SELECTED DECISIONS

of the

NATIVE APPEAL COURT

CAPE and O.F.S.

1933

(Official)

Vol. 5

AKADEMIES- INLIGTINGSDIENS
TYDSKRIFTE
UNIVERSITEIT VAN PRETORIA

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- S E L E C T E D D E C I S I O N S -

of the

- N A T I V E A P E A L C O U R T -

-(CAPE AND ORANGE FREE STATE DIVISION)-

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VOLUME V.

CASE NO.1.

MAKELENI ZABA v NDLALENI FANA.

BUTTERWORTH, February, 1933, Before R.D.H. Barry Esqr., President, Messrs. E.F.Owen and W.F.C. Trollip, Members of the N.A.C. (Cape and O.F.S. Division).

Desertion of wife and subsequent adultery - Claim for damages - Claimant's dilatoriness in taking steps for the return of his wife disentitles him from claiming the full measure of damages for the adultery.

(Appeal from the Court of Native Commissioner, Kentani.)

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This is an action in which the Plaintiff (Respondent) sued the Defendant for damages for having committed adultery with Plaintiff's wife, Nodambile. The defence set up was that although the woman was at one time Plaintiff's wife, he abandoned and drove her away seven years ago.

Judgment was entered for the Plaintiff in terms of his prayer, and against this decision the Defendant has appealed, broadly, on the grounds embodied in the plea and, finally, that the award is excessive and Plaintiff should only have received nominal charges.

From the record it appears that seventeen years ago the Plaintiff twalaed Nodambile, paying to her father four cattle. They lived together as husband and wife for many years and during this time Nodambile bore the Plaintiff five children, four of whom have died. Nodambile's father died comparatively recently.

There is a conflict of evidence as to when Nodambile left the Plaintiff. She states it was seven

years.../

years ago, and the Plaintiff alleges it was only four years. Further, it is alleged for the Defendant that one beast was tendered to the Plaintiff in case there was doubt as to the existence of a marriage, and thus to mark its dissolution. The Plaintiff denies this tender but it is clear that such a beast was driven to the Plaintiff's kraal and back again during his absence, but that he neither refused nor accepted the tender. The mere fact that the tender of this beast was attempted to be made, serves to contradict the main defence that marriage no longer subsisted between Plaintiff and Nodambile.

The intercourse by the Defendant with Nodambile which was at first denied, was subsequently admitted by the Defendant, and he then admitted to having told an untruth on this point. He contended that he had married the woman not knowing that she was another man's wife. His credibility is seriously shaken by his admitted prevarications, and in some respects this Court is not prepared to believe him. He lives in the Location adjoining and the probability is that he must have known that the woman had been living with and had borne children to the Plaintiff over a period of from ten to thirteen years. He never paid dowry for Nodambile, nor were any formalities in connection with a marriage observed. The belated tender of a beast to mark the dissolution of the marriage of the Plaintiff and Nodambile - a marriage which the defence maintained was already dissolved - was evidently merely designed to thwart the Plaintiff's claim.

Coming to the last ground of appeal, this Court is of opinion that the Plaintiff has been guilty of neglect in the matter of asserting his rights to his wife. She has been away from him for a long period of years, and the reasons he gives for not having taken active or effective steps for her return, are unconvincing. He was aware that the woman was living in adultery with the Defendant and took no steps until after her pregnancy had supervened.

Moreover, the probabilities are that he realised that he would have secured no material advantage by suing for the return of his wife or the dowry paid for her, seeing that the number of children she had borne to him exceeded the cattle paid away. This may have contributed to his dilatoriness in the matter.

In the circumstances, the Court considers that the Plaintiff has disentitled himself to the full measure of damages he has claimed.

The appeal is allowed with costs, and the judgment in the Court below altered to one for Plaintiff for one beast or £5, and costs of suit.

Case No.2.../

-CASE NO.2.-

SIPELELE MAGABI v MDABENI MAHOLWANA.

BUTTERWORTH, February, 1939. Before R.D.H.Barry, Esqr., President, Messrs. E.F.Owen and W.F.C. Trollip, Members of the N.A.C. (Cape and O.F.S. Division).

Native Custom - Seduction - Plea of Ukutwala when girl had been a willing party - Measure of damages - Costs.

(Appeal from the Court of Native Commissioner, Nqamakwe).

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The Respondent (Plaintiff) sued the Appellant in the Court below for two cattle or their value £10 for the abduction and seduction of his unmarried daughter Jessie Lena.

The Defendant denied abducting the girl but admitted having seduced her and that for this act he tendered one beast - which tender the Plaintiff admits having received and rejected.

Against a judgment for the Plaintiff as prayed, the Defendant has appealed on the ground that the judgment is contrary to Native Law and Custom in that the facts found to be proved do not in Native Law and Custom constitute "Ukutwala".

Jessie's mother, Magamase, states that as her daughter was wanting medicine, she allowed her to go to Ezolo for the purpose of obtaining the same. She stayed from home that night and next morning early Magamase searched and found her daughter at the kraal of one Mtiki with the Defendant. It is common cause that the girl slept there that night with Defendant and was then seduced by him. Jessie states she met Defendant by arrangement in the veld and that the Defendant took her to Mtiki's. On her own evidence the girl was a willing party, as she admitted she had written to the Defendant often and in one letter made an appointment.

The Defendant's version is that having got that letter he met Jessie and suggested she should go to her aunt. Apparently she did not go to her relative but returned to her home. He goes on to say she wrote again and then stated she was going to get medicine and it would be all right. It was as a result of this letter that the parties met at Mtiki's kraal.

The Native Commissioner has found this to be a case of Ukutwala as well as seduction and awarded

one beast in respect of each offence.

The circumstances of the case having been put to the Native Assessors, they are unanimously of the opinion that an act of twala did not occur, and further, but with one dissentient, state that the Plaintiff is not entitled to two beasts as damages, but only one.

In this case the Plaintiff sued definitely for two beasts as damages - the one for twala, and the other for the seduction without resultant pregnancy, and this Court is not prepared to say that he should be awarded damages in a greater measure than he claimed for under the head of seduction.

That being so, and in the light of the opinion of the Native Assessors, the judgment should have be for one beast or five pounds.

The appeal is allowed with costs and the judgment of the Court below altered to one for Plaintiff for one beast or £5 - the Defendant (Appellant) to pay costs to date of tender, and the Plaintiff (Respondent) to pay the balance of the costs.

- CASE NO. 4 -

- JACOB XAKUMBANA v JACOB TANASI.-

UMTATA, March, 1933. Before R.D.H.Barry Esqr., President, Messrs. H.G.Scott and E.W.Wilkins, members of the N.A.C. (Cape and O.F.S. Division).

Chief's Court - Appeal to Native Commissioner - Omnia praesumuntur rite esse acta - G.N. 2255/ 1926 paragraphs 7 and 8.

(Appeal from Court of Native Commissioner, Umtata.)

The Appellant (Defendant) is the heir and grandson of the late Tanasi in the great house, and Respondent is the heir of Tanasi in the Qadi house.

From the record it appears that four daughters were born to the Qadi house, and that one of these females, although never married, had two daughters and a son named Hambafuti.

The Plaintiff has been away from his home on and off for years at a time, and he claimed from the Defendant in the first instance forty cattle as having been paid for these girls and also damages for one Hambafuti.

The.../

The dispute between the parties has been a protracted one, and appears to have been discussed by the members of the family, then at a hearing by headman Lupuwana, and thereafter before the legally constituted Court of Chief David Jongintaba. Before the latter Court the hearing was also greatly prolonged and, according to the Chief's judgment, the parties themselves had come to an agreement that the Defendant would pay the Plaintiff eight cattle and that all other claims by each party against the other would be waived. The Chief's Court thereupon gave judgment for the eight cattle.

From that judgment the case was taken on appeal to the Court of the Native Commissioner, who dismissed the appeal and confirmed the judgment for eight cattle. The case has now come on appeal to this Court on the following grounds:-

(1) That Plaintiff, whose several claims against the Defendant amounted to 40 head of cattle, entirely failed in his evidence to establish any liability on the part of the Defendant in respect of such claims.

(2) That Plaintiff alleges that the Chief's judgment was based upon a judgment given by Headman Lupuwana for eight head of cattle, said to have been based upon an alleged agreement but in this respect the Plaintiff is flatly contradicted by the Chief, who alleges that Lupuwana's judgment was based upon a consent for 15 head of cattle.

(3) That in view of this conflict of evidence there is insufficient proof that Defendant ever consented to a judgment for eight head of cattle; moreover, there is an entire absence of evidence of the basis of such alleged consent or liability.

(4) That as soon as an appeal was lodged by Defendant to the Native Commissioner's Court, Umtata, against the Chief's judgment, the action became one to be determined de novo, and the onus was upon Plaintiff to prove Defendant's liability in respect of the several claims set up by him (Plaintiff).

(5) That the Chief's evidence is inconclusive as he did not produce to the Court any record of the proceedings before him or any notes, original or otherwise, of the same.

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

(7).../

(7) That the Plaintiff failed to establish any claim against Defendant under Native Custom.

In the Native Commissioner's Court it was held that the Omnia praesumuntur rule applied to the proceedings in the Chief's Court, but that the presumption was rebuttable.

In the opinion of this Court this ruling is in conflict with Sections 7 and 8 of Government Notice No. 2255 of 1928, because in the present case, which came on appeal from the Chief's Court the Native Commissioner had to determine whether the agreement between the parties, and which formed the basis of the judgment, was in fact entered into.

By applying the omnia praesumuntur rule, the onus was wrongly transferred to the Defendant to prove a negative, whereas rule 8 makes it clear that when the particulars of the case, Defendant's reply, judgment and reasons for judgment are in the Native Commissioner's hands, he has to deal with the case not only as a Court of appeal, but he is required by rule 8 to hear and determine the case as if it were a case of first instance. That being so the onus in this case was on the Plaintiff to prove to the Native Commissioner's Court/ that the agreement upon which he based his claim in the Chief's Court was actually come to.

The appeal is allowed with costs and the judgment in the Native Commissioner's Court is set aside; the record is returned in order that the parties may have an opportunity of leading evidence in regard to the alleged agreement as if the case had come before the Native Commissioner as one of first instance.

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- CASE NO: 5 -

-TIWANE LUMKWANA v QELANI LUMKWANA -

UMTATA, March, 1933, Before R.D.H.Barry Esqr., President, Messrs H.G.Scott and E.W.Wilkins, members of the N.A.C. (Cape and O.F.S. Division)

Spoliation - Nqoma - Precarium - Person "Nqomaing" stock has no right to remove cattle out of possession of the person to whom they were "nqomaed", without knowledge or concurrence of the latter.

(Appeal from the Court of Native Commissioner, Mqanduli).

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The parties to this spoliatory action are brothers, and from the record it appears that the Defendant (Appellant) placed certain cattle and sheep with the Plaintiff. The cattle have been with the plaintiff over a period of some years, and during that time the Plaintiff has had the control and use of the cattle for milking and ploughing purposes, and has reported to the Defendant the deaths of some of the cattle placed with him.

The cattle were registered for dipping purposes in the name of the Defendant, but too much importance should not be attached to this fact, because cattle admittedly the Plaintiff's property have also been registered in the Defendant's name. The Plaintiff says he provided the Defendant with money with which to pay the dipping fees as he had the use of the cattle.

It is common cause that when all the cattle at the Plaintiff's kraal were taken to the dipping tank, they were driven by the Plaintiff's herd boy and he would join, en route, the Defendant's boy with other cattle in the Defendant's possession, and together they would drive all the cattle to the tank. On the return journey the boys parted, each with his particular lot.

On a certain day the Defendant took possession of the 18 cattle in question on the veld without the knowledge of the Plaintiff, and this fact was reported to the Plaintiff by his herd.

The Defendant says he did this at the request of the Plaintiff who came to his kraal some days before and that although the Plaintiff was asked for the reason of his wanting the cattle taken away, he declined to offer any explanation. This in itself is difficult to believe for, as Plaintiff says, it is unlikely he would do such a thing seeing he had the use of the cattle.

The Plaintiff denies that he went to the Defendant's kraal as alleged. In support of the allegation the Defendant denies that, including his wife, who was in the hut at the time, he was with Balelo and Mdindwa at the stock kraal when Plaintiff came.

There is a discrepancy between the statements of the Defendant and his witnesses. The Defendant states that after making his request, the Plaintiff sat down and they indulged in friendly conversation, whereas both Balelo and Mdindwa say that as soon as Plaintiff asked the Defendant to take the cattle, he left the kraal. Then again Balelo says that Mjantyi was in company with the Plaintiff, but this Mjantyi denies and, as already pointed out, the Plaintiff denies ever having gone to the

Defendant's.../

Defendant's kraal to ask him to fetch the cattle.

In view of these discrepancies and the improbability of the Defendant's story, this Court is unable to come to the conclusion that the Plaintiff did, in fact ask Defendant to remove the cattle. Further, such alleged action on the part of the Plaintiff is inconsistent with his subsequent conduct, for when the removal was reported to him at Mqushekwana's kraal, he announced the fact to the men, then went to the dipping Foreman to find out what the matter was. He says he also reported to the Headman and he did not delay in bringing his action.

The record discloses that latterly there had been friction between the members of the family and, in such circumstances, it is the more likely that the Plaintiff would not go out of his way to ask the Defendant to take cattle which had not been in his(Plff's) possession for a number of years, but rather that the Defendant would have possessed himself of the cattle in the manner alleged by the Plaintiff.

The circumstances under which the cattle were in the lawful possession of the Plaintiff, approximates the ngoma custom and is akin to the contract of precarium. The stock is lent only during the pleasure of the lender and can be redemanded at any time (vide Ngangomhlaba Sigcau v. Sahluka Tunda, 1931, N.A.C,) but it is not competent for the owner to remove the cattle out of the possession of the person they were nqomaed to without the knowledge and concurrence of the latter.

The Defendant has a vindicatory action if his request to have back his cattle is resisted by the possessor, but he cannot surreptitiously enforce any legal rights he may consider himself to be possessed of.

The judgment requiring the cattle to be restored to the Plaintiff is, in the opinion of the Court, the proper one and the appeal is dismissed with costs.

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- CASE NO. 6 -

- JILINGISI ZIQUKWANA v. SMIT TYALITI.-

Umtata, March, 1933. Before R.D.H.Barry, Esqr., President, Messrs. H.G.Scott and E.W.Wilkins, members of the N.A.C. (Cape and O.F.S. Division).

Marriage - Death of husband shortly after - Desertion of wife prior to death of husband - Claim for return of dowry paid - Tembu custom.

(Appeal.../

(Appeal from the Court of Native Commissioner, Ingcobo)

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The Plaintiff (Respondent) in his capacity as heir of the late Ntengento Tyaliti, sued the Defendant for the restoration of seven cattle, or their value, which were paid by Ntengento to the Defendant as dowry for his daughter Nomakalane. Ntengento died immediately after his marriage, and it is on this ground that the Plaintiff, his heir, claims the restoration of the dowry paid.

The number of dowry paid is not in dispute, but the Defendant pleaded that the Plaintiff was not the heir of Ntengento, that Ntengento died about three months after his marriage and denied that Plaintiff was entitled to the dowry - Nomakalane not having re-married.

Against a judgment for the Plaintiff as prayed, the Defendant has appealed on the grounds:-

(1) That the judgment is contrary to Native Law and Custom in that the widow of the late Ntengento has not contracted a second marriage and, consequently, no second dowry has been received for her and, therefore, the first dowry is not returnable.

(2) That the judgment is against the weight of the evidence and the probabilities of the case.

The Assistant Native Commissioner has found that Plaintiff is the heir and is entitled to institute this action. It appears that the late Mankayi had only one house and that his wife bore him three children viz: (1) Ncanyiwe (2) Tyaliti and (3) Tongani Mankayi. Ncanyiwe had two sons by a man named Dubula. The elder of these is Tubeni, who is alive, and Ntengento, who married the Defendant's daughter.

The Defendant is the son of Tyaliti and his contention is that his sister was never married to Dubula and, consequently, Ntengento was illegitimate.

The Defendant maintains that as Ntengento and Nomakalane had no issue, the proper person to sue is Dubula.

This Court is not prepared, on the evidence, to differ from the finding that the Plaintiff is entitled to maintain the action. The evidence for the Defendant on this point is inclusive and the whole history of the parties suggests that no marriage

between.../

between Dubula and Nomkalane was ever entered into. The Plaintiff's uncle, Tongani, is well qualified to give evidence on the point and he is emphatic that no marriage took place. Dubula caused Ncanyiwe's pregnancy twice. He paid damages for the first seduction but not for the second - as a result of which Ntengento was born. From the time she became pregnant the second time, she lived at Plaintiff's kraal until her death and Ntengento also lived and died there. Dubula has been absent ever since he caused Ncanyiwe's pregnancy and, presumably, his whereabouts is unknown.

Coming to the question as to whether the Defendant is liable for the restoration of the cattle, the parties are agreed on the following points:-

(a) That Ntengento was married towards the end of August, 1931, and died towards the end of October, 1931.

(b) That Nomakalane absconded from her husband's kraal shortly before his death and while he was still ill, and has not since returned.

The Assistant Native Commissioner has come to the conclusion that the whole of Nomakalane's conduct would seem to indicate that she was dissatisfied with her husband and had no intention of returning.

The circumstances of the case having been put to the following Native Assessors:-
Longden Sotyato (Engcobo) H. Nonkwelo (Ngqeleni), E.C.Bam (Tsolo), Mgudlwa Dudumayo (Mganduli) and Candilanga Makaula (Umtata)

they state:-

"Tembu custom, Pondomisi and Pondo custom is that when a woman leaves her kraal whether a bride or on being rejected by her husband, if she does not return, the custom is that the dowry is to be restored.

For a bride, as in the present case, a beast should be kept for the marriage outfit. She must return to her husband's kraal and must not live at her people's kraal. Her guardian cannot keep her and her dowry. A beast should only be deducted according to the time the woman was at her husband's kraal, and in this case she spent no time at her husband's kraal.

It happens, but it is not the custom, that a woman can bear a son as her late husband's heir. It might be that owing to the negligence of the husband's people in not getting her back that she remains with her people until she gets a son. If that happens that son would be heir of the husband

Page .../

had no male issue prior to that son. He cannot inherit if he is born at the kraal of his mother's people. This is not Pondomisi custom - the son would have to be born at his father's kraal and cannot come walking from another kraal. Under Pondo custom he cannot inherit any estate at all.

"The heir should make an effort to get his mother back and if he does not,he cannot claim his cattle. If he asks for the woman and she does not return, then he asks for his cattle. The heir has not to wait until the woman re-marries in order to get back the dowry paid."

While this Court does not, for the purpose of this case, consider it necessary to indicate its concurrence or otherwise in all the expressions given by the Assessors, this much is clear that in this case they are of opinion that, according to Tembu custom, the Plaintiff is entitled to the return of the dowry paid less one beast for the marriage outfit, and that no allowance of another beast need be made in respect of the use of the woman, seeing she was with her late husband for such a short [illegible] while and abandoned him very soon after their marriage.

The record does not show that the Plaintiff as a first step endeavoured to get the woman back, but this Court agrees with the Assistant Native Commissioner that it is clear from the record that the woman left her husband with no intention of ever returning. She left him when he took ill and within two months after their marriage, and since her husband's death her conduct has been such that it is safe to conclude that whether she is fetched or not, she will never again return to her husband's kraal.

There is no cross-appeal on the number of cattle awarded or ordered to be deducted.

The appeal is dismissed with costs.

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-CASE NO:7 -

- GIQONGO VANE v. MAMADUNA MALAHLA.-

Umtata, March, 1933. Before R.D.H.Barry Esqr., President, Messrs. H.G.Scott and E.W.Wilkins members of the N.A.C. (Cape and O.F.S. Division).

Judicial cognizance - In arriving at findings on fact Judicial Officer may take cognizance

of the.../

of the reasons previously given by Superior Court in same action for accepting or rejecting testimony of witnesses.

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(Appeal from the Court of Native Commissioner, Umtata).

The special plea to the effect that the Plaintiff is the wife of the Defendant having been overruled and thereafter the merits having been gone into, the Additional Native Commissioner entered judgment for the Plaintiff for

(a) Nine head of cattle or their value £3 each.
(b) One calf or value £1:10:0.
(c) Twenty-six goats or value 10/- each.
(d) Five sheep or value 10/- each. Also one box, one pot, two mats and one barrel or value 11/-: Defendant to pay costs.

In his plea dated 8th July, 1932, the Defendant admitted having in his possession four cattle, one box, one pot, two mats belonging to the Plaintiff and tendered them to Plaintiff.

The Defendant has now appealed against the judgment given in the following terms:-

The following are the portions of the judgment appealed against:-

(1) Against that portion of the judgment awarding five head of cattle and one calf to the Plaintiff (the Defendant having admitted liability for the balance of four head of cattle.)

(2)Against the portions of the judgment awarding twenty-six goats, five sheep and one barrel to the Plaintiff.

(3)Against that portion of the judgment awarding the costs of the action to the Plaintiff.

The grounds of appeal are as follows:-

(a)That the judgment is against the weight of the evidence and the probabilities of the case.

(b)That the Judicial Officer in delivering judgment stated that in arriving at his findings on fact, he was influenced to a

great.../

great extent by the remarks made by the Native Appeal Court in a written judgment by such Court delivered on the 30th June, 1932, in a matter between the same parties, when a judgment of this Court declaring the Plaintiff to be the wife of the Defendant, was over-:ruled.

(c) It is respectfully submitted that the written judgment of the Native Appeal Court, above referred to, was not part of the record of the case, which came before this Court for decision, and that the Judicial Officer erred in referring to it and that he further erred in allowing it to influence his judgment on the evidence adduced in this case.

(d) That the Defendant suffered irreparable prejudice in the conduct of his case by reasons of the fact that the Court intimated that it could not believe the Defendant in preference to the Plaintiff, for the reason that the Native Appeal Court, in its written judgment above referred to, had declared the Defendant to be unworthy of belief.

(e) That the matters in issue in this case were quite separate and distinct from the issue, in respect of which the Native Appeal Court delivered its judgment aforesaid, and it is submitted that this Court was bound to weigh the evidence adduced before it and decide on the facts, without reference to the remarks of the Native Appeal Court, on the question of credibility of evidence.

(f) That on the evidence adduced, it is respectfully submitted that judgment should have been entered for the Plaintiff for the cattle and other articles tendered in the plea and that in respect of the balance of the claim, a judgment should have been entered in favour of Defendant.

(g) That on the question of costs, costs subsequent to the date of the plea, should have been awarded to the Defendant.

As regards ground of appeal (b) (c) (d) and (e) the Additional Native Commissioner does not dispute that he was influenced in his findings and weighing of the evidence by the judgment of this Court on the special plea put forward by the Defendant to the effect that the Plaintiff was his

wife.../

wife.

On this point the Appeal Court came to the conclusion that the woman's testimony should be accepted in preference to that of the Defendant and gave its reasons for coming to this conclusion. It is now contended that the Judicial Officer should not have taken cognizance of the written judgment of this Court as it did not form part of the record, and his mind was influenced adversely to the Defendant.

In the opinion of the Court this contention is untenable. The case came on appeal on a previous occasion, and up to that stage all the evidence was largely directed to the question whether or not the Plaintiff was the Defendant's wife. This Court decided that they were not married and the record was returned to the Court below and the case proceeded.

A Judicial Officer's judgment in a case and his reasons for judgment form part of a record, and the judgment of the Appeal Court in the same action must, logically also form part of the record. The Judicial Officer was bound by the judgment and in adjudicating upon the case at the subsequent hearing it is difficult to see why he should not take judicial cognisance of the previous judgment given.

This Court is entitled to be influenced by a Native Commissioner's reasons for judgment and comments on the evidence, and so, too, is the Judicial Officer entitled to take cognisance of the whole of the record with all rulings and reasons for rulings given in the course of the hearing, and to apply the doctrine "omnia praesumuntur contra spoliatorum" which, in the light of the evidence adduced by the Plaintiff, was for the Defendant to rebut.

The appeal on these grounds must fail.

Coming to the main issue - the Plaintiff has given a detailed account of her acquisition of twelve cattle and one calf born lately. Of these she admits she herself sold three, excluding the calf, and judgment was entered for the balance. The Defendant tendered four but this offer was rejected.

The case is one of credibility and a careful analysis of the evidence and the reasons for judgment lead this Court to the conclusion that the judgment for the four cattle tendered as well as the balance of five and one calf, should not be disturbed.

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The Plaintiff did not get judgment for the horse claimed as it was proved that it had died from natural causes. The Defendant has admitted liability in respect of one box, one pot and two mats. The Additional Native Commissioner, however, entered judgment also for five sheep, twenty-six goats and the barrel claimed, and this Court is not prepared to say that he has erred.

Having come to these conclusions, the appeal against the order as to costs falls away.

The appeal is dismissed with costs.

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-CASE NO: 8 -

- MTSHUNTSHU FUNWAYO v. SOMDONI GIDIYANA.-

LUSIKISIKI, March, 1933. Before R.D.H.Barry Esqr., President, Messrs. N.W.Pringle and F.L.Osman, Members of the N.A.C. (Cape and O.F.S. Division).

> Native Custom - Practice in Headman's or Chief's Court: If an award is made and the stock is removed from the Defendant's kraal (even if the headman or Chief's messenger accepts less than was awarded) the debtor is relieved from all liability.

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(Appeal from the Court of Native Commissioner, Bizana).

The Plaintiff (Respondent) sued Defendant for twelve cattle or their value. The Plaintiff and Defendant are admittedly the heirs, respectively, of the late Gidiyana and Funwayo. The Plaintiff's sister, Ntombiyeza, was brought up at Funwayo's kraal and there given in marriage twice. The first husband is said to have paid six dowry cattle but the Defendant states only four were received by Funwayo.

It is common cause that the second dowry consisted of six cattle and that these had increase of four, so that according to the Plaintiff there are sixteen cattle involved and according to the Defendant fourteen.

The late Gidiyana married the late Funwayo's sister (Defendant's father's sister), but never paid dowry and Plaintiff alleges that it was agreed between their respective fathers that Funwayo

was to.../

was to receive six cattle out of Ntombiyeza's dowry in view of the failure of Gidiyana to pay any dowry for his wife.

The dispute was brought before sub-headman Mjixwa and the Defendant states that the sub-headman decided that the Defendant was entitled to six of the ten cattle he received as dowry for Ntombiyeza, that four were to be handed to the Plaintiff and that the increase of four were to be retained as compensation for the care and maintenance of the girl.

The Plaintiff admits receiving the four cattle and, whereas the Defendant contends that this was a final settlement, the Plaintiff takes the view that he accepted the cattle only as an instalment.

The Native Commissioner gave judgment for Plaintiff for ten cattle less one beast for maintenance of Ntombiyeza or £45.

The grounds of appeal have been set out at considerable length and contain much that is mere argument. The main ground is, broadly, on the facts and the probabilities. Then a first alternative ground is put forward in the following terms:-

> "It is contended that the Defendant is, at least, entitled to retain out of the dowry of Ntombiyeza one beast for maintenance: four head of cattle sacrificed by him for her, six head (or five head as the case may be) being balance of dowry due for Nozicoto and, as it is admitted that fourteen head (including progeny), have been received and that Defendant had before issue of summons delivered four head to the Plaintiff, the Plaintiff's claim is extinguished."

This is followed by a second alternative to the effect that the Plaintiff having elected to proceed with his claim before a headman, under Native custom, and having been awarded and accepted four cattle, the Defendant is freed from further liability.

The Native Commissioner has found that four and not six cattle were paid for Ntombiyeza, and this Court sees no reason to differ from that conclusion.

On the main question the Judicial Officer ruled that the onus was on the Defendant to prove that the agreement alleged in the plea had been entered into and, on the evidence, he held that the Defendant had

failed.../

failed to discharge the onus and awarded the Plaintiff ten dowry cattle, less one for maintenance. He also concluded that four or five cattle had been paid by Gidiyana as dowry for Funwayo's sister, Nozicoto.

To deal with the fourth ground of appeal first. In this connection it is clear that the dispute was in the first instance brought to a sub-headman for settlement. He gave a decision, the exact terms of which are disputed. It is admitted that the Respondent accompanied the sub-headman's Induna to the Appellant, and that the latter paid over four cattle in terms of the award and that these were accepted by the Appellant. The Appellant states he accepted the four cattle but intimated his dis-:satisfaction.

In the case of Bixongolwana and Lisayi vs. Ntaka (5 N.A.C. 78), the Native Assessors, in an almost parallel case, stated:-

(1) "When a case is heard by a chief or headman and judgment is given, if the successful party kisses his hand, this constitutes an acceptance of the award in his favour. If he is dissatisfied he does not kiss the hand but states he is appealing.

(2) "If the chief or headman sends a messenger (Msila) to carry out the order, the messenger is not the successful party's agent, but remains the messenger of the chief or headman.

(3) "As soon as the stock is removed from the kraal of the judgment debtor by the chief's or headman's messenger, the debtor is relieved of all further liability, even if the messenger accepts less than the amount awarded.

A careful consideration of these opinions leads to the conclusion that if a party is dissatis-:fied with the judgment of a chief or headman he does not accept it but intimates his intention of appealing, i.e., taking his case to a chief of higher rank, or to a duly constituted Court.

If, however, an award is made and the stock removed from the Defendant's kraal, then the debtor is relieved from all further liability. This view is strengthened by the further expression of opinion that even if the Headman's messenger accepts less than the amount awarded, the debtor is, nevertheless, relieved of further liability.

These.../

These rules of Native Law are of general application and the object aimed at is to put an end to disputes. In this case the Plaintiff himself took his case to the sub-headman's court - he never announced that he was going to appeal to a higher authority against the judgment given he went with the sub-headman's messenger to the Defendant's kraal and there took delivery of four cattle in terms of what the Defendant states was the judgment given and he then removed the cattle in question to his own kraal.

In these circumstances the Plaintiff is permitted to retain the four cattle paid to him, but the Defendant is relieved of all further liability in the matter.

Having come to this conclusion, it is not necessary to deal with the further grounds of appeal. The appeal is allowed with costs and the judgment in the Court below is altered to one for Defendant with costs.

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- CASE NO:9 -

FANNY NOMATSHAKA & OTHERS vs. NCOBO MPLOKONYWA.

KOKSTAD, March, 1953. Before R.D.H.Barry Esqr., President, Messrs. D.S.Campbell and W.H.P. Freemantle Members of the N.A.C. (Cape and O.F.S. Division).

Procedure: New defence raised on appeal which was not pleaded in the Court below. Admission in Court below: effect of Dictum: An admission once made should not be allowed to be withdrawn unless it is clear that it had been made through a bona fide mistake, and that no prejudice will be occasioned to the other party. Native custom: allotment - Donatio mortis causa - Gift to daughters - Proclamation 143/1910 paragraph 8.

(Appeal from the Court of Native Commissioner, Mt.Frere.)

The Respondent, Plaintiff in the Court below, sued the Defendant and her husband Shadrack Nomatshaka, to whom she was married in community of property, and also in his individual capacity, for the restoration of certain twenty cattle, twenty sheep and ten goats or their value, alleging:-

(1).../

(1) That he, Plaintiff, is the duly appointed heir of the late Mhlokonywa Nkushubana in the Great House, and that the first Defendant, who is married in community of property to Shadrack Nomatshaka, is his sister in the same House.

(2) That about the 19th March, 1932, the Defendant unlawfully took possession of the stock claimed and which the Plaintiff inherited from his late father.

(3) That she drove the said stock to her kraal where she and her husband detain and refuse to hand them back to the Plaintiff.

With the concurrence of the Plaintiff, Nelson Sineke, Jane Nkushubana and Harriet Nkushubana were joined as co-Defendants.

In their plea the Defendants admit that the Plaintiff is the appointed heir of the Great House of Mhlokonywa Nkushubana, but contend that as the stock was allotted to Fanny during her late father's life time, the Plaintiff is not entitled to have the stock returned to him.

Against a judgment for the Plaintiff as prayed with costs of suit, the Defendants have appealed on the following grounds:-

(1) That the judgment should not have been entered for Plaintiff, who, although placed in the Great House as heir, is not in fact heir.

(2) That it transpired during the hearing of the case that the appointment of Ncobo was irregular as no ground whatever was given at the meeting in 1926 at which he, Ncobo, was appointed, for the disinhersion of his elder brother Befile.

(3) That allotments are made by the kraal head in consultation with his Great wife and the heir of the Great House (MFANEKISO v SIKADE N.A.C. 5 p. 171).

(4).../

(4) That if Ncobo's appointment is held to be valid, then as it was only made in 1926 he, as heir, could take no part in an allotment made in 1923.

(5) That the late Mhlokonywa refused to consider Befile as his heir. Why then, should the allotment made by him be invalidated because Befile was not consulted? Befile himself has taken no steps regarding these allotments.

(6) That the Native Commissioner erred in regarding the document "B" as the allotment, whereas it is only evidence of the allotment.

(7) That the Native Commissioner also erred in his statement of opinion that allotments cannot be made to individuals and that the position was affected because the stock remained at Mhlokonywa's until after his death.

In the case of MAGADLA v. MAGADLA, N.A.C. Vol. 3 p. 28, an allotment was made to a son and it was stated that an apportionment by the father does not divest him of the dominium and is intended to create an estate which would be inherited on the father's death; this was an allotment to a son, not a house.

(8) That allotments are made in different ways, depending on circumstances, e.g., the allotment made in the case quoted in the Magistrate's reasons of GOBENI v. GOBENI (not reported) was not according to custom; when a native wishes to marry according to Christian rites he makes an allotment of his stock without consulting anybody, i.e., under Proclamation 142 of 1910; this was done by the late Mkence and the document containing a record of the allotment made by him was produced in the case of RWIBI v. MTSHOLOZI & ANOTHER, heard in the Native Appeal Court in March 1932 (not reported).

(9) That the object of the custom of the family gathering is to have witnesses in the event of any dispute later. In this case the allotment is not denied.

Nelson Sineke has intervened as representative of his mother, who also received an allotment of stock from Mhlokonywa; Jane Nkushubana joined as co-Defendant in her capacity of widow of Mhlokonywa's great house as having inherited the stock of her deceased daughters, Maggie and Sophia, both of whom were also allotted similar numbers of stock by the late Mhlokonywa; Harriet Nkushubana also

contends.../

contends that her father allotted to her certain stock during his life time.

As regards the allegation by Jane Nkushubana, there is nothing on the record to show that she did in fact inherit the property of her daughters Maggie and Sophia.

It is common cause that:

(1) Mhlokonywa married four wives by Native Custom.

(2) That by his Great Wife, Jane, he had six daughters but no son.

(3) That the Plaintiff is the duly appointed heir of the Great House.

(4) That on the 2nd August, 1923, Mhlokonywa signed a document before his Attorney in which he purported to make gifts of stock to his daughters of the Great House.

(5) That in making such "gifts" of the great house's property Mhlokonywa consulted only his great wife but not the male members of his family.

(6) That no son was ever born in the Great House.

Two documents, the authenticity of which has not been challenged, were put in by consent as evidence. The first of these is dated 22nd February, 1926 and was written by one Albert Dabula. By this document Mhlokonywa assigned to Tana, his son in the third house, the hut of Mapike so that after his (Mhlokonywa's) and Mapike's death, Tana could look after the family but not touch anything without consulting that family as he himself was doing, and that it should be under Tana's control. To Befile was assigned Magwadana's hut on terms similar to those imposed in the case of Tana. And to the Plaintiff he assigned Mambewu's hut on the same terms.

The document shows that all the members of the family, both male and female, were present when it was drawn up.

The second document was drawn up in the office of the late Mhlokonywa's Attorney and is dated the 2nd August, 1923. According to this instrument Mhlokonywa states that he is registering in writing that he has that day made the "gifts" of stock to his six daughters and finally, he states that if there is no male issue in the Qadi house of the first house, he wishes Stanford Ncobo (Plaintiff) the eldest son in the second house, to be his heir, and that the other male in the second house,

Befile, is an illegitimate son by a man named Meje.

In this Court argument was first heard as to whether grounds (1) and (2) of the Notice of Appeal should be allowed to be urged on appeal.

It is clear from Paragraph (2) of the particulars of claim that the Plaintiff alleged himself to be the duly appointed heir of the late Mhlekonywa in the chief hut, and that this contention was definitely admitted in the plea to be correct. When evidence was recorded it was stated for the defence that the Plaintiff was not in fact the heir.

In the Court below no application was made for an amendment of the plea and as issue had been joined thereon, the hearing proceeded on the pleadings as they stood.

While it is permissible in certain circumstances to raise an issue on appeal that was not pleaded in a lower Court, this Court will not lean towards such procedure if by doing so prejudice will be occasioned to the other party and especially if an appellant had every opportunity of raising such new defence in the trial Court, but failed or neglected to take steps in that direction as provided by the rules.

In this case there was a clear and definite admission of fact by the Defendants. In the case of Odendaal vs. De Groen, O.P.D., 1922, it was held inter alia, that an admission once made should not be allowed to be withdrawn unless it was clear that it had been made through a bona fide mistake. Further, in the case of LANGA vs. KONKOTA 5 N.A.C. 115, the case of a Defendant being justified in withdrawing his first plea and submitting another was considered. That case is in point in dealing with the present one and there it was stated that while wide powers of amendment are conferred upon the Court by the Proclamation, it appears that admission made by the Defendant may only be withdrawn when the Court is satisfied that they were made by a bona fide mistake and that their withdrawal will not prejudice the Plaintiff to an extent, which cannot be compensated by an order as to postponement, costs or otherwise.

The same judgment goes on to say:-

> "There is also nothing whatever to explain why the new defence was not raised ab initio and, indeed, it would be difficult to suggest any unless it be that it was an afterthought, which would not be a valid ground."

Now,.../

Now, it is quite apparent from the evidence for the defence that they were well aware of this new ground of defence even before the case was brought into Court and, moreover, the new defence desired to be raised at this late stage in this Court amounts to a direct contradiction of the first plea filed and upon which issue was joined.

For these reasons the appeal on grounds (1) and (2), amounting to a new ground of defence, are allowed.

As regard the remaining grounds of appeal, the parties are agreed that the simple point to be decided is whether the allotments of stock by the deceased, as contained in the document drawn up in the office of the Defendant's Attorney, are valid.

This document is unique in its draftsmanship.

(1) It is designated a "Registration of gifts".
(2) It is then regarded as a registration of allotments.
(3) It possesses some of the characteristics of a record of a donatio inter vivos, a donatio mortis causa and a last will and testament.

In the case of (1) and (2) there are lacking essentials, the absence of which render the document invalid and which it is not necessary to discuss. But it seems clear from the pleadings and the evidence that the Defendants really regard the document as a registration of allotments made to them by their father and the Court must decide whether the allotments have been made consistently with the customs of the tribe to which the parties belong.

The parties to the suit are aboriginal natives living in a communally occupied tribal location. The father of the parties was a polygamist and, as such, established four separate houses.

It is common cause that in making these alleged allotments the deceased was dealing exclusively with property appertaining to his great house - of which the Plaintiff is the acknowledged heir.

The circumstances under which the allot-:ments were made are definitely in conflict with accepted native custom.

(1) There was no meeting of all relatives concerned.
(2) The male members of the family were absent.
(3) It was drawn up secretly.
(4) It amounted to the virtual ousting of the heir without his knowledge of what was taking place.

(5).../

(5) It had the effect of depleting and distributing the estate of the great house.

(6) It was a distribution of estate stock among girls, which is entirely contrary to Native custom.

The document purporting to make these allotments seems to have been designed to circumvent the provisions of Section 8 (as amended) of Proclamation No. 142 of 1910 - the principles of which were perpetuated by the Native Administration Act 1927.

In the opinion of this Court the allotments were improperly made and in a manner altogether inconsistent with Native Custom and, as Native Custom must govern the deceased's actions in this connection, /for/ it follows a fortiori, that/the reasons given and in view of the judgments in the cases of FANEKISO vs SIKADE (5 N.A.C. 178), and MTSHOLOZI and DUTSWEYINI vs. RWIBI (1932 N.A.C. 23), the appeal must fail.

The appeal is dismissed with costs.

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- CASE NO: 10 -

- SAJINI WELA v KONGOLO MTEKELI.-

Kokstad, March, 1933. Before R.D.H.Barry Esqr., President, Messrs. D.S.Campbell and W.H.P. Freemantle, members of the N.A.C. (Cape and O.F.S. Division.)

Application to condone late noting of appeal - Attorney's mistake - Rule 6 Government Notice No. 2254/1928 - Interpretation of Rules - Genuine misconception as to the correct rule to be followed.

(Appeal from the Court of Native Commissioner, Matatiele.)

In this case the Assistant Native Commissioner entered judgment for the Plaintiff, (Respondent), in respect of a horse or its value £5. Both parties laid claim to the horse and the case turned upon the identity of the animal.

The Defendant has appealed on the facts but as the judgment was delivered on the 22nd December, 1932, and the appeal was not noted until the 14th January, 1933, Rule 6 of the Appeal Court rules has not been complied with.

The Appellant has now made application for the condonation of the breach of the rule and in

support of his request his Attorney of record states under oath that he was under the genuine impression that Rule 3 (2) of Order 1 of Proclamation No.145 of 1923 governed the period within which appeals from judgments of Native Commissioners' Courts in these Territories to this Court had to be noted. The Respondent does not oppose the granting of the application.

It has been repeatedly laid down by this Court in numerous occasions, as far back as 1929, when this Court was constituted, that the rule relied on by the Applicant and which concerned a Court no longer in existence, has been superseded by the corresponding rule as contained in Government Notice No. 2254 of 1928.

It is urged that in view of the fact that the judgments of this Court are not reported nor accessible to practitioners, /not/ there is good reason why they are/au fait with the rulings of the Court.

In applications of this nature a liberal but not a lax view should be taken and the Court will also take into consideration that this is the first request of its kind to be dealt with in this Court sitting at Kokstad and, further, that the Respondent has offered no objection to the appeal being heard.

In the case of SERONGOANE vs. FINESTONE, 1928 C.P.D., application was made for an order condoning a delay of two days in setting down with the Registrar an appeal from a Magistrate's Court judgment. The delay was due to an error on the part of the Applicant's Attorney, who was under the impression that the period prescribed was a calendar month and not four weeks. The application was allowed, as it was not due to gross negligence or indifference.

In the present case there has not been gross negligence on the part of the Plaintiff's Attorney, but a genuine misconception as to the correct rule to be followed, and as there will be no prejudice to the Respondent, the application will be allowed - the Applicant to pay costs.

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To deal with the appeal on the merits. The case is one of credibility concerning the identity of a horse to which both parties laid claim. The Assistant Native Commissioner has found that the horse is the property of the Plaintiff and with this conclusion this Court is not prepared to differ.

Both the weight of the evidence and the probabilities of the case favour the Plaintiff's contention.

The appeal is dismissed with costs.

.../

claim.

As regards the £3:10:0, the claim is stronger than the one for the £5. It is true that Malaiko has erred in his arithmetic to the extent of 10/-, but his evidence and that of Dyokwana satisfies this Court that the sum claimed was loaned to the Defendant by the Plaintiff.

The Defendant is admittedly a convicted criminal; he has indulged in illicit liquor traffic and has been convicted for violence. These facts, while they do not establish that he has not told the truth in this case, yet serve to give a warning that the Defendant is not a person of good character and his uncorroborated evidence must be accepted with reserve. A further insight into the Defendant's character is got from his own evidence where he first states that he has cattle at home now registered in his mother's name, but in cross-examination he shifted his ground and said that the cattle at present in his mother's name were not attachable for his own debts.

The weight of evidence and the probabilities are entirely in the Plaintiff's favour. The appeal will, accordingly, be allowed with costs and the judgment in the Court below altered to read:-

"Judgment for Plaintiff as prayed with costs "of suit."

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CASE NO:11.

TSHAYILE MXEBELELE vs.ROLOBILE MAQAKUVA.

LUSIKISIKI, July, 1933, before R.D.H.Barry Esquire President, and Messrs R.Welsh and N. .Pringle members of the N.A.C. (Cape & O.F.S. Division).

Pondo custom - Dowry: of a first husband returnable if woman bore him no children and is thereafter again given in marriage and a second dowry received for her.

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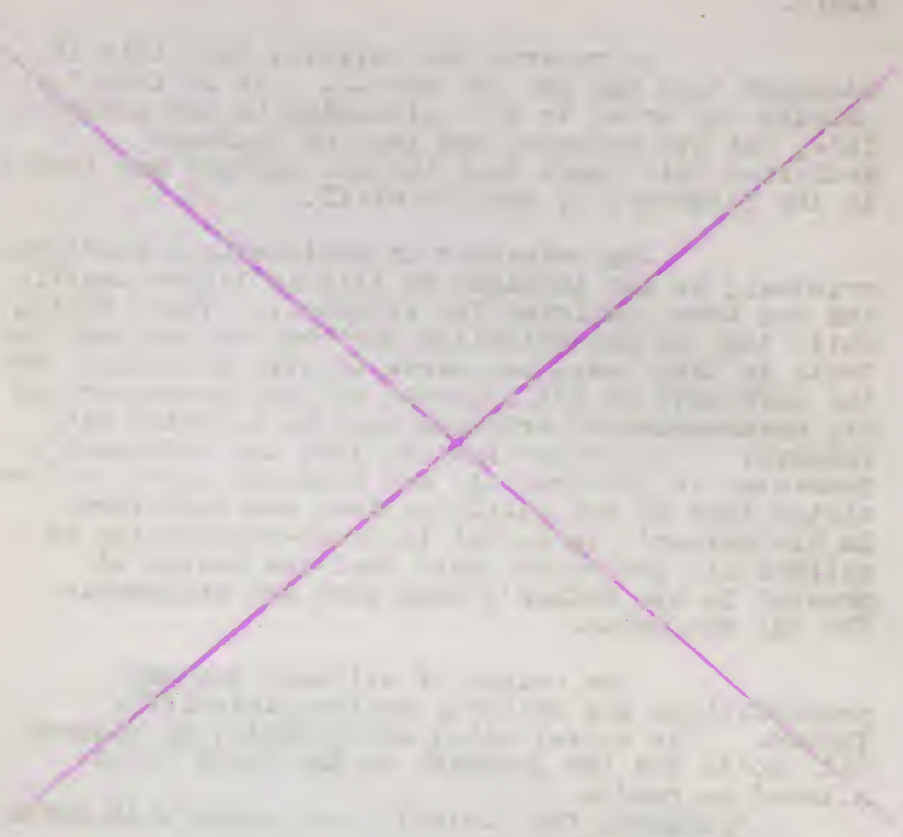
In this case the Plaintiff (Respondent), in his capacity as heir to the late Pelepele, claimed the return of seven cattle paid by Pelepele as dowry for the Defendant's sister Masikanise, on the grounds that shortly after the marriage Pelepele died without issue and that Masikanise had returned to Defendant and had by him been married and received a second dowry.

The Defendant admitted both marriages and the receipt of two dowries for his sister, but contended that only five head of cattle had been paid by Pelepele, and not seven, that Masikanise had given birth to a child which died in infancy as well as a still-born child of which the sex was apparent and

further.../



further, that the woman had been driven away by Pelepele's people.

Against a judgment for Plaintiff for five cattle and absolution from the instance in regard to the remaining two beasts claimed, the Defendant has appealed on the facts and also on the contention that the judgment is against Native Law and Custom inasmuch as Pelepele died of leprosy and the Defendant cannot be penalised for such as his sister had performed her duty as a wife to the best of her ability.

There is no cross-appeal in regard to the number of cattle awarded and as the Defendant admits the receipt of five cattle, the point to be determined is whether the Defendant is in the circumstances liable for the restoration of the five cattle admittedly received as dowry from the late Pelepele.

The evidence on the record clearly establishes that Pelepele did not die soon after his marriage but that he lived for over ten years after entering into the union and then died of leprosy at an institution.

The Assistant Native Commissioner found that no child or still-born child had been born to Pelepele but that the woman had a miscarriage. This Court is not prepared to say that he has erred in his conclusions in this respect, especially in view of what the Assistant Native Commissioner saw when the alleged graves were opened. No traces of bones could be found and the different soil strata had obviously never been previously disturbed at the spot.

The evidence as to the woman having been driven away is unsatisfactory and as the Defendant has received two dowries for the woman and as she bore her first husband no children the Plaintiff is according to Pondo custom entitled to have his brother's dowry returned to him.

The appeal is dismissed with costs.

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CASE NO:12.

BENNETT ZIBI v.NATHANIEL LUBANGO.

KOKSTAD, July, 1933. Before R.D.H.Barry Esquire, President, and Messrs. H.E.F. White and W.H.. Freemantle, members of the N.A.C. (Cape and O.F.S. Division).

Practice - Interpleader: Exhibition of Writ when making attachments: Copies of inventories:

(Appeal from the Court of Native Commissioner Mount Fletcher).

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In this case the Respondent got judgment against one H.P.Mlandu,and on a writ being executed

certain.../

certain seven cattle were attached and were claimed by the Appellant as being his personal property.

The Respondent having refused to permit the Messenger of the Court to release the cattle the Appellant (Claimant) instituted the present interpleader action.

The acting Native Commissioner declared the cattle to be executable and against this decision the Claimant has appealed on the following grounds:-

"(1) From the evidence adduced at the trial "of this action it is abundantly clear "that there was no judicial attachment "made by the Deputy Messenger, Elijah "Nqoti, either on the 19th November "1932, or the 21st November 1932, of the "stock in question, in that the procedure "laid down in Section 5 (1), (2), (3), "(4) of Order XXIV pf Proclamation No. "145 of 1923 was not observed, nor "carried out by the said Deputy "Messenger; and that the Presiding "Judicial Officer, should, on that ground, "have declared the stock attached "illegally, to be non-executable, seeing "that no copy of the writ of execution "was served upon the judgment debtor, "or left at his premises, either on the "19th November 1932, or on the 21st "November 1932.

"(2)From the "return" made by the Deputy "Messenger, Elijah Nqoti, on the said "writ of execution, it appears that the "seven head of cattle were, on the 21st "November 1932, removed by him out of the "possession and control of the Claimant - "this was the day of the alleged attach- "ment.

"The presumption arising from such "possession, in law, was that the Claimant "was the OWNER of the said stock, and thus "the ONUS PROBANDI was on the execution "Creditor.

"Notwithstanding this, the Presiding Judi- "cial Officer ruled that the Onus Probandi "was on the Claimant, thereby erring "against the said legal proposition, well "established in law.

"(3) If the Presidjng Judicial Officer was "correct in holding, as he did, that the "seven head of cattle were, when attached, "in the possession of the Judgment Debtor, "then it is respectfully submitted that "there is ample evidence on record to shew "that though attached in the possession "of such Judgment Debtor, such cattle were " 'mafisaed' by the Claimant to the "Judgment Debtor; and that the stock were "the property of the Claimant.

Execution.../

"That the ONUS OF PROOF shifted when this "evidence was elicited and it became necessary for "the Execution Creditor to show that the stock in "question were the property of the Judgment Debtor, "and how this came about.

"Such ONUS was not discharged by the "Execution Creditor and accordingly the Court "should have given a ruling that the cattle were "not executable."

In this Court only the first ground was pressed.

The original judgment against the Debtor and the legality of the writ itself are not challenged but it is contended that the attachment itself is defective and does not conform to the requirements of Order XXIV, 5 (1), (2), (3) and (4) in that a copy of the writ was not served at the time of execution.

The Messenger's return on the writ is in the following terms:-

"On the 19th November 1932 I proceeded to "Defendant's residence with this writ. Defendant "was not at home. I produced this writ to his "wife, demanded payment thereof. She refused "to accept the writ. I then wanted to attach "(stock about 25) which were grazing in the "vicinity of the Defendant's kraal. She asked "me to wait until her husband returned as he "would have to pick out the cattle which did not "belong to him. I waited for her husband's "return. About 5.30 I went to see what had "happened to the cattle. I found they had "disappeared. I then went in search of them. "I found them about 7.p.m. They had been "removed to Defendant's brother-in-law's kraal, "Bennett Zibi. There were then only eight of "the twenty-five. Mlandu and Zibi both hid "themselves when they saw me approach. I left "the cattle in Zibi's kraal and returned on "Sunday. I found Zibi and accused him of "trying to assist Mlandu to seize the cattle, "he agreed. I left the cattle with Zibi and "went in search of the balance but was unable "to find them. I seized the eight cattle at "Zibi's kraal and brought them to Mount Fletcher."

The Messenger's evidence is to the effect that on proceeding to the Debtor's kraal on the 19th November 1932 (a Saturday) he found the Debtor away and he then went to where the cattle in question and others were being herded. The herd boy explained that some belonged to the Debtor and some to others. The Deputy says he made an inventory of all the cattle and told the boy he was attaching them. No inventory was however handed to the herd boy. The Messenger then returned to the kraal of the Defendant and saw his wife. She declined to go to the cattle and point out those

belonging.../

belonging to her husband. When the Debtor did not turn up the Messenger went back to where the cattle had been left and found them gone as also the herd boy. The same day eight of the cattle were found at Bennett Zibi's kraal. No attachment was made. The inventory made when the cattle were first seen was tendered to the Debtor's wife but she declined to receive it and the Messenger did not then leave a copy of the inventory or a notice of attachment at the Debtor's kraal.

On the following Monday the Messenger again went to the Debtor's kraal, found him away and left a copy of the inventory there.

There is nothing on record to show that the writ was not in the Messenger's possession, but it was not exhibited on this occasion owing to the absence of the Debtor and the fact that his wife would have nothing to do with the matter.

But the returns on the writ go to show that on the 20th August 1938 the Messenger proceed-:ed to execution on the same writ and that it was then duly exhibited to the Debtor, It is not clear to this Court as contended that in the case of subsequent seizures as against the same Debtor in the same suit the writ must on each occasion be exhibited to him and a copy left with him or at his residence.

In the opinion of the Court the attachment on the Saturday was not defective as the writ had been previously exhibited to the Debtor and it is not contended that in August this was not done nor that a copy thereof was not then left with the Debtor. Moreover, a copy of the inventory of the stock attached was left at the Debtor's kraal on Monday the 21st November 1938.

On the question as to whether the cattle were or were not attached then out of the Debtor's but in the Claimant's possession this Court is satisfied that the writ having been exhibited to the Debtor on the occasion of a previous attachment and that the Messenger made an inventory of the cattle in question before they were surreptitiously spirited away from the Debtor to the Claimant that they were then judicially attached and the mere fact that the Messenger altered his inventory so as to cover the attachment on the seven cattle only and in effect released the balance does not affect the question.

The appeal is accordingly dismissed with costs.

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CASE NO:19.

KOKSTAD.../

CASE NO:13.

GEORGE DUBE v. NATHANIEL LUBANGO.

KOKSTAD, June, 1933. before R.D.H.Barry Esquire, President Messrs. H.E.F.White and W.H.P.Freemantle members of the N.A.C. (Cape and O.F.S. Division)

Procedure - Interpleader: failure in - mala fides:mere allegation that cattle claimed had been handed by Respondent to another person since judgment, has not effect of rendering the judgment inoperative.

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(Appeal from the Court of Native Commissioner Mount Fletcher)

This is an Interpleader action and to appreciate the position and view the evidence in its true perspective it will be of advantage to review briefly the circumstances to which it is a sequel.

The Respondent having become engaged to marry a girl named Daisy Dube paid over to the Judgment Debtor certain stock as "engagement beasts". Before the marriage could take place a rupture occurred and Daisy Dube sued Nathaniel for damages for breach of promise but failed in her action.

The institution of that action was palpably in the nature of a manoeuvre to deprive Nathaniel of the dowry he had paid because the girl had by that time become attached to another man to whom she was married soon afterwards and whom paid dowry for her. Two dowries were thus held simultaneously.

Nathaniel then took action against Henry P. Mlandu for the return of the dowry paid. He got judgment and on appeal the judgment was sustained.

Daisy Dube is the daughter of Mlandu's sister Emily; her father had died leaving this girl and several sons of whom George is the eldest.

George has been away from his home for a considerable time and the girl and her mother fell under the guardianship of Mlandu.

It was Mlandu who negotiated the marriage of the girl to Nathaniel, it was he who throughout the proceedings acted in all respects as the girl's guardian, it was at his instigation that his Attorney wrote to Nathaniel demanding that the latter should marry the girl by a certain date or take the consequences and it was also the judgment debtor Mlandu who received the dowry paid by Nathaniel, assisted by his brother, Jacob Lubango, and the dowry has

remained.../

remained in his possession and control until about the time execution took place.

This is borne out by the evidence of Emily Dube (Mlandu's sister and mother of Daisy) who states that until Daisy got married the judgment debtor was the custodian.

The letter written to Nathaniel requiring him to marry the girl was the first stage of the abortive action designed to deprive Nathaniel of the right to claim the return of his dowry. This letter required Nathaniel to marry the girl not later than the 30th June. Mlandu swore in evidence that the girl was at home at that time but he had to confess on being pressed that Daisy had left Mount Fletcher and gone to Engcobo on the 22nd June - thus rendering it almost impossible for a marriage to take place by the date fixed even if Nathaniel had been prepared to go on with the marriage.

Having got judgment against Mlandu Nathaniel caused levy to be made. Certain cattle were attached and to these two parties have successfully preferred claims. The one a brother-in-law to the judgment debtor and the other the claimant in the present case - who is the elder brother of the girl Daisy.

In the original action Mlandu set up as one of his defences that George Dube was the proper person to be sued but as pointed out it was Mlandu who without reference to George Dube put through the marriage negotiations with Nathaniel and received and held the dowry paid.

From the present record it appears that even at this stage George Dube is not present but that in point of fact the action has been instituted at the instigation of Emily, his mother, and she reveals her true motives when she states that she is the proper person to receive Daisy's dowry.

Some of the cattle attached are the identical ones paid by Nathaniel and others are those paid as dowry for Daisy by Zilwa - the man to whom Daisy got married.

It was urged in this Court that as Mlandu had handed the cattle to Daisy's mother, Emily, that the judgment obtained against him ceased to be operative and consequently no writ under that judgment was of avail as against the judgment debtor. The contention was also put forward that in the circumstances the judgment creditor would have to take out summons against Emily Dube.

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This Court is not prepared to accept this interpretation of the law as in its opinion the judgment against Mlandu still stands and cannot be deemed to be rescinded by a mere allegation that he had subsequently handed the cattle to another party.

In the present case the point of onus was raised - hinging on the question as to whether the cattle were in the possession of the judgment debtor or the claimant at the time of seizure. Now it is obvious that they are not in the possession of the Claimant of record but even if they are not deemed to be in the possession of Mlandu then the only other person in whose possession they can be is that of Emily - who has her own kraal and states definitely that she is the person entitled to hold Daisy's dowry - an assertion which is contrary to Native Custom.

The cattle graze with the debtor's, they are registered in his name and the basis of the claim is on a par with the earlier manoeuvre to deprive Nathaniel of the dowry he paid. The movement of the cattle, if such movement did indeed take place, must have been underhand and clearly designed to thwart execution and to have the effect of providing a defence to any interpleader proceedings that may be instituted.

The Appeal is dismissed with costs.

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CASE NO:14.

SANGOVANE GWEBANI v. MTSHOBELA BAMBIZULU.

KOKSTAD, June, 1933. Before R.D.H.Barry Esquire, President and Messrs. H.E.F.White and W.H.P. Freemantle members of the N.A.C. (Cape & O.F.S. Division).

Spoliatory action - Onus: if Plaintiff's evidence is void of credence, Defendant has no case to meet - Absolution judgment competent.

(Appeal from the Court of Native Commissioner Mount Frere.)

This is a spoliatory action in which the Plaintiff (Respondent) claimed from the Defendant the delivery of a certain mare and its foal which he alleges the Defendant wrongfully and unlawfully spoliated and drove away to his kraal. In his plea the Defendant denies having spoliated the animals but states that these were removed by him with the Plaintiff's full consent and permission.

The.../

The evidence led is extremely meagre consisting, as it does, of a few sentences by the Plaintiff and Defendant.

There is no alternative claim for the value of the horses or damages and the case is therefore a purely spoliatory one.

The Acting Native Commissioner in his reasons states that he had no reason to believe the one party in preference to the other but came to the conclusion that the onus rested on the Defendant to establish his plea.

In the opinion of this Court the onus was in the circumstances wrongly assigned to the Defendant. The Judicial Officer found himself unable to believe either of the parties and this Court is in the same position in view of the unsatisfactory manner in which the case has been presented.

If then the evidence of the Plaintiff is so unsatisfactory as to be void of credence then no act of spoliation has been established and the Defendant had no case to meet.

The appeal is allowed with costs and the judgment in the Court below will be altered to read: "Absolution from the instance with costs of suit".

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CASE NO: 15.

DINILE NXELE v. MBELE MKOKELI.

UMTATA, July, 1933. Before R.D.H.Barry Esquire, President and Messrs. E.G.Lonsdale and H.M.Nourse members of the N.A.C. (Cape & O.F.S. Division).

Rescission default judgment - Action under Common Law permissible where there is allegation of fraud and where service of original summons defective: Applicant not limited by Order XXXIII of Proclamation 145 of 1923.

(Appeal from the Court of Native Commissioner Elliotdale).

In this case it is necessary to set out the pleadings in extenso. The Respondent claimed from the Appellant damages as and for adultery. The Appellant was in default and on the 10th May 1932 a default judgment was granted in terms of the prayer - a writ being taken out in due course.

On the 21st November 1932 the Appellant issued summons against the Respondent for the rescission of the default judgment, the setting aside of the writ and for the return of the property

attached.../

attached thereunder on the following grounds:-

(1) That the said judgment is void ab origine for want of proper service of the Summons in the said action.

(2) That the said judgment is void ab origine as the same is not supported by sufficient legal evidence.

(3) That the said judgment was obtained by fraud, that is to say by false evidence.

Regarding ground (1) Plaintiff says:-

(4) That on the 2nd day of May 1932 the Defendant (then Plaintiff) issued a summons in the above Court against the Plaintiff (then Defendant) returnable on May 10th 1932 for three head of cattle or £15 damages for alleged adultery between Plaintiff (then Defendant) and Defendant's (then Plaintiff's) alleged wife Nonembile alias Dinah.

(5) That the said Summons was served upon Plaintiff (then Defendant), who resides 30 miles from the Court House at Elliotdale in the forenoon of the 7th May 1932 for appearance before the said Court at or before 10 a.m. on the 10th day of May 1932; hence the service of the said summons was short, defective and bad in Law and no judgment should have been given by the Court thereon, and the judgment given is invalid.

Regarding ground No.(2) the Plaintiff says:-

(6) That it appears from the record of the said action that the sole evidence produced by Defendant (then Plaintiff) in support of his allegation of marriage and adultery is his own.

(7) That having regard to the nature of the claim such evidence was wholly insufficient to satisfy legal requirements and the Court should, according to the Rules of Court and the Common Law called upon Defendant (then Plaintiff) to produce sworn testimony other than his own in support of his alleged marriage and the adultery alleged between Nonembile alias Dinah and Plaintiff then Defendant.

(8) That according to Law the evidence of an alleged husband alone is insufficient to prove the fact of his alleged marriage and

(2) the fact of alleged adultery.

(9).../

(9) That by reason of the allegations set out in paragraphs (6), (7) and (8) hereof the said judgment is void ab origine andshould never have been given.

Regarding ground (3) the Plaintiff says:-

(10) That when the Defendant (then Plaintiff) on the 10th day of May 1932 gave evidence under oath before the Judicial Officer who presided at the said proceedings that the said Nonembile was his wife and that Plaintiff (then Defendant) had committed adultery with her in scoffling season 1931 he well knew such evidence was false and given with the object of wilfully misleading the said Court and defrauding the Plaintiff (then Defendant) of three head of cattle or £15 and the costs of suit, because in truth and in fact to the knowledge of the Defendant (then Plaintiff) the said Nonembile alias Dinah is not and never has been the lawful wife of the Defendant (then Plaintiff)

To this Summons the present Defendant (Respondent) has excepted, alleging:-

(1) That it does not disclose a cause of action
(2) That it is vague and embarrassing in that (a) the judgment sought to be rescinded (whether by application or summons) being default judgment, Plaintiff must conform with the requisites and provisions of Order 28 Section 1 which he has not done and thus the Summons fails to disclose a cause of action and is vague and embarrassing to Defendant.
(b) That ex facie the summons the application or action to rescind is not timeous and is not within the period prescribed when applications can be made to rescind default judgments, such time having expired. There is thus on the face of the summons no cause of action.

(c) That the allegation (1) of the particulars of claim cannot per se found an action to rescind a default judgment. This matter being one for consideration after the judgment has been rescinded in terms of Order 28 Section 1.

(d) That the allegation in paragraph (3) of the Summons is no cause of action, the sufficiency or otherwise of the evidence not being any ground for rescission of a default judgment nor a matter for the Native Commissioner's Court to consider

or.../

or decide whether he or another Native Commissioner has adjudicated on sufficient evidence.

(e) That allegation (3) of the particulars of claim discloses no cause of action. No specific fraud being alleged whereon the judgment was obtained there being merely an allegation that a conflict of evidence exists between the parties and an assertion (not warranted competent or justified), by Plaintiff that the evidence is false. That an allegation of fraud must clearly show grounds and particulars substantiating the allegation and allege corroborating factors. A mere assertion that evidence is false does not constitute the essentials of an allegation of fraud and this contention by Plaintiff is vague and embarrassing and discloses no cause of action.

By way of reply to the exception the Plaintiff states:-

(1) That his action and the several claims thereunder are brought under and based on the Common Law; the contentions of the Defendant as set out in paragraphs (1) (2) (b) (c) and (d) of his exception are bad in Law and afford no grounds therefore.

(2) That as regards the contentions in paragraphs (2) (e) of Defendant(s exception Plaintiff maintains that the particulars set forth in paragraphs 10 of the particulars of claim disclose a good, clear, and sufficient cause of action based on allegations of fraud, namely Defendant's false evidence under oath in the judicial proceedings referred to therein.

In the course of argument the Defendant's Attorney confined himself to the exceptions (1) and (2) (a) and (b) and abandoned the remainder.

The Judicial Officer allowed the exceptions and against this decision the Plaintiff (Appellant) has appealed on the following grounds:-

(1) That the Plaintiff's (now Appellant) Summons commencing his action against the Defendant (now Respondent) conforms to and complies in every respect with the requirements of Order VII of Proclamation No. 145 of 1923, and no exception that it does not has been taken thereto by the Defendant.

(2) That three clear causes of action have been

set.../

set out in the particulars, the admission or proof of any one or more or all of which, would entitle the Plaintiff to judgment against Defendant forth-with.

(3) There being a clear allegation of fraud, by false testimony, the questions of whether the action is or is not timeous or whether it can be met by a special plea of prescription, if they arise at all, could only be settled after evidence had been given fixing the actual date of the discovery of the fraud by the Plaintiff.

(4) That there is nothing in Order VII, supra, entitling a Defendant to claim from a Plaintiff in an action by Summons Security or payment into Court of the costs of such action. That in this action Plaintiff is not a peregrinus but a person of fixed abode.

(5) That the contention of the Trial Court that the words "or proceed by way of action" or Summons" should be imported into the Provisions of Order XXVIII of Proclamation 145 of 19[illegible], is opposed to all the rules governing the interpretation of Statutes, as there is no ambiguity in the wording of the provisions of the Order.

(6) There is nothing either in the Proclamation or Order XXVIII depriving or precluding his Common Law right of instituting his action by way of Summons and/or compelling such person to proceed by way of application in terms of such Order; which is permissive and not peremptory and form-s an alternative to the Common Law Rights of such person.

(7) That the contention of the Trial Court that an application under the Order is more expeditious than a summons issued under the Common Law is not supported either by actual practice or experience in the Courts, nor is such contention in issue.

(8) That for the reasons above set out the judgment of the Trial Court is bad both in law and in Procedure and Practice.

(9) That Defendant's exceptions, referred to as (1) and (2) are bad in Law and should have been dismissed with costs.

In the Court below the exeeptions 2 (c) (d) and (e) were abandoned so that the only points

for.../

for decision are those raised in the grounds (1) and (2) (a) and (b).

The appeal turns mainly upon the construction of and extent of the application of Order XXVIII to the circumstances of this case. This Order provides machinery by means of which Judicial Officers are enabled to rescind judgments given by themselves: provided that such decisions fall within the category laid down in Section 36 of the Proclamation.

It has been contended that the rules contained in this Order must govern all actions taken for the rescission of judgments whether such actions are in the form of applications or summonses.

The Native Commissioner has taken this view and in giving his reasons he has indicated that he has experienced much difficulty in coming to a decision owing to the absence of any definite rulings to serve as a guide. He has, however, come to the conclusion that if a view contrary to his own is taken then the effect will be to render inoperative the requirements of Order XXVIII because it will be competent for any Appellant to ignore the rules specifically laid down to be followed. He has also construed the judgment in the case of Elizabeth vs Lopes Ovitz and another, 1920, O.P.D. 55 as supporting his interpretation of the Order in question.

Without here entering into an exhaustive review of the very numerous authorities (some of which are enumerated at the foot hereof) this Court is unable to support the contention of the Court below. The case of Elizabeth vs Lopes Ovitz and another, which the Judicial Officer [illegible] relies upon, lays down no more than that that an application for rescission of a judgment cannot be made by way of motion but must be by action in accordancewith Order XXVIII. In that case the question of proceeding by way of summons to obtain Common Law rights was apparently not in issue.

In the present case the summons discloses a clear cause of action inasmuch as it alleges that the service of the summons in the original case was defective and that judgment was obtained by fraud - the fraud consisting of the perjured and unsupported testimony of the Plaintiff in the original case.

A careful consideration of all the authorities satisfies this Court that in a case such as the one under review, in which, for one

In [illegible]

thing, fraud is alleged it is competent to proceed by way of summons under the Common Law to bring about the rescission of such a default judgment and further that the Plaintiff is not confined to the rules contained in Order XXVIII. If this were not so then even if the fraud is discovered after the period laid down in the Order for the institution of the proceedings for rescission the injured party would have no means of redress.

In the opinion of this Court therefore the Appellant should not have been debarred from proving the allegations in his summons, as he was fully entitled to do before his prayer for rescission could be granted and the exceptions should not have been allowed.

The appeal is allowed with costs, the exceptions to the summons taken in the Court below are dismissed with costs and the case is returned for further hearing.-:-:-:-:-:-:-

CASE NO 16.

AMOS KUMSHA v. LIBALELE BOKOLO.

UMTATA, July, 1933. Before R.D.H.Barry Esquire, President, and Messrs. E.G.Lonsdale and H.M. Nourse members of the N.A.C. (Cape and O.F.S. Division).

Damages - Adultery - Ntlonze: Retention of for reasonable period.

(Appeal from the Court of Native Commissioner ENGCOBO.)

The Plaintiff (Respondent) got judgment in the Court below for three cattle or their value £9 as and for damages for adultery by the Defendant with the Plaintiff's wife and costs and in reconvention the Plaintiff (Defendant in reconvention) was ordered to return to the Defendant the latter's hat, which the Plaintiff detained as Ntlonze or its value 10/- and costs.

Against the judgment in convention the Defendant in convention has appealed on the facts and probabilities and the Defendant in reconvention has cross-appealed on the following grounds:-

(1) Defendant in reconvention was fully justified in accordance with Native Custom in detaining the hat belonging to Plaintiff in reconvention as "Ntlonze", or proof of the catch, it being one of the essential requisites for an action for damages for adultery that the"Ntlonze" be produced at the trial.

(2) Defendant in reconvention stated in his evidence that he is prepared to hand

Defendant's (Plaintiff in reconvention) hat back to him when the case is finished.

(3) The Court having found the adultery proved, and in view of the Defendant in reconvention's willingness to hand back the "Ntlonze" at the termination of the trial, erred in giving judgment for Plaintiff in reconvention on the counterclaim.

(4) The Court erred in giving judgment for Plaintiff in reconvention for costs on the counterclaim, Defendant in reconvention's action in detaining the hat as "Ntlonze", being fully justified and in accordance with Native Custom.

The Appellant denied the adultery in toto and put Respondent to the proof thereof. In answer to the claim in reconvention Respondent admitted having Appellant's hat and stated he is retaining it as "Ntlonze" in respect of the said adultery and in his evidence he stated that he is prepared to hand the hat back to the Appellant at the conclusion of the case.

The Native Commissioner found the adultery proved and gave judgment for Plaintiff on the claim in convention with costs and gave judgment for Plaintiff in reconvention for the return of the hat claimed or its value 10/- and costs.

The Court sees no reason to disturb the judgment on the claim in convention as there is sufficient evidence to support the finding of the Native Commissioner. The appeal on the claim in convention is therefore dismissed with costs.

It is a well known practice among Natives, which is recognised in our Courts, for a husband to take from a man whom he detects committing adultery with his wife some article belonging to the adulterer, usually his blanket, which is subsequently produced at the trial as "Ntlonze", or proof of the catch, and this Court has no desire to interfere with this practice.

In this case Respondent expressed his intention of restoring Appellant's property at the termination of the proceedings and in consequence this Court is of opinion that the Native Commissioner erred in awarding costs to Appellant on his claim in reconvention.

The cross-appeal is allowed with costs and the judgment on the claim in reconvention is altered to read For Plaintiff in reconvention for the return of the hat claimed or its value 10/-m

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CASE NO 16. UMTATA.../

MATIKELA PAWULI v.YASHWENI XAM.

UMTATA, July, 1933. Before R.D.H.Barry Esquire, President and Messrs. E.G.Lonsdale and H.M.Nourse members of the N.A.C. (Cape & O.F.S. Provinces).

Native Custom: Refund of wedding expenses not claimable where girl given in marriage without reference to her guardian according to custom.

(Appeal from the Court of Native Commissioner MQANDULI.)

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In this case the Plaintiff (Respondent and cross-Appellant) sued the Defendant for

(a) A declaration of rights in respect of a girl named Mahala, and

(b) Delivery of her dowry, viz. nine head of cattle or their value £45.

Judgment was entered for Plaintiff subject to a deduction of two cattle paid as maintenance and wedding expenses.

The appeal is on the facts and probabilities and also on the contention that as Nokilam, the mother of Mahala, was telekaed prior to 1907 and as the late Xam had made no effort to secure her return he must have been taken to have abandoned Nokilam and to have forfeited all rights in, to or arising out of her and such abandonment must be taken to have had effect from the date when Nokilam first left the late Xam and has no right to any children born to Nokilam subsequent to her leaving him.

The cross-appeal is noted on the ground that in the circumstances the Defendant is not entitled to retain two beasts out of Mahala's dowry for maintenance and for supplying a marriage outfit.

The point to be decided on the main issue is whether Mahala was born during the subsistence of the marriage which admittedly was entered into between Xam and Nokilam. The Assistant Native Commissioner has found that Mahala was born during the subsistence of the marriage and this Court sees no reason to differe from him. The girl was born about 1911 and during 1907 the late Xam was successful in an action against Pawuli for damages for having committed adultery with Nokilam. The defence set up in that case was that the woman was Pawuli's wife. On appeal the following judgment was given:-

"The marriage of the woman Nokilam to the Respondent (Xam) is not in dispute and that the marriage has never been dissolved,

consequently.../

consequently it was not possible for the woman to be given in marriage to the Appellant (Pawuli)."

There is no satisfactory evidence on record that the marriage was dissolved subsequent to that judgment and prior to the birth of Mahala.

Coming to the cross-appeal it is clear that the Defendant never maintained Mahala and that he gave her in marriage without reference to her legal guardian. He is therefore not entitled to any maintenance fee and cannot demand as of right to be re-imbursed for any outlay he may have incurred as wedding expenses. What, if any, he may get rests with the Plaintiff.

This point appears to have been raised only after the Assistant Native Commissioner had given judgment and if it had been threshed out at an earlier stage the order given may have differed from that recorded.

In his notice of appeal the Defendant has stated inter alia that in the event of his appeal being successful he will abandon that part of the judgment entitling him to deduct from the dowry a beast to re-imburse himself for the cost of the wedding of Mahala, i.e. he abandons one of the two cattle awarded to him.

As already stated this Court is of opinion that the Defendant is entitled to neither of these two cattle and therefore the Plaintiff was justified in cross-appealing.

The result is that the appeal is dismissed with costs, the cross appeal is allowed with costs and the judgment in the Court below is amended by the deletion therefrom of the words "subject to the deduction of two head of cattle paid as maintenance and wedding expenses."

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CASE NO:18.

SELBOURNE BOKWE v. DOROTHY KABANE.

KING WILLIAM'S TOWN, September, 1933. Before R.D.H.Barry Esquire, President, and Messrs. C.P.Alport and C.J.N.Lever members of the N.A.C. (Cape & O.F.S. Provinces).

Damages - Seduction and pregnancy: Conception as result of incomplete connection:period of gestation - Credibility.

(Appeal from the Court of Native Commissioner VICTORIA EAST).

In this case the Plaintiff (Respondent) sued the Defendant (Appellant) for (a) £100 as damages for breach of promise and (b) £100 as and for damages for seduction and pregnancy. The Assistant Native Commissioner awarded £5 on the first and £50 on the second claim.

The appeal is entirely on the facts and probabilities of the case and an implied assertion that

when.../

when in the Transkei she became pregant by some other man. In the plea the Defendant contended that although both parties are christians and educated natives nevertheless they adhere to their native laws and customs, according to which the action should be tried. The case was tried under the Common Law but this point has not been raised on appeal nor is the measure of damages awarded in question.

The Defendant contends that as he is not responsible for the Plaintiff's pragnency he is not liable in damages for breach of promise to marry the Plaintiff.

It is not denied that the Plaintiff, an unmarried girl, gave birth to a child on the 4th April 1933. Normally her pregnancy would have occurred about the end of June, 1932. The Plaintiff states she last saw her periods on the 8th July 1932 but prior to that date there had been intimacy.

The medical evidence given by Dr. Macvicar is to the effect that he examined the Plaintiff on the 9th August 1932 and that she then told him she had missed one of her periods. He tried to examine her internally but could only get one finger into her vagina as the vagina was still intact and carnal connection could not have been complete. He then goes on to say that it would be consistent for the child to be born on the 4th April 1933 if the Plaintiff last saw her periods on the 15th June 1932 and her due date would be the 15th April 1933 if she last saw her periods on the 8th July 1932. There is thus only a difference between the normal period of gestation and that given by the girl of eleven days, i.e. the child would have been born prematurely to that extent. The medical evidence goes to show that there is considerable variation from the normal period of gestation for as stated by Dr, Macvicar,

> "Taking the mean there would be just as "many cases before as after that date. "The mean is based on European women. "The labour is easier with native women. "The extreme period is between seven to "eleven months. Both dates could be "possible." He also says it is possible for a woman to have menstruation periods after becoming pregnant and that pregnancy could happen without rupture of the hymen.

The girl's evidence is to the effect that she became engaged to Defendant in May 1931 and that the misconduct began in March 1932. She swears that she was a virgin and this receives strong support from the Dodtor's evidence as he states that when he examined her on the 9th August 1932 her vagina was intact and connection could not have been complete.

On that.../

On that day the Plaintiff told Dr. Macvicar that penetration had not ac tually taken place. It seems clear that although the story of the Plaintiff gives a history not in accordance with a perfectly normal process of reproduction yet it is not inconsistent with medical testimony.

It is unusual to find in cases of /are/ seduction that there/eye witnesses of the occurrences and it has been repeatedly laid down that the rule of law in cases of seduction is that more than the mere statement of the parties concerned is required and that there must be some evidence aliunde in order to enable the woman's oath to be preferred to the man's; there must be some evidence apart from the woman's own statement and bearing on the matter of her seduction which leads one to believe her rather than the man. In the present case there is evidence aliunde of a meeting of the relatives of both parties at which the Defendant is alleged to have admitted the misconduct. He denies the admission but his version of what took place at the meeting is so wide of the probabilities that the Court finds itself unable to accept his account as the true one.

It is usual among Natives in cases of this nature to report the pregnancy to the person who caused or is believed to have caused it and it is obvious that that was the whole object of the meeting. The Defendant was asked if he knew the girl and that she was pregnant and he replied in the affirmative. The Plaintiff's party retired while the Defendant's people considered the matter. Thereafter the Plaintiff's party were told that they would be communicated with later on. Now it is clear from the nature of the meeting and the Defendant's own evidence that he knew he was being charged with causing the girl's pregnancy and the Defendant also states he admitted she was pregnant but he states further that he was never asked if he admitted being responsible. If that is correct then it is difficult to understand why knowing the object of the meeting he did not give a denial then. The Bokwes said that the Kabanes could return and that they would let them know later on. There would have been nothing to let them know if therehad been a clear unequivocal repudiation by the Defendant.

It was only after a second meeting at which only the Defendant's people were present that it was decided to repudiate the Defendant's responsibility and the Defendant thereafter wrote to the Plaintiff and for the first time denied definitely that he had caused the pregnancy.

It is quite clear to the Court that there had been considerable intimacy between the parties, that all along the Defendant was fully aware of the girl's condition and yet throughout the very lengthy correspondence that passed between them he not only did not disclaim responsibility but was, in fact, willing to proceed with

the.../

the marriage. It was only at the meeting (the second one) of his own people that it was decided to resist the charge.

At this point Milner Kabane's evidence becomes instructive for he states that at the first meeting the Bokwes asked for an extension of time in which to discuss the matter. They did not hear again until February when the Defendant came to see him and said he would like to qualify his previous admission as he was beginning to doubt whether he was responsible for Dorothy's condition.

The evidence reflects the impression made on the mind of the Court that the Defendant all along believed himself to be responsible and if he believed that then his belief amounts to an admission that in their love making he realised that they had gone too far. He obviously entertained this belief until February when as a result of the meeting of his own people it was decided to deny responsibility. This decision was most probably taken on the strength of the absence of the girl in the Transkei about June and July 1932. If it is a defence that her pregnancy was caused by another person when so absent then the onus of proving that rests on the Defendant and he has failed to produce any evidence whatever in support of such an assumption.

There is on record the admission of their courtship which according to his own letters put in may be described as hectic. Numerous letters from the Defendant to the Plaintiff (the authenticity of which has not been challenged) are couched in the most passionate terms of endearment and certain passages reasonably capable of adouble interpretation.

The presumption in favour of the Plaintiff is very strong for not alone had the couple ample facilities for misconduct but the evidence shows that their love making must have been almost violent.

Added to this there is the very natural act on the part of the Plaintiff in acquainting the Defendant of her condition as soon as she became aware of it and the Defendant's failure to deny responsibility until only two months before the child was born and as a result of the conclave among his own people,

The appeal is accordingly dismissed with Costs.

GODONGWANA.../

CASE NO:19

-GODONGWANA DYOSINI v ALFRED & VELAPI BEKWA-

BUTTERWORTH, October, 1938. Before R.D.H.Barry Esqr., President, Messrs.C.Ross Norton and J.W.Sleigh, members of the N.A.C.(Cape and O.F.S.Division.)

Land: Succession to, when held under Proclamation No.227 of 1898 (as amended) - Fingoes: Chieftainship of discussed: Right to nominate chief wife not recognised - Costs on higher scale: Application for.

(Appeal from the Court of Native Commissioner, Butterworth.)

This is an enquiry held by the Native Commissioner of Butterworth under the provisions of sub-sections (2) and (3) of section 3 of Government Notice No.1664 of 1929.

The Appellant, Godongwana Dyosini, laid claim to garden lot No.316(Folio 6448) in Location No. 7, Springs A, in the "surveyed" district of Butterworth - which lot is registered in the name of one Klongi (deceased).

The Appellant alleges himself to be the eldest son of the great house of the late Dyosini, his mother being Nonesi. He alleges that Klongi was of the Xiba House.

The Respondent in turn also claims to be Dyosini's great heir because his father Sibunuzide was the son of the Great Wife of Dyosini, named Nojini, and he contends that the Appellant's mother was not the Great Wife.

The Native Commissioner awarded the lot to the Respondent and ordered each party to pay his own costs. Against this decision Godongwana has appealed on the following grounds:-

(1) That the finding was against the weight of evidence both as to the facts and as to the tribal custom relating to the marriage of chiefs among the Amazizi, a clan of the Fingo tribe.

(2) That the Native Commissioner erred in holding that the late Dyosini had no right to nominate his Great Wife subsequently to his first marriage as a chief of the Amazizi clan of the Fingo tribe and according to the tribal custom or custom of that clan.

(3) That under the custom of the Amazizi the dowry of the Great Wife is provided by the Councillors and/or people, and the Native

Commissioner.../

(3) That the motive commissioner erred in
holding that a late Dyoaini had no right
Dyoaini, and dismissing his petition without
surveyed Amanbiri clan of the Ningo-Prampram
the region according to the original custom
of that clan.

Commissioner erred in not giving due significance to the fact that the dowry of Nonesi, the second wife of Dyosini, was so provided.

(4) That the Native Commissioner erred in not giving due weight to the evidence adduced in Case 126/1901 between the said Nonesi as Plaintiff and Dyosini (alias Joseni) as Defendant, as to the status of Nonesi and the right of Dyosini, and as to the custom of the Amazizi.

(5) That according to the evidence as to facts and as to the customs of the Amazizi the second wife Nonesi, mother of Godongwana, was the Great wife, as the eldest son was entitled to succeed to the land of the deceased heir of the Xiba House, that is to the land of Klonji Bekwa.

(6) That, if the Native Commissioner were correct in holding that Dyosini was not a chief who could nominate his wives and that Nonesi, as the second wife in order of marriage, was the right hand wife, and if he were correct in holding that Noselem, the fourth wife in order of marriage, was a Qadi of the right hand wife, then he should have held that the sixth wife, in order of marriage, namely Nobayibile the mother of Klonji, was also a Qadi of the Right Hand House, more especially as her dowry, as required by Native Custom, was not provided by either the parents or the grandparents of Dyosini, and that consequently Godongwana was even in that event heir to the land of Klonji.

The Respondent has cross-appealed against the order as to costs, contending:-

(1) That as Alfred Bekwa was the successful claimant to lot 316, he was entitled to have costs awarded him.

(2) That there was no misconduct by the said Alfred Bekwa, or other exceptional circumstances whereby he should have been deprived of his costs.

(3) That the discretion allowed the Native Commissioner as to the award or otherwise of costs was not judicially exercised in the circumstances.

It is common cause that the Respondent's father was the eldest son of the first wife married by Dyosini, but notwithstanding this fact the Appellant contends that his father was a chief of the Amazizi clan of the Fingo tribe and that, as such, had the right to do so and did declare Nonesi to be his Great Wife.

According.../

According to Soga in his "South Eastern Bantu" opposite page 425, the genealogical tree indicates that Dyosini is of a minor house of Mabidlili, Mabidlili being the second house of Mafuya. Mafuya being the third house of Dweba. Dweba's ascent is through Gwili - Komane - Sijadu - Jama. Jama is described as not being the heir of Zizi because Zizi's great heir was Langa and his right hand heir Lanyeni . It is obvious therefore that Dyosini while having descended from Zizi, he (Dyosini) has his descent through a son of a minor house who was not an heir and thence on through a succession of minor houses Dweba himself is not descended through an heir but even if he was, then Dyosini has no claim to chieftainship of the tribe, for Dweba's great heir in the direct line would be Mulana, his heir through the Right Hand line would be Ngwaqa, whereas Dyosini is the product through a succession of minor houses, and even in the family group of his father Madlibili, he is only the son of a minor house. He may have thus believed himself to be a chief and in this belief may have been encouraged by the fact that the people of his location accorded him that rank, but neither the belief nor the attitude of his people can be assumed to be based on sound foundations, nor could the mere fact of either cloak him with the status of a chief.

If Dyosini can claim to be a chief, then the Zizi clan of the main tribe must be literally swarming with chiefs, for there are very many persons descended through senior channels who have better claims to chieftainship than Dyosini ever possessed.

Soga clearly indicates (a) The Royal line; (b) The reigning line and (c) the right hand line. The Appellant has no claim to be in the direct lines of descent in (a) and (b), but he is descended through a minor house in line (c), and similarly through a series of minor houses in each generation.

In the case of the Pondos, Tembus and other of the greater tribes, it is permissible for the paramount chief only to nominate or substitute his Great Wife, and among the Tembus a lesser chief too, but in his case he must be a chief of very considerable standing, and could so nominate but only with the permission of the paramount. This privilege is rightly esteemed to be a great and a very exclusive one, and for cogent reasons one to be exercised only by a supreme or paramount head of a tribe.

Among some of the peoples and tribes to whom the generic name of "Abambo" is applied, the custom was also recognised, but this Court is not for that reason prepared to accept as correct the contention that every male descendent from an original royal stock, even if such male happens

to be.../

to be the eldest son in his own particular house, is entitled to enjoy the full rank of a chief and to exercise the exceptional privilege which is the exclusive prerogative of the undisputed head of a tribe.

It is an accepted historical fact that the Fingoes, when they were driven and dispersed from the North, consisted of a horde of destitute people, the broken remnants of various tribes. That they were thoroughly despoiled and many killed, including the chiefs of their tribes, is shown by the plight they were in when the Gcaleka chief Hintsa gave them sanctuary, and also by the fact that their remaining leaders were men descended through minor houses of their chiefs and not in the direct or royal line. Apart from the Hlubis, Amabeles and others, we find that Njokweni, who apparently headed the Amazizis and made supplication to Hintsa, could never have laid claim to be the paramount chief of the Fingoes or of the Amazizis.

This Court has consulted the genealogical trees of the Amazizi compiled by various authorities and while these are not in perfect accord, they are, however, in agreement in point that Mongameli is of infinitely superior rank to Dyosini and that the latter is descended through a succession of minor houses.

At the time of the Gcaleka War the Fingo peoples broke away and went to the Ciskei, and about 1868 some returned to the Transkei - the chief men being Sigidi and Smith Mhale. These people were given locations in a somewhat haphazard fashion - each under a headman. Some of these headmen were descended from chiefs in varying degrees and others not. The people were a mixed lot and far from being homogeneous. Having been given locations these headmen began to regard themselves as chiefs, and this fact is revealed by Godongwana himself when he stated in evidence that the Government made his father a chief by giving him a part of the district to control.

As stated by the late Mr. W.T.Brownlee, a former Chief Magistrate: "In three districts there are over a hundred headmen and their recognition would mean that there would be over a hundred chiefs".

This Court has come to the conclusion that the lineage and descent of Dyosini did not justify him in arrogating to himself the status of a paramount chief, nor would the fact, even if established beyond any doubt, that the cowry of Nonesi was provided by his followers, have the effect of conferring upon him a rank and status to which his birth disentitled him.

The Respondent is in a very strong position being, as he is, the eldest grandson of Dyosini in the house of the first wife married by him. The evidence is of a conflicting and contradictory nature, Before the Respondent can be ousted from his position the status of the Applicant must be

established.../

established beyond any doubt.

A perusal of the evidence goes to show that while the principle is accepted that among the Amazizi a man cannot deprive a married woman of her status, it is at the same time contended that that is what was done by Dyosini. To illustrate this: a reference to Nonesi's evidence will reveal the following passage:- "Nojini was the Great Wife before I was declared to be. I remember when Noji-:ni's eldest son was circumcised... there was a great ceremony." Mzoyiyana states inter alia: "I was called to the meeting by the Defendant (Dyosini). He stated that he was removing Plaintiff (Nonesi) as the great wife. We said he could not do that and put any other wife in that position."

It appears that both Nojini and Nonesi were married in the Ciskei and that Nojini's son was born and circumcised only after they had removed to the Transkei, so that the rite was performed, as stated, with great ceremony after Dyosini had taken Nonesi to wife. It would seem then that this son was in fact regarded as the great son and this is borne out by reference to the evidence of Msitweni where he stated that "Nojini's son was born in this country. He was circumcised as the great son or eldest son of the Great House."

This evidence is eloquent contradiction of the contention that Dyosini always regarded Godongwana as his heir. It is a remarkable fact that certain of the witnesses called on behalf of Nonesi in the case tried in 1901, all testify to the fact that they were ignorant of Godongwana's status until that case cropped up. Even Joseph Gcilitshana makes that statement.

As to the fourth ground of appeal - the question of the chieftainship of the tribe was not the real issue in the case heard by the Magistrate in 1901. and it is conceivable if not highly probable that in coming to the conclusion he did the Judicial Officer was influenced by other considerations than the rank assumed by the Appellant's mother. She sued for maintenance and it was ordered that her husband(the late Josini) suitably maintain Nonesi and allow her to plough sow nd reap portion of the land allotted to him under survey. The evidence shows that she had always ploughed this portion and all the Judicial Officer did was to direct that she should continue to be maintained out of that portion of the land. This Court is not prepared to say that the question of the chieftainship of the Amazizi tribe was then incidentally settled, nor does this Court feel itself bound by such an interpretation of the then Assistant Magistrate's

judgment.../

This Court has not before it his reasons for judgment, - there having been no appeal.

As regards the sixth ground of appeal. This Court finds it difficult to accept as correct the contention of both sides to the dispute that Nobible was the Xiba wife of Dyosini. It would be contrary to Native Custom as alleged for the dowry of a Xiba House to be paid out of the estates of any of the existing houses of the husband. It is accepted Native Custom that the dowry of a Xiba wife is provided by the husband's father or grandfather. In the case of Dyosini his ancestors were not existent at the time of the marriage and there is no evidence whatever to show that there was any estate of his father out of which dowry could have been paid.

This Court prefers to take the view that as the dowry came from one or other of the existing houses, that Nobible was a Qadi wife. Ordinarily wives take precedence in the order in which they are married, but in this case that order was admittedly broken when Noselem was married. It is also admitted that the fifth wife, Nowayini, was allied to Nonesi's house, therefore in the absence of evidence that the dowry of Nobible came from Nonesi's house, Nobible must have been allied to the Great House. Moreover the weight of the evidence supports the view that Nobible's dowry came from the Great House.

For these reasons the Court is not prepared to disturb the award of the Native Commissioner.

Coming to the question of the cross-appeal: it is clear that the regulations under which this enquiry has been held make provision for the award, assessment and recovery of costs, but what this Court has to decide is whether in ordering each party to pay his own costs the Native Commissioner has exercised his discretion judicially and not capriciously, or arbitrarily, or upon wrong principles.

According to his reasons the Native Commissioner has interpreted the regulations to indicate that

(a) The initiative in the institution of these enquiries, the manner in which they shall be conducted and the choice of witnesses is entirely in the hands of the Native Commissioner, and

(b) That there is an absence of the formalities and the consequent expenses associated with ordinary civil customs.

He felt that in view of these characteristics not found in ordinary civil actions, the aspects of bona fides and reasonableness should be

admitted.../

admitted in deciding the question of costs, and as there was no reason to doubt the honest belief of the unsuccessful claimant in the justice of his claim, it was felt to be inequitable that he should bear the whole cost of the proceedings over which he had no control. From this view this Court is not prepared to dissent.

In the case of Wait vs Estate Wait, 1930, C.P.D. at page 5, a statement of the law by Sterndale, M.R. was quoted with approval and is in the following terms:-

> "There is a settled practice in the Courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to shew some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised and therefore, there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the Judge at the trial and this Court cannot interfere with his discretion."

The reasons given by the Native Commissioner satisfy this Court that his discretion has been exercised in a judicial manner and that his reasons for departing from the ordinary rule entitling a successful litigant to his costs are in all respects sound.

In this case the Court sees no reason to question the bona fides of the Appellant in pressing his claim to the Lot in question and the situation that has arisen is mainly due to the actions of his father Dyosini for which Godongwana cannot be held responsible.

In view of the circumstances surrounding this case the Court, in deciding the question of costs, accepts as a guide the pronouncement made in the case of van der Merwe vs van der Merwe, 1921 T.P.D. 144, and as discussed in Howard's "Administration of Estates" 5th Ed. at pages 376 and 377. That case deals with an unsuccessful attack on the validity of a will. In this case there is no will, but the succession to the rights of occupation of a certain land have been rendered obscure owing to the conduct of the common ancestor of both the Claimants, necessitating a statutory investigation being held by the Native Commissioner in his administrative capacity in order to determine the reasonable claims of both parties.

In such circumstances the Court is not prepared to say that in making the award the Native Commissioner did not exercise a proper discretion or that the grounds upon which he exercised it were not exceptional nor insufficient. As regards the

costs.../

costs of the appeal - the Court is of opinion that the successful parties are entitled to their costs for the reason that the position was clarified as a result of the inquiry by the Native Commissioner who dealt very fully and ably with the case. The responsibility for incurring further legal costs must rest on the parties upon whose initiative the subsequent proceedings were instituted unsuccessfully.

The result is that

(1) The appeal is dismissed with costs, and
(2) The cross-appeal is dismissed with costs.

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CASE NO:20.

NATALA TENGANI v NTONDWANA DLAKANA

BUTTERWORTH, October, 1933, before R.D.H.Barry Esqr., President, Messrs. E.F.Owen and C.Ross-Norton members of the Native Appeal Court (Cape and O.F.S. Division).

Practice and Procedure - Appeal Court Rules: Government Notice No.2254 of 21/12/1928 - Appellant's Attorney unable to produce, P/A: Case struck off the roll with costs.

(Appeal from the Court of Native Commissioner MQAMAKWE.)

In this case the Respondent got judgment in the Court below for five cattle or £25 to dissolve his marriage with Appellant's ward.

On appeal the Appellant's Attorney intimated that Appellant, although requested thereto, had failed to provide him with the necessary Power of Attorney.

The Court directed the case to be struck off the roll with costs.

-:-:-:-:-:-

CASE NO:21

SIKWEKO MKOTELI v. QAQAQA SHINTA.

BUTTERWORTH, October, 1933, before R.D.H.Barry Esqr., President, Messrs. E.F.Owen and J.W.Sleigh, members of the N.A.C. (Cape and O.F.S. Division).

Procedure: Absolution judgment should not be granted at close of the Plaintiff's case if there is any evidence upon which a reasonable person might give judgment for Plaintiff, and not necessarily on which he should give judgment.- Appeal Court: in weighing value of evidence is in as strong position as Court below.

-:-:-:-:-

(Appeal from the Court of Native Commissioner WILLOWVALE).

Postea .../

This case came before the Court at its last session. At that stage the Court below had granted absolution from the instance at the close of the Plaintiff's case.

On appeal this Court ruled that notwithstanding certain discrepancies in the evidence led for the Plaintiff, a prima facie case had been made out and consequently absolution had been prematurely granted. It also then made/clear that /it/ in coming to that conclusion it in no way fettered itself by any definite findings on the evidence.

At the re-opening of the case the only further evidence tendered was that of the Defendant and against a repeated judgment of absolution from the instance, the Plaintiff again appealed on the facts. The Court has now to decide the issue on the whole of the evidence, each party having closed his case.

The sum of £8/10/- claimed is made up of two amounts, namely, £5 and £3/10/-. As regards the former the Plaintiff states he advanced the Defendant £5 to enable him to pay a fine imposed on the Defendant as a result of a conviction on a criminal charge. The Defendant admits the conviction and the fine, but alleges that he got the loan from one Sahluko Mrogoza who with a woman named Mabel brought the money to him in gaol. He states that Sahluko was present at the previous hearing by the Assistant Native Commissioner, but as a result of the judgment then given Sahluko was not called upon to give corroborative evidence, and he cannot now be traced.

This Court is not entitled to take it for granted that Sahluko's evidence would have amounted to a complete confirmation of the Defendant's version or that it would have been free from contradictions and flaws, or withstood the test of cross-examination.

It is unfortunate that his evidence is not on record, but this Court has nevertheless to deal with the record as it stands. The Defendant stands alone in his defence which amounts to a categorical denial, whereas the Plaintiff's statement receives corroboration by his witnesses Dyokwana and Malaiko.

On the record this Court is, in the absence of any comments by the Judicial Officer concerning the demeanour of the witnesses and the manner in which th ir evidence was given, in as good a position to judge of the value of the evidence as the Judicial Officer. The evidence given on behalf of the Plaintiff is not free from discrepancies, but having regard to all the circumstances, they are understandable and not of such a character as to nullify the Plaintiff's

claim.../

claim.

As regards the £3:10:0, the claim is stronger than the one for the £5. It is true that Malaiko has erred in his arithmetic to the extent of 10/-, but his evidence and that of Dyokwana satisfies this Court that the sum claimed was loaned to the Defendant by the Plaintiff.

The Defendant is admittedly a convicted criminal; he has indulged in illicit liquor traffic and has been convicted for violence. These facts, while they do not establish that he has not told the truth in this case, yet serve to give a warning that the Defendant is not a person of good character and his uncorroborated evidence must be accepted with reserve. A further insight into the Defendant's character is got from his own evidence where he first states that he has cattle at home now registered in his mother's name, but in cross examination he shifted his ground and said that the cattle at present in his mother's name were not attachable for his own debts.

The weight of evidence and the probabilities are entirely in the Plaintiff's favour. The appeal will, accordingly, be allowed with costs and the judgment in the Court below altered to read:-

"Judgment for Plaintiff as prayed
"with costs of suit."

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-MNUKANA BADAZA v. SIMPI SIDLAYIYA.-

KOKSTAD, October, 1933. Before R.D.H.Barry Esquire President and Messrs. D.S.Campbell and H.E.F.White members of the N.A.C. (Cape & O.F.S.Provinces)

Presumption of marriage in cases of long co habitation: Parent of widow accepting second dowry before returning first dowry restored, does not invalidate second marriage of widow.
Held:- that as woman was a widow she was free to re-marry, and the union with second male constituted marriage, notwithstanding fact that her guardian had not restored the first dowry paid for her.

(Appeal from the Court of Native Commissioner MATATIELE).

-:-:-:-:-

In this case the Plaintiff (Appellant) claims as against the Defendant a declaration of rights in regard to two children named Mangesi and Nopatane, alleging that they were born to him by Nowile to whom he was married by native custom. He states that Nowile deserted him about 1931 (taking with her the two children) and went to live with the Defendant who is her eldest son by her first husband.

The Defendant, while admitting that the Plaintiff is the natural father of the children, denies that a marriage was entered into between the Plaintiff and his mother and states that the first dowry paid by his father for Nowile has never been restored and that, therefore, by native custom, this would be necessary before his mother could enter into a second marriage by native custom.

The crisp point to be decided in this case is whether the Plaintiff did in fact enter into a marriage with the woman Nowile. The Judicial Officer has found that this is not the case.

From the record it appears that certain cattle were paid by the Plaintiff to the woman's father Zweni. Both Plaintiff and Zweni say they were paid as dowry, whereas the Defendant contends they were paid as a fine.

The presumption is strongly in favour of the Plaintiff for not only was the woman a widow when she went to live with the Plaintiff, but she has lived with him over a period of ten years and bore him four children, two of whom have died - the remaining two being the ones forming the subject of this case. It is common cause that the second of these children was born after the cattle were paid, but it has been contended that the first of the two children was born before the cattle

were.../

were delivered, so that in any event the Plaintiff is not entitled to this first child.

The Plaintiff states that the cattle were paid at the time of marriage but were not removed owing to the fact that Zweni's stock was liable to attachment. The fact remains that they were removed and their receipt is admitted by the woman's guardian.

The circumstances disclosed do not justify this Court in casting upon these children the stigma and disadvantages attaching to a declaration that they are illegitimate. On the contrary, very strong evidence is required to bring this about in a case such as the present one, and the evidence adduced to this end is unconvincing.

The woman was free to marry after the death of her first husband, and the fact that the dowry he paid had been returned before her father accepted dowry from the Plaintiff, does not have the effect of invalidating her marriage to the Plaintiff (Jacob Jobela vs Ndabeni Gqitiyeza, Vol. I, p.19: Reports of selected casses by Machanik).

The appeal is accordingly allowed with costs, and the judgment of the Court below altered to read:

"Judgment for Plaintiff as prayed with costs of suit."

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CASE NO:23

1.SCORBELLAR D. LEBESE
2. CARNOT KIKINI V MIRIAM PARKIES.

KOKSTAD, October, 1933. Before R.D.H.Barry Esquire President and Messrs. D.S.Campbell and H.E.F. White members of the N.A.C. (Cape and O.F.S. Provinces).

Contract - Written contract of lease capable of cancellation and variation by subsequent verbal agreement if parties are deemed to have been in perfect agreement as to terms of new lease - Credibility.

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In this case the Plaintiff (Respondent) claimed as against both Defendants jointly and severally
(a) cancellation of a certain verbal agreement of lease entered into in or about June 1932;
(b) £50 as and for damages for breach of agreement, and
(c) Ejectment of Defendants from the farm "Miriam" and costs.

The action is based on the allegations that about January 1932, the parties entered into a written agreement of lease of the farm for a period of five

years.../

years; that about June, in the same year, a fresh verbal agreement of lease was entered into and of which a memorandum was subsequently reduced to writing, but was never signed. This new lease purported to cancel the former one. It is contended that the terms of this unsigned memorandum of lease are of full force and effect as there was no agreement that it would only be binding when it was reduced to writing and signed.

The summons goes on to allege that the Defendants committed a breach of the verbal agreement in clause 8, in that they failed and refused to give Plaintiff certain land on the left flank of the stream and the ploughed land in front of the huts, which were specially excluded from the lease. Further, that they broke clause 9 by occupying all the huts instead of only one and refuse to vacate them.

The Defendants admitted that a lease was entered into in January 1932, but denied that it was superseded by a fresh verbal lease in the following June, which they never signed. The refusal to restore the huts and land are admitted, and this act is deemed to be justified by the fact that the new lease was never agreed upon or signed. The Defendants contend that even if the particulars of the summons are established, the Plaintiff would not be entitled to cancellation of the alleged agreement, but to an action for damages and/or an order of specific performance.

The Judicial Officer ordered that the verbal agreement as embodied in the memorandum be cancelled and that the Defendants be ejected. He came to the conclusion that the Plaintiff was entitled to damages but by consent the amount was not fixed pending appeal.

It is necessary here to draw attention to the impropriety of not giving a complete judgment, but to submit only an instalment for disposal by this Court. In this case the Judicial Officer has given a definite finding that the Plaintiff is entitled to damages and should his finding be confirmed, it is conceivable that when his award is made one or other of the parties may be dissatisfied, resulting in a second appeal being noted with its consequent delays and duplication of costs.

Against the judgment the Defendants have appealed on the following grounds:-

(1) The onus of proving the Defendants' consent to the agreement sued on (it being an agreement containing additional stipulations against the interest of Defendants, not included in the agreement previously arrived at between Plaintiff and Defendant Lebese), rested on the Plaintiff.

(2) This onus was not discharged by the unsupported testimony of the recollections of the only one of

Plaintiff's.../

Plaintiff's witnesses called.

(3) The weight of evidence, the probabilities and the Plaintiff's neglect to submit more than one of her witnesses to the Court are against the Plaintiff and entitle the Defendants to judgment.

(4) Defendant Kikini was not proved to have been a party to the alleged agreement sued on, there being no evidence whatever on record led by Plaintiff that he was ever a party thereto, or that Defendant,Lebese, was his duly appointed agent. On the contrary, the only evidence on record is the uncontradicted evidence led by the Defendants that Kikini wasnever a party to the contract nor was Lebese his agent. Kikini was, therefore, entitled to absolution from the instance. Further, without Kikini being a party to the contract sued on, the original agreement of January, 1932, stands and/or the agreement sued on is of no force or effect against either Defendant.

(5) That in any case the breaches complained of do not entitle the Plaintiff to an order for ejectment and cancellation of the agreement.

In view of the admissions on record, there are at this stage, two points to be determined, viz.:-

(a) Was the second lease entered into, and
(b) If it was, then is the Plaintiff entitled to what she has asked for?

It is common cause that a written lease was entered into in January 1932, and that the lease was to bind the parties for a period of five years. The lease was reduced to writing and signed by the parties. Six months later steps were taken with a view to cancelling the original lease and substituting a new one, as it became necessary to materially vary its items. Changes of a radical character were to be made and to judge by the evidence, there was a considerable amount of discussion. Mr. Attorney van Niekerk, who was acting for both sides, statesthat eventually they agreed to the terms of the new lease, but the Defendant contends that he never consented to all the terms and strenuously opposed them.

The Native Commissioner has preferred to believe Mr. van Niekerk rather than the Defendant for the reasons that the value of the statement by a person of his professional status with his training and well ordered mind, should be accepted. This Court does not feel called upon even to discuss Mr. van Niekerk's rectitude and professional ability, but still the Court must judge according to the evidence and this goes to show that Mr. van Niekerk is a very busy man, that he clearly relied upon his memory and when tested in this connection his replies were very inconclusive because he himself seemed to realise that he could not give positive replies

to.../

to many questions.

It is of course perfectly legitimate for the parties to enter into a new verbal lease, and thus to cancel the original one, but it is essential that in order that it should be valid the parties must have been in perfect agreement.

A perusal of the documents put in and the evidence given, satisfies the Court that the Plaintiff desired a radical change in the position, mainly to her advantage. This involved the evacuation of the residential huts, the erection by the Defendants of buildings in accordance with her wishes and instructions within 12 months from the 1st April, 1933; the breaking up of certain land, and the increase of the rental. It is not unreasonable to conclude that the first lease was more favourable than the proposed second one to the Defendants and they held the definite advantage - seeing that the original lease was for a period of five years of which only six months had elapsed. It seems highly improbable that in such circumstances the Defendants would have been so ready as the Plaintiff would have the Court to believe, to enter into a new lease to their disadvantage and without certain safeguards which the Defendant very naturally and reasonably say he stipulated for.

It is an indispensable element in a contract of the nature of the one in question that there shall be a complete consensus and that the agreement of each party to the contract should be unequivocal. In the opinion of this Court there is a strong doubt that the Defendants ever agreed to all the terms of the new lease. It is true that some clauses in the new lease were agreed upon. The first Defendant, purporting to act on behalf of the co-Defendant, denies that the important one cancelling the original lease was accepted by him. This clause cannot be deemed to ipso facto have the effect of rescinding the old lease because that was to be brought about in consequence of the desire on the part of the Plaintiff to vary certain other vital clauses.

As long as some of the terms of the new lease were not definitely agreed upon, it follows that the others would not become operative inasmuch as the intention was to substitute a whole new lease for the whole of the original one. The variations proposed were, as stated, more to the advantage of the Plaintiff than the Defendants, and this Court is not prepared to say that the new lease was agreed to in all its terms with the consequent effect of cancelling the lease entered into in January 1932, and the Defendants should have been given the benefit of any doubt that existed.

The result is that the Court comes to the conclusion that on the record, the verbal lease prepared in June 1932, was never entered into and consequently, the

lease.../

lease of January 1932, must be held to be binding for the present.

The preparation of the record for which a former Assistant Native Commissioner, and not the Native Commissioner, must be held responsible, falls short of what is required. The exhibits have been wrongly lettered, causing considerable difficulty, and one exhibit ("F") upon which a witness was examined was never put in and does not form part of the record.

The appeal is allowed with costs and the judgment in the Court below altered to one of absolution from the instance with costs of suit.

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CASE NO:24.

ELIZABETH NTSEKI ~~or JULY~~ vs. LESALA NTSEKI.

KOKSTAD, October, 1933. Before R.D.H.Barry Esquire, President and Messrs. D.S.Campbell and H.E.F.White members of the N.A.C. (Cape and O.F.S. Provinces).

(Appeal from the Court of Native Commissioner MATATIELE).

Marriage by Christian rites: Female partner of customary union entered into during subsistence of a marriage by Christian rites of the man with another woman, has no status and cannot claim accruals to her "house", even if her union regarded as a valid marriage; children of such customary union illegitimate.

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In this case the Plaintiff (Appellant) claims a declaration of rights to certain six cattle, two horses, fifty sheep, one donkey and £2:16/- in cash. Her claim is based on the grounds that she was married to her late husband, Austin, by Native Custom during the subsistence of a marriage by Christian rites between her husband and another woman. She alleges that she earned certain stock whilst living as Austin's wife, and also bought stock from grain reaped off lands allotted to her house. The summons goes on to say that although the Plaintiff regarded her marriage as binding under custom (dowry had been paid for her) it was ruled at a magisterial inquiry held under the provisions of Act 38 of 1927, that Native custom could not apply and for the reason she maintained that the stock earned by her, and also the stock purchased or acquired with the proceeds of the grain from the lands allotted for her use and maintenance do not belong to Austin's estate.

The Defendant who has been duly appointed by the Native Commissioner to administer Austin's estate, denies that Plaintiff earned stock as alleged, save as to what was stated at the inquiry. This portion of the plea is quite meaningless to this Court as it is not aware of what was stated at that enquiry, nor do the statements

then.../

then made form part of the record. He denies that, notwithstanding the Plaintiff's claim, he took possession of the property, sold some and proposed to deal with it all as estate property, but on the contrary, the Plaintiff voluntarily gave him possession and that he sold it without knowledge of her alleged claim." The Defendant goes on to allege that :-

> "(a) Plaintiff knew her union with the deceased "was unlawful, or
> "(b) If she had not known (which is not admitted) "then ignorance of the law is no excuse."

"Thus in either case (a or b), and even assuming that the Plaintiff did in some way contribute towards acquiring the stock, while unlawfully living as man and wife with the deceased, by cultivating his lands the property held by and/or given to deceased as his own property and by mutual consent of deceased and Plaintiff, was considered as his, and Plaintiff cannot now avail herself of her alleged ignorance of law as to her status and/or rights in property so acquired under such circumstances as a ground for claiming it after his death. Finally, the Defendant alleges that the property claimed was actually delivered to Defendant "q.q.", by Plaintiff as Estate property and accepted by him as such and in the circums-:tances, and ignorance of law being no excuse, the pro-:perty now belongs to the estate by virtue of such delivery."

It is common cause that, by consent, a temporary restraining interdict was granted pending the settlement of the present claim by the Plaintiff for a declaration of rights in the property in question. At the conclusion of the Plaintiff's evidence, which is all there is on record, the Assistant Native Commi sioner granted absolution from the instance and against this judgment the Plaintiff has appealed on the grounds that the Plaintiff's evidence is unrebutted and that the finding that the Plaintiff entered into a union with Austin and that she was regarded by the Headman who had the allotment of lands by Austin and by the Plaintiff herself as Austin's second wife, is contrary to law, but in any event to maintain consistency with such a finding he should have awarded Plaintiff the usufruct of the stock she claims as he finds that Austin was entitled to the usual services of a wife under Native Custom, and whilst imposing these obligations on Plaintiff denies her any of the customary privileges in so far as maintenance and support are concerned.

The appeal is further based on the contention that absolution from the instance on a claim for a declaration of rights without requiring the Defendant to adduce evidence in support of his rights, is irregular; that the judgment is contrary to law and against the weight of evidence and that a reasonable discretion was not exercised in regard to the prayer for alternative relief.

It is clear from the Plaintiff's own

statement.../

statement that, except for the donkey, the stock in question is either original stock or the increase of stock acquired from the proceeds of the two lands allotted for the maintenance of the Plaintiff and that the money is the proceeds of the sale of wool from sheep so acquired. Her lack of legal status is beyond question, for she admits that she entered into a union with Austin and with the full knowledge that a marriage by Christian or civil rights between him and another woman subsisted. She is thus not in the position of a wife, notwithstanding the fact that dowry was paid for her. To appreciate this, any children she may have borne to Austin would be illegitimate (see Sec. 3 of Proclamation No. 142 of 1910).

It would be contrary to morality and public policy to in any way recognise the Plaintiff's rights which rest on her contention that she was the second wife of Austin, or had rendered him services as such. As the two lands were allotted for the support of the Plaintiff's house, it is incontestible that these lands could ever have been allotted to herself for her own personal and exclusive benefit, and of this she must have been well aware, seeing that she contends she was regarded by the Headman as Austin's wife and that both Austin and herself regarded their union as a marriage.

The allotments would have been made in the name of Austin, and the fact that there was no valid marriage between Austin and the Plaintiff cannot confer on the latter full and complete rights to the proceeds of the lands to the exclusion of the rights of Austin, which the administrator of his estate is justified in exercising.

The case of the Plaintiff is in some respects a hard one, but on the other hand she has of her own volition put herself in the predicament in which she finds herself as she cannot now complain that the absence of any rights as the wife of Austin excludes her from participating in Austin's acquisitions while the illegal and immoral union subsisted between them.

The law as it stands has specifically attempted to safeguard the position of women married to a man by Native custom in the event of such a male entering into a civil marriage or marriage by Christian rites, but there is an en tire absence of any legal provision to protect women in the position of the Plaintiff, and the reasons for this are clear, and so obvious as not to need enumeration.

The Plaintiff has thus far been maintained by Austin out of the products of the lands allotted to him for the purpose, and the Plaintiff must be deemed to have no further rights in the lands and what they have hitherto produced by way of stock acquired - seeing she was merely in the position of a concubine.

That being so, and in view of the fact that the Defendant's status is not being challenged, there was

no.../

no need for the Judicial Officer to require the Defendant to lead or give evidence or to grant alternative relief.

In this Court it was stated that the Respondent had abandoned his claim to the donkey in question.

In the opinion of the Court this fact should not affect the question of costs, seeing that the Plaintiff (Appellant) has failed on her main claim and that the donkey formed only a very insignificant portion of the claim.

The appeal is dismissed with costs.

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CASE NO:25.

BEFILE MHLOKONYWA v NCOBO MHLOKONYWA.

KOKSTAD, October, 1933. Before R.D.H.Barry Esquire, President and Messrs. D.S.Campbell and H.E.F.White members of the N.A.C. (Cape and O.F.S. Provinces)

Native Custom - Succession: Eldest illegitimate son of right hand wife cannot succeed to great house in which there is no male issue as against eldest legitimate son of the Right Hand Wife who at formal meeting of whole family was assigned by his father, in his lifetime, to Great House and agreed to by the parties and other members of the family present at the meeting.

(Appeal from the Court of Native Commissioner Mt.Frere).

In this case the Plaintiff (Appellant) claimed as against the Defendant (a) a declaration of rights that he is the rightful heir of the late Mhlokonywa and as such entitled to the unallotted stock of his father. (b) An account of the stock taken by the Defendant from Mhlokonywa's estate.

The defence set up was in effect that the Defendant and not the Plaintiff is the heir to the Great House and therefore the Plaintiff's claim has no foundation.

It is common cause that the deceased had four wives or huts. In the Great House there was no male issue but only daughters. The right hand wife bore two sons, the Plaintiff and the Defendant - the Plaintiff being the elder of the two.

In argument great stress was laid on the contention that under Native Law it was not competent for Mhlokonywa to put a younger son as heir in the Great House and disinherit the Plaintiff - an elder brother - without good cause, and the usual formalities attaching to such an act.

In.../

In the ordinary course the Plaintiff, if legitimate, would have automatically assumed the heirship to the estate of the Great House on his father's death in preference to the Defendant and this is the Plaintiff's contention. But in this case a meeting of the family was convened and held by Mhlokonywa, at which the parties were present as well as all the members of the family. At this meeting Mhlokonywa placed certain of his sons in various houses so that each would have an heir. At this meeting, too, the Defendant was definitely appointed to the Great House and the Plaintiff to the Right Hand House. The proceedings were reduced to writing and all parties acquiesced. No objections were raised to the dispositions made. The appointments were further concluded and ratified by the Plaintiff and Defendant both kissing the hand of their father.

It is contended by certain witnesses that they did not construe this act of Mhlokonywa to have the effect of ousting the Plaintiff, but it seems illogical that a son should be proclaimed as heir of the Great House and yet not to enjoy the rights and privileges of his heirship, but that another son who was assigned to and accepted the heirship of another house should have not only concurrent, but as in this case, greater privileges in that house.

Now it is clear to this Court that Mhlokonywa did not act without reason when he publicly proclaimed the Defendant as his heir to his Great House, for it emerges that he always regarded the Plaintiff as illegitimate. He naturally desired to have his eldest legitimate son as his great heir, but he provided for "the other son" i.e. the Plaintiff, by allotting to him his mother's house (the right hand house).

This is not a case of disinhersion in the ordinary acceptance of the term, but rather an act by Mnlokonywa to avoid the possibility of disputes arising between the members of his family after his death by publicly assigning a son to the great house, seeing there was no son born in that house.

The gathering at which the position was made clear appears to have been a formal one and the status of the respective sons as pronounced by their father was not only acquiesced in without demur, but was sealed by the solemnity of the kissing of the father's hand by the sons and a report of the occurrance made to the chief. The deceased's wives were also present at the meeting and they too raised no objection.

The arrangement made in 1926 by Mhlokonywa was never challenged nor disturbed and it is only after his death that the Appellant has set up his claim to be the heir.

While this Court agrees that an heir cannot be ousted from his position without good cause and without the appropriate formalities yet, in this particular case,

the.../

the features are peculiar,for not only is the illegitimacy of the Appellant a factor, but there is also the definite appointment of the Respondent by his father as his heir in the Great House.

Both parties to the suit and all the members of the family having accepted the appointment by the deceased, it is too late now for the Appellant to endeavour to nullify the formal institution of the Defendant as heir in the Great House (See Tinini Zakaza vs. Dennis Pennington, IV N.A.C. 192/3).

In the opinion of the Court the Native Commissioner rightly concluded that the Appellant is not the heir of the Great House and is not entitled to the Great House property claimed.

The appeal is accordingly dismissed with costs.

CASE NO:26.

SITWANGU MCITWA v BOTYILE DEBEZA.

KOKSTAD, October, 1933. Before R.D.H.Barry Esqr., President, and Messrs. D.S.Campbell and H.E.F.White members of the N.A.C. (Cape & O.F.S. Provinces).

Dowry cattle: Attachment of - Bona fide restoration of conjugal rights by wife - Writ for attachment of dowry cattle paid by husband set aside when Court satisfied that, obedient to a judgment of Court, the wife genuinely tried to restore conjugal rights but again left her husband owing to her further ill-:treatment by him.
Held, that in such circumstances the husband cannot claim the return of his dowry.

(Appeal from the Court of Native Commissioner Mt.Frere.)

On the 13th December, 1932, the present Respondent obtained a judgment against the Appellant in the Court of the Native Commissioner, Mount Frere, for the return of his wife or the dowry paid for her.

There was no appeal against that judgment and the wife returned to her husband in compliance with the order of Court, and lived with him as his wife for some time. On the 23rd March 1933 (See Mr. Lange's letter of the 24th March 1933) she again left him, alleging further ill-treatment, and on the 12th April 1933, Respondent issued a warrant for the attachment of the dowry paid by him. The Respondent admits that after his wife left him he visited her at her father's kraal and there exercised his marital privileges up to the time of the issue of the writ.

The Appellant has now applied to have this warrant set aside on the grounds alleged in his application.

There.../

There is clear and admitted evidence that the relations between husband and wife have not been good and he admits that he has assaulted her on several occasions. After the order of the Court the wife appears to have made up her mind to forgive her husband and her action in returning to him and remaining at his kraal for a period of over three months indicates a bona fide intention on her part to return to him. The woman now alleges further ill-treatment on the part of the husband - the fact that she allowed him marital privileges up to the time of issue of the warrant seems to indicate that for some reason she was afraid to live at his kraal.

The allegation for further ill-treatment after the order of Court is true, and if that was the reason for the wife's subsequent desertion, it would create a new cause of action.

The facts of this case shew that the woman did comply with the order of the Court, and lived with her husband a reasonable time, that she left him owing to the alleged additional acts of ill-treatment and in the circumstances the husband was not justified in taking out the warrant of execution.

The refusal of the application to set aside the writ is based mainly on the concluding passage in a letter written by the Appellant's Attorneys to the Plaintiff's Attorney as follows:-

> "We may mention further that your client is at "liberty to issue writ at his pleasure."

The Native Commissioner has concluded from this that the woman had no intention of returning to the Plaintiff.

This Court is unable to take the same view for not only does the whole history of the case suggest that the fault lies with the Plaintiff rather than with his wife, but in order to get at the true meaning of the letter, one should be guided by the context of the whole rather than one selected passage. A perusal of the letter shows that it informs the Respondent's Attorney in very emphatic terms that the woman had left the Plaintiff alleging that she had been again assaulted by him and that she had therefore left him justifiably and for good cause. Further, that the woman had lodged with the Police her complaint of the assault upon her. Then followed the lines quoted above, which, in the opinion of the Court would have amounted to a contradiction of the allegations contained in the same letter if accepted literally.

The letter was clearly intended to inform the Respondent's Attorney of the grounds upon which his wife left him and that he could issue a writ if he liked,

but.../

but that the responsibility for doing so would be his own after having been informed of the circumstances in which the woman had left her husband.

For these reasons the application should have been allowed and the writ set aside. The appeal is accordingly allowed with costs.

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CASE NO:27

CCLE NOMPOZOLO v LUCAS JINI.

UMTATA, October, 1933. Before R.D.H.Barry Esquire, President and Messrs. E.G. Lonsdale and A.G. McLoughlin members of the N.A.C. (Cape and C.P.D. Provinces).

Land - Sale: Agreement to sell land held under Proclamation No.227 of 1898 cancelled and instalment of purchase price ordered to be refunded on misrepresentation by the Defendant that land registered in his and not the name of his minor son.
Interest: mora: costs on higher scale.

Held, that failure by Defendant, as a condition precedent to the sale, to comply with Section 11 of Proclamation No. 196 of 1920 entitled the Plaintiff to regard the agreement to sell as void and that the Plaintiff is entitled to have restored to him the instalment of the purchase price paid.

Held,further, that the Plaintiff is entitled to interest on such instalment from the date of mora viz., date of payment.

(Appeal from the Court of Native Commissioner LIBODE).

In this case the Plaintiff (Respondent) sued the Defendant for:-

(a) An order declaring a contract of sale by the Defendant to Plaintiff of Lot 121 (A.O.F.5771) and agricultural allotment No. 155 (A.O.F.542) situate in Bulube's Location, Butterworth, as null and void ab initio, and an order on the Defendant to repay to the Plaintiff the sum of £30 paid on account of the purchase price of £135 for the two lots, with interest thereon at 6% per annum from the date of sale to date of repayment.

Alternatively,

(b) For an order cancelling and rescinding the said contract of sale and ordering the Defendant to repay the sum of £30 with interest as disclosed in paragraph (a) above.

The particulars of the claim allege that on the 9th of April 1929, the Defendant sold to the Plaintiff the two lots in question for £135, representing that he was the registered holder. The lots were to be transferred to the Plaintiff's son Dumbleton Jini. On the 11th April 1929 the Plaintiff paid to the Defendant £30 as a deposit on account of the purchase price and required him to obtain the necessary official authority for the transfer of the two lots. This permission was never obtained.../

obtained although the Defendant was frequently pressed thereto.

The Plaintiff goes on to allege that subsequent to the payment of the £30 he discovered that the lots in question were registered not in the Defemdamt's name, but in that of his minor son Colesbairn Nompozolo and that the Defendant had not the power to sell the lots and has not obtained the authority to do so. It is therefore contended firstly, that the contract of sale is null and void ab initio. by reason of the contract being in breach of the condition of the grants of the lots precedent to alienation or transfer thereof; and secondly, by reason of the facts that the lots did not belong to Defendant but to his minor son and that the Defendant had not observed the requirements of the law as laid in Sections 11, 12 or 13 of Proclamation 196 of 1920.

The summons avers that if the contract is not void ab initio, then the refusal and neglect of the Defendant for over three years to obtain the necessary powers, authorities and consents enabling him to carry out his obligations under the contract and his disregard of such obligations and the non-delivery of occupation and possession of the lots, entitle the Plaintiff to regard the contract as cancelled and rescinded.

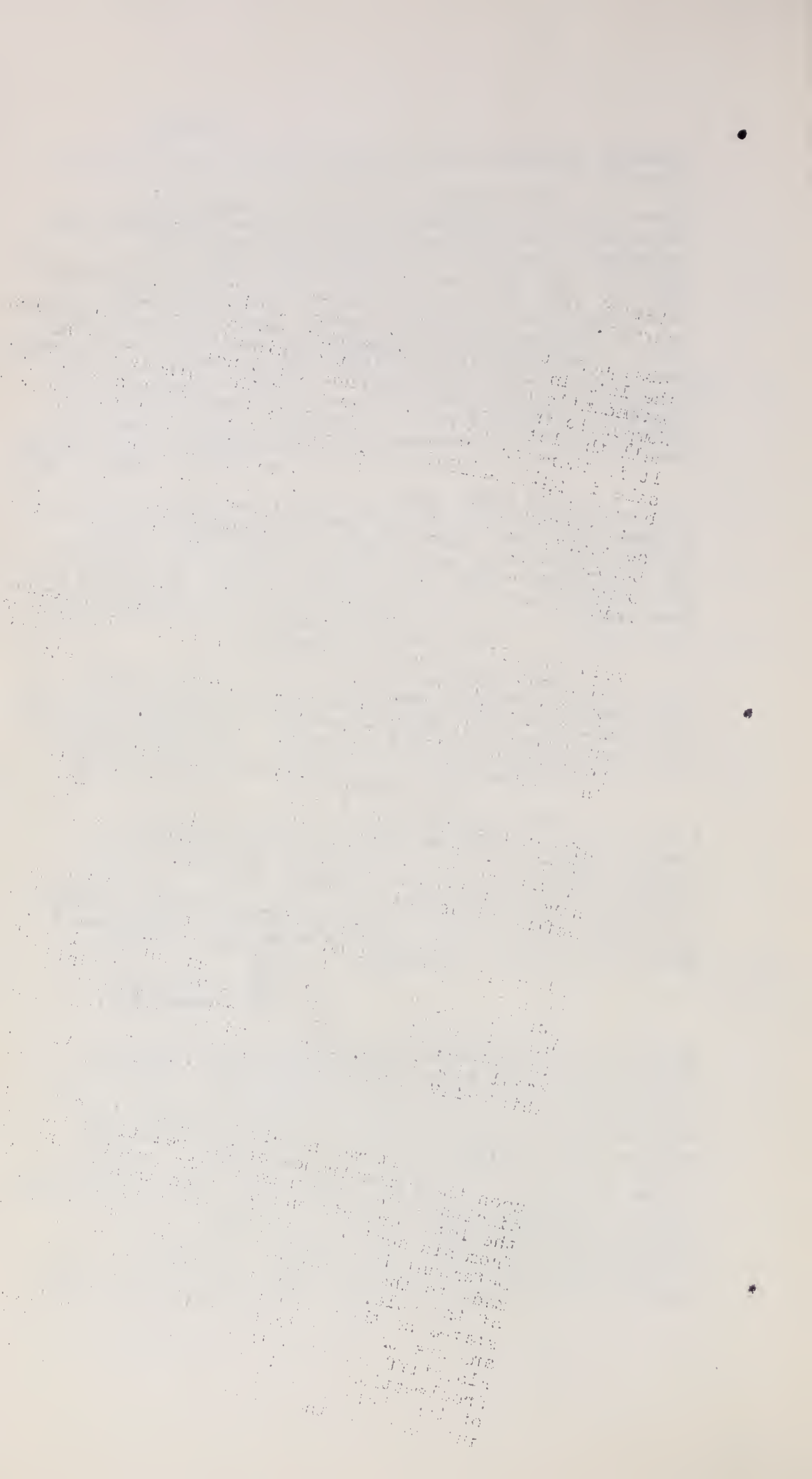
The Defendant filed a special plea to the effect that throughout the negotiations he acted on behalf of his minor son Colesbairn Nompozolo and that having disclosed this fact to the Plaintiff, the action should have been brought against Colesbairn, assisted by the Defendant as Colesbairn's guardian.

These allegations were denied by the Plaintiff who contended that on the 12th April 1929, when he paid £30 to the Defendant on account of the purchase of both lots, the Defendant still represented himself to be the owner and gave the Plaintiff a receipt in Sixosa, which being interpreted meant: "I sell my kraal site to Mr. Lucas Jini for £135 (one hundred and thirty-five pounds sterling): £135

By cash 30 £105 (Sgd)
Cole Nompozolo.

It was nearly 7 months after the contract that upon the remonstrance of his relatives the Defendant disclosed the true name of the grantee and repeated that the lots were his and had been transferred to his name from his son's. During the period of 7 months the Defendant is alleged to have broken frequent promises made to the Plaintiff to get the Magistrate's approval of the sale. When the disclosure was made the Plaintiff states he there and then importuned the Defendant to go and see the Magistrate, but that he failed. The Plaintiff contends that under Section 11(3) of Proclamation 196 of 1920, the duty of deciding if a sale of land held under the title of these two lots is in the interests of the minor lies upon the Magistrate and not,

as in.../



as in this case, on the Defendant, therefore such decision by the Magistrate is a condition precedent to the contract of sale. This argument is used as a reply to the contention raised in the special plea. The Plaintiff states he could not sue the minor assisted by his guardian as he would have had to aver in the summons that the action was in the interests of the minor as held by the Magistrate, whereas no such opinion had been given by the Magistrate, whose inquiry and decision amount to a condition precedent to the lawful sale of the allotments. The action, it is therefore maintained, was rightly brought against the Defendant who sold the land in his own name, which he had no right to do or to receive a portion of the purchase price.

After evidence had been led the judicial Officer overruled the special plea with costs. The Defendant's Attorney stated that his case was contained in that portion of the plea which says that the failure of the Plaintiff to fulfil his part of the contract justifies the Defendant in regarding the contract as broken, thus entitling him to retain the sum of £30, as and for compensation for Plaintiff's occupation of building lot 121 and as for damages sustained by Plaintiff's breach of contract - the agreement being that payment be made before the consent of the Chief Magistrate was obtained. The Attorney asked for a ruling and intimated that if the ruling was against him no further evidence would be led.

The Court below took the view that the contract entered into is in effect a contract with a suspensive condition - the condition being the consent of the Chief Magistrate in terms of Proclamation 227 of 1898, as amended; that such a contract requires a fulfilment of the condition before it became of force and effect. The Court also ruled that the claim of the Defendant to retain the £30 paid on account as compensation and damages amounted to a counterclaim, and that no judgment on it could be granted unless properly set up as such. As a result of these rulings no further evidence was led and judgment was entered for the Plaintiff with costs on the higher scale - the Court declaring the agreement between the Plaintiff and Defendant to be cancelled, the Defendant to repay the Plaintiff the sum of £30 with interest as prayed.

A recapitulation of the alternative, or rather the main plea and the replication is not necessary to appreciate the portent of the judgment given as they are for the most part a repetition of the special plea and the reply it called forth. The contentions of the respective parties are sufficiently disclosed and they amount to this that each party accuses the other of a breach of contract.

The appeal noted by the Defendant is based on the following grounds:-

(1) That the dismissal of the plea is against the weight.../

weight of evidence and contrary to law in that apart from the original agreement the Plaintiff became aware on the 16th October 1929 that the sale was on behalf of Colesbairn and did not repudiate it, but having acquiesced therein and ratified it, he is bound thereby.

(2) That the award of costs on the higher scale is not justified and not in terms of Order XXXI, 2 (3).

(3) That on the main claim the judgment is against the weight of evidence, contrary to law and that the correct judgment is one of absolution from the instance.

(a) That the sale was not in law void ab origine or null and void as alleged in the particulars of the claim, nor do the allegations, even if proved, give rise to an action for cancellation of the sale and for the return of the purchase price.

(b) That the agreement of sale not being null and void, or based on fraud, the Plaintiff's action should have been for specific performance with an alternative claim for damages. The Plaintiff is not entitled to claim restitutio in integrum.

(c) That there is a presumption in law that the purchse price is payable in cash and the Plaintiff has not rebutted that presumption. That the Plaintiff at no time, as he is by law required to do, tender payment of the purchase price, either against transfer or otherwise.

(d) That in any event judgment for interest from the 12th April 1929, is bad in law.

(e) That the Defendant's contention being borne out both by the evidence and the law, the judgment should have been for the Defendant, or one of absolution from the instance.

The case can best be understood by resolving it in terms of the elementary essentials of an agreement of sale and purchase:-

(i) Competent parties;(ii) Legal subject matter of sale, plus questions of price and identity of object of sale, which do not enter materially into this enquiry.

Dealing with the first of these essentials - we find that Defendant states - his other contentions and denials to the contrary notwithstanding -

"I regarded the site and land as mine... when I sold "it to Jini I described it as my kraal site."

This is borne out by Exhibits "B","H" and "I", from which it clearly emerges that at no time did Defendant himself regard his position in the matter as other than that of the owner of the lot in question and as principal in the agreement. His position accordsfully with the contention set up by the Plaintiff and his witness that he dealt with Defendant as principal. Even when challenged by his

relatives.../

relatives as to his ownership, the solution is not a novation but a family arrangement to re-transfer the land to his (Defendant's) own name.

This finding dispose not only of the special plea which was rightly overruled, but the subsidiary issues of sale by an agent; of the powers, etc. of a guardian and of that of novation.

The next essential, that of the legality of the subject matter of the sale, clarifies the remaining aspect of the case. From the record it appears that the kraal site and land in question are situate in the district of Butterworth and are held under the provisions of Proclamation No.227 of 1898, as amended by Proclamation 196 of 1920, under conditions including a prohibition of alienation or transfer without the consent of the Chief Magistrate of the Transkeian Territories first had and obtained. In his plea Defendant admits this condition and contends that he had the right "to negotiate the sale and transfer which would be subject to the consent of the Chief Magistrate. He would in any event become acquainted with this condition when transferring the site to his son's name as alleged. He states explicitly in reply to the Assistant Native Commissioner:

"I knew the matter had to go thro' the Magistrate."

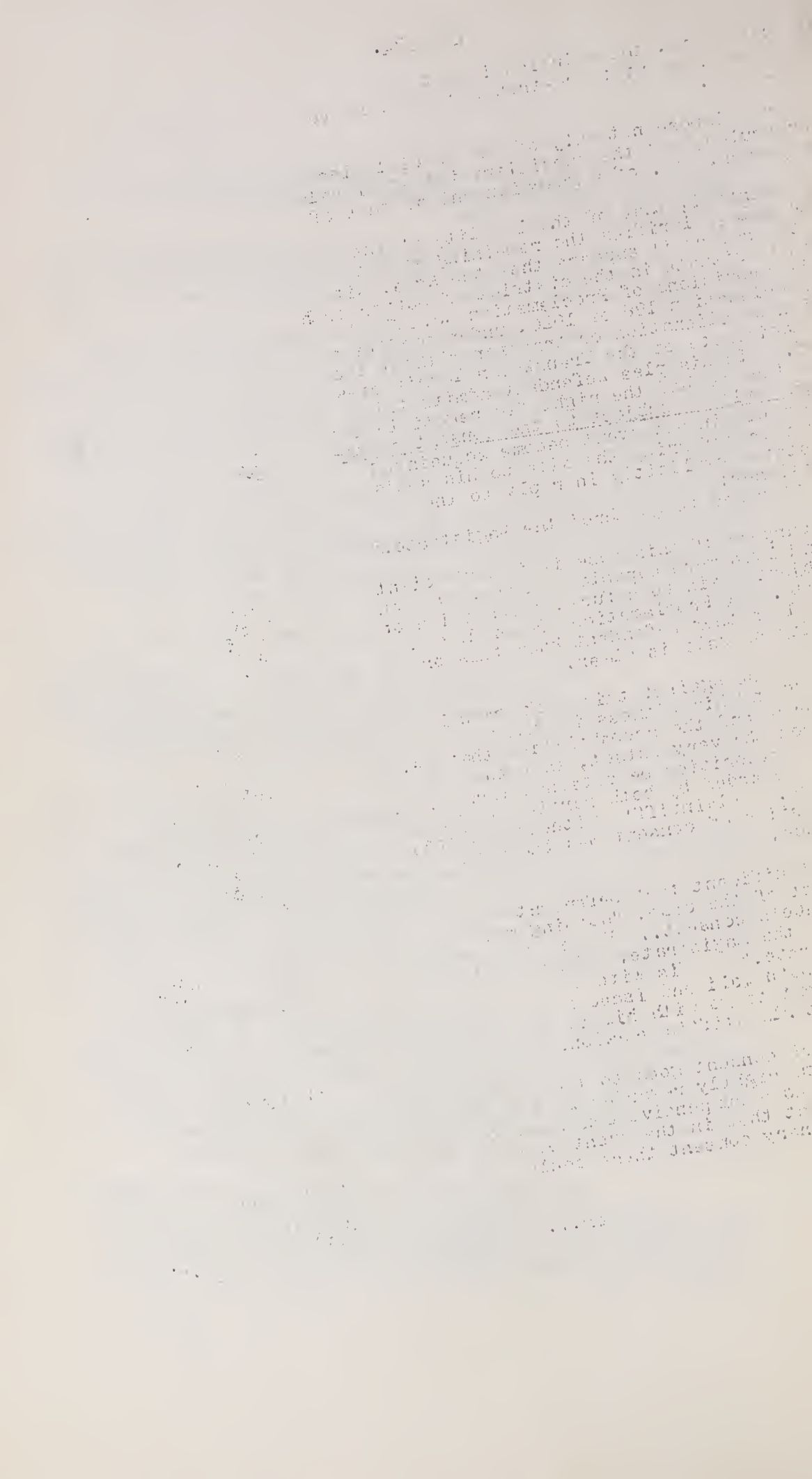
For the purpose of this case it is sufficient to note that the site and land were capable of sale, even on behalf of the minor, subject again to a further condition of approval by the Magistrate. (Proclamation 196 of 1920). Moreover, it is immaterial whether Defendant knew this or not - the legal possibility of sale is clear.

Viewing the case against this back ground, the contention of the Plaintiff and his witness is fully substantiated by the evidence and the probabilities that he, the Plaintiff, insisted from the very outset, that the necessary consent - of the authorities be obtained through the Magistrate, - the official regarded by both parties as the proper agent for the service. Plaintiff's witness, Maliwa, also explains that this question of consent was the main point in Plaintiff's attitude.

It is most significant that Defendant attempted to deny this aspect of the case: "Nothing was mentioned about the Magistrate's consent.. He did not ask me on the first day to go to the Magistrate. He has never asked me to go to the Magistrate." His witness Roger Nompozolo supports him, but both Qoli and Isaac say that the Plaintiff did ask Defendant to go with him to the Magistrate - thus bearing out Plaintiff's version.

This question of consent goes to the very root of the case. It has been rightly regarded by the Assistant Native Commissioner as a suspensive condition in the agreement for it is apparent that in the event of a refusal of the desired preliminary consent there could be no sale at all.

Nor.../



Nor would the agreement crystalise into a contract until the condition had been fulfilled (III Maasdorp p.138). Now this condition has admittedly not been fulfilled by Defendant for the reason that he would appear to have insisted on full payment before getting that consent (Evidence of Maliwa, Qoli and Isaac). Until it was fulfilled, there was no contract and Defendant could not legally demand payment in the absence of another suspensive condition to that effect which has not been proved.

The evidence of the Plaintiff and his witness is definitely to the contrary and the Court sees no reason to doubt their credibility. On the other hand, it is very evident from the instances enumerated above that Defendant is a person who is not worthy of belief on his own showing and that of his own witnesses.

The sale having failed for lack of formality due to the attitude of the Defendant, the Plaintiff is entitled to recover the deposit paid. (Mackeurtan "Law of Sale of Goods in South Africa," pp. 316-7. See also Rubin vs. Botha A.D. p.583 on the general principle). Plaintiff is entitled to the return of the money paid with interest (ibid p.339) from date of mora, viz. from the date of payment to Defendant of the money.

Coming to the question of costs: the case presented considerable difficulty and was made more complicated by the voluminous pleadings and subtle issues raised. In the opinion of the Court the Judicial Officer exercised his discretion judicially and reasonably in allowing the Plaintiff costs on the higher scale.

In this Court the Respondent's Attorney had applied for costs of appeal on the higher scale. The position having been cleared by the exceedingly able and well reasoned judgment of the Assistant Native Commissioner, the issues in this Court were simplified to such an extent that an order of costs of appeal on the higher scale is not warranted.

The appeal is dismissed with costs.

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CASE NO:28.

MNGOMA FETUMANI v NOTA NTSHENTSHE.

UMTATA, October, 1933. Before R.D.H.Barry Esquire, President and Messrs. E.G.Lonsdale and A.G. McLoughlin members of the N.A.C. (Cape & O.F.S. Provinces).

Pondo custom: Payment of further dowry by husband of ngena union: Doweries of girls born of such union claimable from their mother's father or his heir, less isondlo fees.

(Appeal from the Court of Native Commissioner NGQELENI).

The.../

The Plaintiff (Appellant) who is admitted to be the heir of his grandfather, Nomágushe, claims from the Defendant six cattle or their value, being the dowry received by the Defendant for a girl born to Nomagushe's widow, Mandanya,

Against an absolution judgment an appeal has been noted on the facts and conclusions of Native Law and custom.

It is common cause (a) that Mandanya gave birth to two girls, Ntombi and Sebenzana, of whom Nomagushe was not the natural father. (b). That both these girls were brought up at the Defendant's kraal. (c) That he gave both in marriage, receiving ten cattle as dowry for Ntombi and six for Sebenzana. (d) That of the ten cattle paid for Ntombi, five are in the possession of the Plaintiff and five are held by the Defendant.

The Plaintiff contends that after Nomagushe's death, Mandanya was ngenaed by Jike as a result of which the two girls were born. He states that he received the whole of the dowry, ten cattle for Ntombi, but returned five of these to the Defendant, representing two isondlo beasts and three as dowry in respect of the ngena union.

On the other hand, the Defendant alleges that no ngena union was effected between Jike and Mandanya, but that the two girls were born as the result of intercourse with one Dinana. As regards the divided dowry of Ntombi, he states that without admitting liability, but in order to settle the dispute as to the ownership of the girls, he offered to return the dowry paid for his sister by Nomagushe.

The Native Commissioner states that, ex facie, each of the versions is as probable as the other, and he therefore entered an absolution judgment.

This Court is, however, of opinion that on the evidence and probabilities, the Plaintiff has fully established his contention that the two girls in question are the issue of an ngena union between Nomagushe's widow and Jike.

Jike is a younger brother of the late Nomagushe and lived at his kraal. It would be natural that he should be the one to raise seed to his brother.

The girl Ntombi went through the Intonjani rite at Nomagushe's kraal and the mere fact that she and her sister lived with her mother at the Defendant's kraal does not nullify the Plaintiff's rights in the girls.

The version of the Defendant is so wide of the probabilities that the Court is unable to give credence to it. The Defendant states that he voluntarily paid Plaintiff five cattle out of Ntombi's dowry to stop the dispute about the girls. It is almost unbelievable that a native would give away five cattle unnecessarily, especially as in this case the Defendant himself states that Mandanya had born twins to Nomagushe, in which circumstances the Plaintiff could have had no possible claim for the return of dowry paid by Nomagushe for his wife. On the other hand, the Plaintiff denied the birth of the twins and he would thus have been entitled to the whole dowry, less isondlo fees.

The.../

The Plaintiff's explanation of the division of Ntombi's dowry is the more probable one. He states that he paid two cattle as isondlo fees and three as dowry in respect of the ngena union. This would, in the opinion of the Native Assessors, be in accordance with custom for, on the circumstances of the case being put to them, they stated:-

> "An ngena husband could pay as many as three cattle if the woman stays at the kraal. If the deceased is the eldest son and the ngena husband comes next to him, then the ngena husband calls the sons of the ngena union the younger sons of his brother. If an elder brother ngenas, then cattle would be paid to keep the woman at the kraal. As long as the woman has born children, dowry is paid for the ngena union so that the dowries of the daughters can come to the kraal. Further dowry for the ngena union could be paid to strengthen the union. The ngena husband would pay more dowry, seeing the woman bore children."

There is also the uncontradicted statement of the Plaintiff that when the five cattle passed, the girl came and stayed with him for several years, then returned to Defendant and got married.

The appeal will therefore be allowed with costs and the judgment in the Court below altered to read:

> "Judgment for Plaintiff as prayed with costs of suit."

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CASE NO:29.

STOTSOLO VAPI & MANGWANYA VAPI v EBENEZER VAPI.

UMTATA, October, 1933. Before R.D.H.Barry Esquire, President and Messrs. E.G.Lonsdale and A.G. McLoughlin members of the N.A.C. (Cape & O.F.S. Provinces).

> Pondomisi custom - Succession: The heir born in the Right Hand House succeeds also to the heir-:ship in the Great House as against a posthumous illegitimate son born by the Great Wife - even if the latter was born at the Great House Kraal.

(Appeal from the Court of Native Commissioner TSOLO.)

In this case the point to be decided is whether the first Plaintiff or the Defendant is, according to Pondomisi custom, the heir in the Great House of the late Vapi Shinta.

From the record it emerges that the late Vapi had two houses; that the Defendant is the admitted heir in the Right Hand House, and that the first Plaintiff is the only male child born to the widow of the Great House.

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The Native Commissioner has found that this child was born some two years after the death of the late Vapi and this Court sees no reason to take a different view. It is common cause that the first Plaintiff was born at Vapi's Great Kraal.

The Native Commissioner found himself unable to decide whether the first Plaintiff could, in Native Law and custom claim to be heir to the estate of the late Vapi in the Great House, and gave judgment of absolution from the instance.

The Plaintiffs have now appealed on the ground that, according to Native Law and Custom, the Plaintiff is the heir of the late Vapi in the Great House, whether he (Plaintiff), be a posthumous or "a picked up" child, inasmuch as he (Plaintiff) is the sole male child of the late Vapi's Great Wife, Mangwanya, who gave birth to him at the late Vapi's Great Kraal.

It is agreed that the whole case hinges upon the point as to whether the Plaintiff or the Defendant is the heir to the late Vapi. The circumstances of the case having been explained to the following Assessors, four of whom are of the Pondomisi tribe:

(1) Dingezweni Mbobela;(2) Qunqu Mkondweni; (3) Ndevu Jubase; (4) Tabankulu Mhlontlo; (5) Nongonwana Jiyajiya and Candilanga Makaula, they state unanimously:

"According to Pondomisi custom a child born after the death of the kraal head and born at the kraal, under illegitimate conditions, is just like a wild cat that eats up the fowls - and if it is found in the fowl-house it is killed.

"There is the right hand son born of the blood.

"The son (the Plaintiff) may be born of the Great House, but he cannot inherit at the kraal."

The Court sees no reason to take a different view of this expression of Native Custom on the point, especially in view of the fact that the first Plaintiff is not the issue of an ngena union, and that the ngena custom obtains in the Pondomisi tribe. Moreover, the cattle in question have been restored to the Great House.

The appeal is allowed with costs and the judgment in the Court below altered to read:

"Judgment for the Defendant with costs of suit - the Defendant is declared to be the heir in the Great House of the late Vapi Shinta."

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CASE NO: 30.

AARON NGABAYO v MPIYONKE BOLOKODLELA.

Procedure.../

The Appellant's Attorney therefore applied to amend the Summons by striking out of the claim the words: "five head of cattle or their value". A ruling on this application was reserved and argument on the legal point raised was proceeded with.

In the opinion of this Court this application must be refused inasmuch as it would alter the whole ground of action, and if it were allowed then the Respondent would reasonably be entitled to be allowed to file a fresh plea, and the Appellant might then desire to file a replication. Moreover, the Court has come to the conclusion that the evidence does not support the allegation of adultery, so that no object is to be gained by amending the summons. Furthermore, the alteration or the conversion of the claim at this stage from one based on Native Law to an action arising under the Common Law, might have the effect of rendering certain passages of the recorded evidence inadmissible.

This Court does not feel called upon to deal with the legal issue in the contention that the Plaintiff's marriage being one by Christian rites, he cannot claim damages on the basis recognised by Native Law and custom.

On the facts the Court has come to the conclusion that the judgment in the Court below should not be disturbed, and it therefore makes no difference whether the marriage is by Christian rites or by Native Custom if the commission of the adultery is not proved.

Coming to the question of costs. While the absence of notice by the Respondent to raise the new point of law in argument has greatly inconvenienced both the Court and the Appellant's Attorney, there has been no actual increase in the costs of hearing the appeal, and this Court does not therefore feel justified in penalising the successful Respondent.

The appeal is dismissed with costs.

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