act 38/1927. The parties were members of the Tshangaan tribe.

Mr. Heather, Counsel for the Appellant, in his able and interesting address to the Court maintained that the judgment is against the weight of evidence and bad in law, in that the matter was decided on the Native law of inheritance, which law, he states, is opposed to the principles of public policy or natural justice. His contention is that the Appellant could not be made liable for debts incurred by his deceased father before his death where he did not consent or reap any benefit - although admittedly the heir. He admits that in so far as he has benefited he would be liable. He maintains the deceased's creditors should be limited to the value of the assets in the estate. He further contends that, if the Court finds that according to Native custom the eldest son as heir is responsible for all the debts of his father, then such a custom, he submits, is opposed to public policy and natural justice, notwithstanding the proviso to section 11 of Act 38, 1927.

The parties to this case are members of the Tshangaan tribe in the Zoutpansberg District (Transvaal). In Natal in the case of Msutu vs. Bovela, 17 N.L.R. 357, it was decided that an heir was only liable to the extent of the property he had received from the estate. This decision was followed in the case of Mhlengwa vs. Mhlawuli, 1920 N.H.C. 30 - when it was finally decided that an heir is only liable for the debts of the deceased in so far as he has received property from the estate to cover the same.

As regards the law in Zululand, a contrary decision was given in the case of Mbili vs. Zinyongo - 1917 N.H.C. 128 - wherein it was held that under section 41 of the Native Code of 1878, which is applicable to Zululand, it is clear that an heir's liabilities are not limited to the value of the assets in the estate. As this contention has since been affirmed in the case of Ntulizwe vs. Komfi - 1921 N.H.C., 6, which decision went in appeal to the Appellate Division where it was held that even if defendant had not inherited from his father's estate he would nevertheless be liable as heir for his father's debts. Solomon J. in the course of his judgment stated "The law is certainly a very harsh one, but that is no ground for not enforcing it". We entirely agree with this view.

This clearly affirms the doctrine of universal succession recognised and practised by most of the Bantu tribes in this country. Harsh though it may be in its implications and results as has been indicated in argument by Mr. Heather. Yet it should

be.....

be observed that it is not always so for the heir succeeds to the Kraal property including wives and daughters which if numerous represents considerable wealth from the Native view point. We feel as with his Lordship Mr. Justice Solomon that until some modification is brought about by legislation - and this seems to be contemplated by section 116 of the Draft Proclamation amending the Natal Native Code which includes Zululand, appearing under Government Notice No. 1796 of the 6th November, 1931,- the law, as at present existing, should be enforced.

It must, however, be borne in mind that this contemplated modification applies only to the Natal Province, so that this custom as far as concerns the Natives of the Transvaal stands.

It may be further observed that the doctrine of universal succession acquires practical importance in its application to the question of the transmission of liabilities. It is certain that Native Law in evolving the conception of universal succession, which was destined to dominate the whole field of the law of inheritance, started from this very question concerning the debts of the deceased. For if on a man's death, his property is distributed piecemeal, a grave question arises as to what is to happen to his debts. The doctrine of singular succession must endanger the rights of those who have claims against the inheritance. But where the whole mass of rights and obligations passes in its entirety to the heir, the matter stands very differently. If there is but one heir he will take the whole estate subject to its liabilities.

It is most characteristic of the Native law of inheritance that the view was adopted that the heir must be made answerable for the debts of the deceased, if necessary, with his own property. The heir was made answerable in the same manner as though he had contracted the debts himself or to put it more plainly he was made answerable in the same way as though he were the deceased himself. The personality of the father passes to that of his heir.

The above applies more particularly to Zululand yet this Court is aware that this doctrine of universal succession applies to the Tshangaan as well.

We therefore come to the conclusion that if it can be shown that the deceased (Scotch Ngwashongeni) received lobolo for the sisters of Respondent the Appellant his son and heir, is liable for such lobolo to the former.

We feel that as the Native High Court and the Appellate Division have accepted this custom in the decisions above referred to, that we cannot hold that the same is contrary to public policy in that it is opposed to natural justice and equity.