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SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(CAPE AND O.F.S.)

1937.

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MAWENI JAJI vs. NGONGWANA MSOLO.

UMTATA: 19th February, 1937. Before H. G. Scott, Esq., President, and Messrs. W. J. G. Mears and J. H. Steenkamp, Members of the Court.

Appeal—Late noting—Objection in limine to hearing of appeal—Application for condonation refused.

(Appeal from Native Commissioner's Court, Tsolo.)

(Case No. 124/1936.)

In this case judgment was delivered on the 10th December, 1936, and the appeal against that judgment was noted on the 5th January, 1937, four days after the period prescribed by Rule 6 of Government Notice No. 2254 of 1928 had expired.

The respondent objected in limine to the hearing of the appeal on the ground that it was not timeously noted and the appellant applied for condonation of the late noting and attached to the application an affidavit and certain correspondence setting out the grounds on which condonation is sought.

The affidavit of Mr. Heathcote, a partner in the firm of Messrs. Gush, Muggleston & Heathcote, Umtata, Attorneys for appellant and who had originally instructed Messrs. H. Wood-Gush & Haft, of Tsolo, in this matter, set out that on the 18th December, 1936, the appellant interviewed him and informed him that judgment had been given against him on the 10th idem and that he wished to appeal. On the same date Mr. Heathcote wrote to Messrs. H. Wood-Gush & Haft requesting them to note the appeal and file the necessary security. The affidavit further set out that it would appear that Mr. Haft, Attorney for appellant in the Court below, had to leave Tsolo on the ground of ill-health and as a result of this and the intervening holidays the matter was not attended to until after the new year by a brother attorney in Tsolo; that Mr. Heathcote's firm wrote to Mr. Mackay who noted the appeal for Mr. Haft. Attached to the affidavit of Mr. Heathcote is a letter from Mr. Mackay dated 12th February, 1937, in which he says that the delay in noting the appeal is due to the fact that he and his brother attorneys closed their offices from the 15th December, 1936, to 4th January, 1937, for the Christmas Holidays and consequently the letter from Messrs. Gush, Muggleston & Heathcote of the 18th December, 1936, would not have been opened until the 4th January, when it was immediately attended to.

It would appear that the real reason why the appeal was not noted timeously is due to the fact that the offices of the attorneys in Tsolo were closed for what they term the Christmas holidays and that in any event correspondence would not have received attention during that period, quite apart from Mr. Haft's illness.

In this connection it is observed that no information has been furnished as to when Mr. Haft was taken ill or when he left Tsolo and why arrangements for carrying on his business during his absence could not have been made.

If attorneys choose to close their offices and do no business that is their own concern, but it does not, in the opinion of this Court, afford an excuse for failing to comply with the rules.

If the appellant was desirous of appealing there seems to be no reason why he could not have consulted Mr. Haft immediately on the conclusion of the case and given him the necessary instructions.

While this Court has power to extend the time for noting an appeal, it will only do so on good cause being shown and in our opinion that has not been done.

Moreover, this Court after carefully considering the record in the case is of opinion that the appeal would have small chance of success.

The objection to the hearing of the appeal is accordingly allowed with costs and the appeal is struck off the roll with costs.

MQOKELI AROSI vs. BELENI MANYAKANYAKA.

UMTATA: 18th February, 1937. Before H. G. Scott, Esq., President, and Messrs. W. J. G. Mears and J. H. Steenkamp, Members of the Court.

Wrongful Impounding—Pound Regulations Sec. 77, Proc. 387 of 1893 as amended by Proc. 60 of 1910—Notification of trespass—Refusal to pay either verbally or by conduct necessary before trespassing animals can be impounded.

(Appeal from Native Commissioner's Court, Qumbu.)

(Case No. 114/1936.)

Plaintiff sued defendant in the Court below for 16s., reduced during the hearing to 6s., as damages for the wrongful impounding of two horses.

Defendant denied the wrongful impounding alleging that he had duly notified plaintiff of the trespass who failed to pay the trespass fees and release his horses.

The Native Commissioner entered judgment for defendant with costs and against this judgment an appeal has been noted.

The Native Commissioner has found the following facts: That before sunrise on a certain date in July, 1936, defendant seized for impounding two horses which were found trespassing in his land. After sunrise he was informed by one Mpuku that the horses belonged to plaintiff and he thereupon sent his son, Tolbert, to notify plaintiff of the trespass. After Tolbert's return from plaintiff defendant milked five cows, had breakfast and then proceeded to drive the horses to the

pound. Plaintiff's son, Patekile, arrived at defendant's kraal to release the horses, but found they had gone and he followed defendant up only to find on arrival at the pound that the horses had just been impounded. This version of the matter is disputed by the plaintiff who alleges that defendant did not notify him of the trespass and that he only learnt of it through a third party.

The Native Commissioner has accepted the defence evidence on the point and we are not prepared to say that he was wrong. At the same time the mere notification does not necessarily free him from liability, section 77 of Proclamation No. 387 of 1893, as amended by Proclamation No. 60 of 1910, provides that:—

"The Native custom that the proprietor shall take the trespassing stock or notify the trespass to its owner when known, and the said owner being in the same or an adjoining location, or immediate neighbourhood, shall continue to be in force in the Native locations aforesaid. Provided that if such owner shall refuse to pay the damages claimable under the preceding clause, the said proprietor may impound the said stock".

In this case there is no evidence of a demand for payment at the time defendant reported the trespass, nor of the plaintiff's refusal to pay either verbally or by conduct and in these circumstances defendant was not justified in immediately impounding the horses.

The appeal will be allowed with costs and the judgment in the Court below altered to one in favour of the plaintiff for 6s. and costs of suit.

MANASE SEPTEMBER vs. ZACHARIAH MPOLASE.

Port St. Johns: 9th February, 1937. Before H. G. Scott, Esq., President, and Messrs. L. M. Shepstone and M. Adams, Members of the Court.

Engagement cattle—Agreement that marriage to be by Christian Rites—Failure of bridegroom to contract marriage by such rites entails forfeiture of Engagement cattle—Waiver of agreement and allegation that Customary union substituted must be proved.

(Appeal from Native Commissioner's Court, Bizana.)

(Case No. 165/1936.)

In the Court below plaintiff (appellant) sued defendant (respondent) for the return of his wife or the dowry paid for her alleging that he had entered into a customary union with Mangwane, defendant's daughter, in 1931 and paid as dowry for her 5 head of cattle, 1 horse and £12, that there was one child born of the union and that in 1935 Mangwane deserted him and refuses to return.

Defendant pleaded that plaintiff seduced and caused the pregnancy of Mangwane and abducted her with a view to marriage, that it was then arranged with plaintiff that the marriage should be by Christian rites and plaintiff thereupon paid 5 cattle, 1 horse and £5 as engagement cattle and made arrangements for the solemnization of the marriage by Christian Rites but subsequently failed to carry out his undertaking and postponed the date thereof. Thereafter, owing to complaints by Mangwane and defendant, plaintiff again

made arrangements for the solemnization of the marriage and Mangwane was taken back to defendant's kraal pending completion of the arrangements, defendant denies that Mangwane deserted the plaintiff and says she is willing to return to him as soon as the marriage by Christian Rites is solemnized, but if he fails to enter into the said marriage by Christian Rites, defendant pleads that he has forfeited the cattle and other property paid.

In his replication plaintiff denies having caused the pregnancy prior to the agreement for marriage having been come to; he admits that it was originally agreed that the marriage should be by Christian Rites, but says this agreement was subsequently waived by mutual consent and that he married Mangwane by Native Custom and she lived with him as his wife for a period of five years up to the time of desertion.

After hearing evidence the Native Commissioner entered judgment for defendant with costs. Against this judgment an appeal has been noted on the following grounds:—

1. That the Native Commissioner has overlooked the presumption of law in regard to the onus probandi in that, as it is an admitted fact that the plaintiff and defendant's daughter lived as man and wife for a period of three years (from 1932 to 1935), and that dowry was paid by plaintiff to defendant there is a legal presumption that the parties were legally married and the onus is on the defendant (and not on plaintiff) to prove that the parties are not so legally married, and this onus the defendant has failed to discharge.
2. If it is held that the Native Commissioner is correct in throwing the onus on the plaintiff to prove that the agreement to marry by Christian Rites has been cancelled or waived, it is contended that the plaintiff has discharged such onus in that it is an admitted fact that plaintiff paid dowry to defendant for his daughter; that the said daughter lived with plaintiff as his wife for three years; that it is within the knowledge of the defendant that the parties were so living together and he took no steps to prevent them so doing. These facts constitute a Native Customary union between plaintiff and defendant's daughter and support the contention of the plaintiff that the agreement to marry by Christian Rites was waived by the parties either actually or tacitly.

   Alternate grounds of appeal if the above fail but not otherwise.

3. Even if the agreement to marry by Christian Rites had not been waived, it is contended that the plaintiff is now justified in refusing to marry the plaintiff's daughter by Christian Rites on the ground of her adultery with Mbantso, and/or on the ground of her further adultery with some person to the plaintiff unknown since the institution of this action—it being admitted by the woman that she is now (10/12/36) between six and seven months pregnant and she and the plaintiff having been separated since October or November, 1935.
4. On failure of all the above grounds of appeal the plaintiff submits he is at least entitled to have the judgment altered to one of absolution from the instance to give him an opportunity (should he so desire) of marrying the plaintiff's daughter by Christian Rites or of instituting action for an annulment of the agreement and restoration of the dowry paid by him on the ground of the adultery of the defendant's daughter.

In regard to the first ground of appeal, this Court agrees that the onus was correctly placed on the plaintiff, but not for the reasons given by the Native Commissioner.

The defendant in his plea alleged that the agreement was that the marriage was to be by Christian Rites and as plaintiff had failed to carry out the agreement he had forfeited his cattle. Plaintiff in his replication admits the arrangement about the marriage by Christian Rites but alleges a waiver and it was, therefore, incumbent upon him to prove such waiver positively.

The appeal on the first ground must fail.

In regard to the second ground of appeal the plaintiff contends that the assertion that the marriage by Christian Rites was waived, is proved by the fact that he paid dowry for the girl and that she lived with him for three years as his wife. It is admitted that the cattle were paid as earnest cattle in respect of the marriage and it still remained for plaintiff to prove that a customary union was entered into and that the cattle, therefore, became permanently the property of defendant. The fact that the woman lived with plaintiff for two or three years certainly lends support to his assertion that the arrangements for the Christian marriage were dropped, but it is not necessarily conclusive. His evidence as to the reason for the failure of the Christian Marriage negotiations is that his prospective mother-in-law demanded a " Bikibiki " fee and a " Nqutu " beast and that he refused to pay them because defendant refused to allow them to be counted as dowry and that his mother-in-law then refused to allow the Christian marriage to take place and he then asked for his wife to be returned to him which was done. It is difficult to believe this evidence for several reasons. As far as this Court is aware the custom of the payment of a " Bikibiki " fee is one practised only by the Zulus and as the parties are Pondos, it seems unlikely that any such fee would have been demanded and in fact such demand is denied. Plaintiff also asserts that a Nqutu beast was demanded. This is denied by defendant and support is lent to his denial by the fact that the Nqutu custom is not recognized among the Pondos (see Ncekana *vs.* Ntshivana 3 N.A.C. 206 and Siposo Damane *vs.* Telepula 3 N.A.C. 207), and, furthermore, even where a Nqutu beast is paid, it does not count as dowry and is not recoverable. Plaintiff's evidence leaves the impression that he is endeavouring by any means to evade the consequences of his action in refusing to marry Mangwane by Christian Rites, but he has not been happy in his choice of his reasons for the failure of the negotiations. Apart from this, it seems highly improbable that people who had insisted on a Christian marriage, should drop that attitude and allow a customary marriage, because plaintiff had failed to comply with the demands. Is it not more likely that they would have refused to countenance a marriage of any sort until those demands had been complied with?

In the opinion of this Court the evidence of the plaintiff on this aspect of the case is not worthy of credence and it finds that he has failed to discharge the onus of proving a waiver by the defendant of the arrangement for a Christian marriage and the appeal on the second ground must fail.

In so far as the third ground of appeal is concerned, it is only necessary to say that the plaintiff does not base his refusal to marry Mangwane on the grounds set out therein. The adultery with Mbantso has clearly been condoned and the subsequent adultery with some other person has not been proved. Mangwane says that plaintiff is the father of the child with which she is now pregnant and this Court sees no reason to disbelieve her. This ground of appeal also fails.

In so far as the fourth ground of appeal is concerned, no good reason has been advanced for altering the judgment into one of absolution from the instance to give plaintiff an opportunity of marrying Mangwane by Christian Rites in view

of the fact that, at the commencement of the case, it was stated that she was prepared to return to him, provided he married her by Christian Rites and on the question being put to him, he stated definitely that he was not prepared to do so. As to giving him an opportunity to institute an action for the annulment of the agreement and restoration of the dowry paid on the ground of the adultery committed by Mangwane, it is evident that plaintiff is not genuine in refusing to marry her by Christian Rites by reason of her adultery. He adopts a high moral attitude because he says he is a Christian, but this does not accord with his desire to have the woman back as his wife by customary union. If his objection was genuinely based on Christian principles, he would refuse to have anything whatever to do with her and it would seem that he is using these alleged principles solely with a view to the recovery of his cattle when all else had failed.

As pointed out above the adultery with Mbantso was condoned and he could not, therefore, base a claim for annulment of the agreement on that adultery (see Nield *vs.* Nield, 1908 T.S. 1113; Bell vs. Bell, 1909, T.H. at p. 29 and Meyer *vs.* Meyer, 1935, E.D.L.D. at p. 58).

As to the other alleged adultery it was not pleaded that Mangwane ever committed adultery with anyone other than Mbantso. She was called as a witness for plaintiff and says her present pregnancy was caused by him and, as pointed out above, we see no reason to disbelieve her.

In our opinion this ground of appeal also fails.
The result is that the appeal is dismissed with costs.
Mr. Adams dissents from this judgment.

MANASE SEPTEMBER, Appellant **vs. ZACHARIAH MPOLASE,** Respondent.

Dissenting Judgment—Native Appeal Court (Cape and O.F.S.) in the above-mentioned case.

(Appeal from the Native Commissioner's Court, Bizana.)

(Case No. 165 of 1936.)

It is common cause that Zachariah, father of the woman, Eliza and the plaintiff agreed that the latter should marry Eliza by Christian rites. It was therefore incumbent on the plaintiff to fulfil his contract by executing such a marriage unless otherwise released therefrom. In what way does he claim to be released? In his plea he states "This agreement was subsequently waived by mutual consent". What is mutual consent? I submit it may be either express or implied. There is nothing in this case to indicate express cancellation but it is considered that the circumstances definitely prove implied consent by both Zachariah and Eliza.

This opinion is based on the following facts:—

1. Zachariah states that dowry was agreed upon.
2. Thereafter plaintiff and the woman eloped.
3. After the elopement dowry was paid and the woman continued to live with plaintiff for a number of years, in fact, a child was born of the union. Zachariah would have the Court believe that he, as a good christian, insists on a christian marriage. The acceptance of dowry after the elopement and the living of his daughter with plaintiff for a number of years as a concubine according to his story hardly substantiates this.

The essentials of a Native Marriage have been complied with, payment of dowry and delivery of the woman; this is followed by the living together for a number of years and raises a presumption of marriage. The woman considered herself to be plaintiff's wife, for she stated in the Magistrate's office, " I reside with my husband " and was willing to continue doing so. This took place on the 5th of October, 1935. If she did not agree to accept such a marriage, why remain on with plaintiff? Zachariah also states " The girl saw the Christian marriage had fallen through ".

Now whether or not there was an agreement between the father and the prospective son-in-law, I consider that the woman has accepted the position that she is the wife of plaintiff, by Native Custom. Such being the case, there is a valid waiver of any agreement she may have been a party to before, as the father cannot bind his daughter by contract without her consent. These facts alone would justify a judgment for plaintiff. Let us, however, go to the action of the father, he says that after the elopement dowry was paid and admits that the woman lived with plaintiff and that " For three years I just waited to see what they would do ". In other words, as the perfectly good christian which he would have us believe he is, he permits his daughter to live as a concubine to plaintiff.

The father admittedly states " I used to fetch her back and he also came to fetch her ". He does not anywhere say at what period he fetched her back, may be it was on and off right up to the arising of the present trouble, but the Court has no right to assume this because it may just as well have been during the first six months and that for the later period he took no action whatsoever, which would in my opinion constitute a definite waiver of the original agreement. There has been an implied waiver of the original agreement and the Native marriage accepted by both Zachariah and Eliza; under the circumstances, I consider a correct judgment would be one of " For plaintiff with costs as prayed ".

M. ADAMS,
Member of the Court.

Port St. Johns, 9th February, 1937.

NOFAYILE MNDWEZA vs. JABAVU MNDWEZA.

Umtata: 19th February, 1937, before H. G. Scott, Esq., President and Messrs. W. J. G. Mears and J. H. Steenkamp, Members of the Court.

Surveyed allotments—Right of widow who is holder of registered title to eject person not her heir—Rights different to those of widow who occupies by virtue of section nine *of Proclamation* 142/1910—*Wives ranking of—Unusual to marry wife into a house where there is already an heir except among Pondomise—Law to be applied where parties reside in areas where different Native Laws in operation—Section* eleven (2) *Act* 38/1927—*Variation of Customs—Onus of proof—Evidence which should have been produced at trial cannot be admitted on appeal—Rebutting evidence—Right to call.*

(Appeal from Native Commissioner's Court, Umtata.)

(Case No. 604/1936.)

In this case the plaintiff sues defendant for—

(*a*) An Order of Ejectment from building Lot. No. 248, Kambi Location, Umtata District.

(*b*) A Declaration of Rights in regard to 14 cattle.

(*c*) An order for delivery of one beast or payment of its value.

Plaintiff in her summons avers:—

1. Plaintiff is the right hand house widow of one Mndweza and defendant is the great son of the late Mndweza.
2. That plaintiff is the registered owner of a certain building Lot No. 248 situate in the Kambi Location in the Umtata District whereon a kraal is erected.
3. That defendant is residing at this kraal with plaintiff's consent but now wrongfully and unlawfully lays claim to the kraal and site and attempts to assume control in defiance of plaintiff's wishes and rights.
4. That plaintiff desires defendant to remove from the kraal and establish his own and has called upon him so to do but he neglects or refuses.
5. That there are 14 head of cattle, the property of the said right hand house of Mndweza (plaintiff's house) at the said kraal which are there with the consent and approval of the heir of the said right hand house for the support and maintenance of plaintiff and in which she has life interest.
6. That defendant now wrongfully and unlawfully lays claim to the said cattle and disputes plaintiff's rights therein.
7. That defendant has removed two head, exclusive of the 14 cattle before mentioned and refuses to restore them though called upon.
8. That the heir of the right hand house approves of this action and the claims made by plaintiff.

Defendant pleads:—

1. Defendant denies that plaintiff is the right hand house widow of the late Mndweza and states that his late father first married one Notenti by whom he had three children, to wit: The Defendant and two daughters.
2. That after the death of the late Notenti—which occurred before 1896—Mndweza married plaintiff and placed her in the Great Kraal, where she was regarded as Mndweza's Great wife.
3. That Mndweza died about 1911 and had three children by plaintiff; to wit Ntlalo and two females.
4. That when survey took place thereafter the land of the Great House was registered in plaintiff's name and the defendant and plaintiff have resided there, as ever since plaintiff's marriage she has been recognised as the Great wife and defendant as her son and Heir.
5. Defendant whilst admitting that the land in question is registered in plaintiff's name states:—
   (*a*) That the land is the property of the Great house of the late Mndweza.
   (*b*) That as the heir of Mndweza he has the right to reside thereon.
   (*c*) That he has so resided during the whole of his life.
   (*d*) That plaintiff has no right to eject him therefrom.

6. Defendant as heir and guardian of the estate of the late Mndweza states that since Mndweza's death (1911) he has managed and controlled the affairs of the kraal and provided for plaintiff in accordance with Native Custom and he denies that he has at any time disputed plaintiff's rights to the usufruct of the cattle or that he has removed or disposed of any cattle in a wrongful or unlawful manner, and further puts plaintiff to the proof of her claim for the cattle.

7. That in reply to paragraph 8 defendant denies that there is a Right Hand House of the late Mndweza.

The Native Commissioner entered the following judgment: —

Application for ejectment order refused with costs. On claims B and C absolution from the instance with costs.

Against this judgment an appeal has been lodged on the grounds: —

1. That the judgment is against the weight of evidence and probabilities of the case.

2. That plaintiff being the registered holder of the Title Deed to the building site surveyed in her name, after her husband's death, and having paid therefor and paid the quitrent has an absolute right to apply for the ejectment of the defendant who has refused to leave though so requested.

3. That in any event there was ample proof of justification to entitle plaintiff to the remedy asked for.

4. That according to Native Custom the second wife of a commoner is his right hand wife and any variation of the custom must be proved by those alleging it. That no such proof was adduced by defendant and plaintiff proved her status and was entitled to the orders asked for.

5. That the judgment is against the Native Custom appertaining to the status of wives.

6. That the rebutting evidence called should not have been allowed as the material facts had been revealed in cross-examination and were in issue when defendant closed his case.

Before evidence was led the attorney for the defendant in the Court below admitted that the kraal site and land is registered in the name of the plaintiff but contended that as she is the widow of the late Mndweza by virtue of which fact she acquired the title defendant as heir by Native Law and Custom has the right to reside on the kraal site.

After argument the Court below held that the onus was on the defendant. The defendant then led evidence seeking to show that plaintiff was married by Mndweza subsequent to the death of his Great Wife Notenti and was put in the Great House and was not the Right Hand Wife. Plaintiff on the other hand called evidence to show that Notenti was alive at the time of her marriage and that consequently she was the Right Hand Wife. There is a strong conflict of evidence as to whether Notenti died before or after plaintiff's marriage but it is clear that when plaintiff was married there were grown up children in Notenti's house.

The Additional Native Commissioner in his reasons for judgment stated that in order to determine plaintiff's status it was material to ascertain whether she was married during the lifetime or after the death of the Great Wife Notenti and that as the latter died at the Emjanyana Leper Institution it would have been competent for plaintiff to have adduced evidence from that Institution as to the date of her decease

and as there was, in his opinion, insufficient evidence to determine the status of the plaintiff he entered an absolution judgment in respect of the cattle claimed.

The Additional Native Commissioner is, in the opinion of this Court, wrong in his view that it was the duty of the plaintiff to produce evidence from the Emjanyana Institution as to the date of Notenti's death. The onus had been placed by him upon the defendant who alleged a variation in the ordinary custom in regard to the ranking of wives and it was for him, not the plaintiff, to prove that Notenti was dead when plaintiff was married and that, consequently, it was possible for plaintiff to have been married into the Great House as he alleges.

Before this Court plaintiff's attorney made application to put in certain correspondence which had passed between him and the Superintendent of the Leper Institution in regard to the date of Notenti's death. This was objected to by defendant's attorney and the Court refused the application as the evidence on the point was available and should have been led at the trial.

The Additional Native Commissioner allowed defendant, after the close of plaintiff's case, to call rebutting evidence to show that plaintiff was not the Right Hand wife of the late Mndweza. In this he was clearly wrong for that contention was the whole basis of his case and was what he was originally called upon to prove.

On the claim for ejectment the Additional Native Commissioner refused the order applied for on the ground that plaintiff having acquired the allotment by reason of the fact that she was the widow of the late Mndweza she has no greater right than he would have had to eject his son and heir or the other members of the family from their parental home without good and sufficient reason and relied for his judgment on the case of Mavayeni *vs.* Mavayeni (5, N.A.C. 91).

The questions this Court has to decide are:—

(*a*) Whether the plaintiff was married into the Great House or was the Right Hand Wife.

(*b*) What her rights are under the title granted in her name.

It has been long laid down that commoners do not nominate the position of the wives in the family but that their rank and status follow in the order of their priority in marriage. The rule is that the first wife is the Great Wife, the second is the Right Hand wife, the third is the Qadi of the Great House, the fourth is the Qadi of the Right Hand House, etc.

In this case it has been specially pleaded, however, that upon the death of the first wife the second wife was married into the Great House and that in fact no Right Hand House was established.

It is common cause that at the time of the second marriage there was already an heir in the Great House and the parties in this case are Pondomisi. Pondomisi Law permits the marriage of a woman into the Great House of which there is an heir.

The difficulty arising in the application of Pondomisi Law in the present case is that the parties, though Pondomisi, are resident in Umtata District, where Tembu Law prevails, and in view of the provisions of sub-section (2) section *eleven* of Act No. 38 of 1927 the Court has no option but to apply Tembu Custom.

Even if Pondomisi Custom did apply there is no evidence whatsoever that the necessary formalities to substitute plaintiff in the Great House were complied with.

In the case of Nzonda Kwaza *versus* Ndalana Kwaza (4, N.A.C. p. 376) a case from Engcobo District, Tembuland, the Court accepted the statement of the Native Assessors that it is most unusual for a wife to be married into a house where there is already an heir, and when this is done the wife so remarried to replace a Great wife is invariably taken from the family of the late wife.

In the case of Moni *vs.* Msongelwa (5, N.A.C. 151) this statement of Tembu Custom was re-affirmed.

The evidence shows conclusively that the plaintiff was the second wife married and that therefore in the ordinary course she would be the Right Hand wife.

As pointed out above the defendant, having pleaded that there was a variation in the ordinary custom, should have proved that plea by very strong evidence. He failed to do so and there was strong evidence on the plaintiff's part that Notenti was alive when she was married and this Court has no hesitation in finding that a Right Hand House was established and that defendant is heir in the Great House but not to the Right Hand House to which there is an heir, the son of plaintiff.

In so far as the rights of plaintiff under the title are concerned it is certainly true that she acquired the title to the building lot in question by virtue of being the widow of the late Mndweza but the fact remains that title was issued in her name without any reservations whatever and her right to apply for the ejectment of defendant, who is not her heir, even without showing cause, is clear.

The present case is distinguishable from that of Mavayeni *vs.* Mavayeni (5, N.A.C. 91) because in the latter case the widow was occupying an allotment not by virtue of a title deed but under the rights preserved to her by section *nine* of Proclamation No. 142 of 1910. Her position, therefore, would be very different from that of a widow who had a clear grant in her own name. It is clear that the cattle claimed are the property of plaintiff's house and in fact this was not disputed by defendant's attorney.

The appeal will accordingly be allowed with costs, the judgment in the Court below is set aside, and the following order substituted: —

(*a*) That the defendant leave the said building lot within six months from the date of this judgment.

(*b*) It is declared that the 14 head of cattle at the kraal of the plaintiff are the property of the Right Hand House of the late Mndweza and must remain at the kraal for the support and maintenance of plaintiff and her family.

(*c*) That the defendant restore to the plaintiff the two cattle removed to Tsolo or pay their value the sum of £6

(*d*) That defendant pays costs of suit.

NQUTSHU SATANA vs. HLATI MAHLUNGULU.

PORT ST. JOHNS: 9th February, 1937. Before H. G. Scott, Esq., President, and Messrs. L. M. Shepstone and M. Adams, Members of the Court.

Dowry Restoration—Widow—Remarriage—Dowry paid by first husband not recoverable where she has borne him children—Pondo Custom.

(Appeal from Native Commissioner's Court, Bizana.)

(Case No. 191/1936.)

The particulars of claim in this case were as follows:—

1. The plaintiff is the brother and heir of one Ralazincame.
2. The said Ralazincame during his lifetime was married by Native Custom to one Malusizini, daughter of the defendant for whom he paid seven head of cattle, one horse and 13 small stock as dowry to the defendant.
3. One child was born of the above marriage and shortly thereafter the said Ralazincame died and Malusizini returned to the defendant's kraal from which kraal, in or about February, 1936, she was again given in marriage to a second husband and the defendant has received a second dowry for her.

By reason of the above as the heir of the said Ralazincame plaintiff claims the restoration of six head of cattle, one horse and 13 small stock (one beast having been deducted for the child born) or their value £30. 16s. with costs of suit.

Defendant filed the following plea:—

Defendant admits all the allegations in the plaintiff's summons contained save that he says the dowry paid was seven head of cattle, one horse and 10 small stock and defendant further says:—

1. The parties to the suit are Pondos.
2. That the marriage of Ralazincame and Malusizini existed for about three years and one child was born of the marriage.
3. That under Pondo Law and Custom no dowry is returnable to the heir of a deceased husband on the remarriage of his widow if children were born of the first marriage.

No evidence was led and the Native Commissioner dismissed the summons with costs.

Against this judgment an appeal has been noted on the following grounds:—

"It is a principle of Native Law and Custom that no man is entitled to retain two dowries for the same woman.

This principle is of universal application throughout the Transkeian Territories and the Pondo Assessors are asked to explain in detail why it should be departed from in cases where the parties to the suit happen to be of Pondo origin thus creating confusion and lack of uniformity in the Laws and Customs as applicable to natives in the Transkeian Territories.

It is submitted that the judgment is contrary to Native Law and Custom and the plaintiff, as the heir of the late husband Ralazincame, is entitled to an order from the Court for the return of the dowry paid by the said Ralazincame less a deduction of one beast for the child born of the marriage (see Gwetye Jonas *vs.* Tandatu Yalezo 4, N.A.C., page 92, Alveni Joloza *vs.* Geza 4, N.A.C., page 93 and other decisions)."

The Native Commissioner gave the following reasons for judgment:—

"The facts as stated in the pleadings and summons are not in dispute. The parties confined themselves to item three (3) of the plea and the appeal is on this point. The whole case pivots on whether defendant can hold, under Pondo Custom, two dowries for the same woman, if she, being a widow and having children by her former deceased husband, remarries.

"Both sides quoted Native Appeal Court authorities in support of their contentions (*vide* cases recorded in the evidence).

" After consulting the authorities the Court was guided by the principles laid down by the Native Appeal Court in regard to Pondo Custom.

" It being admitted that the parties are Pondos plaintiff was adjudged as not being entitled to the return of his dowry and his summons was dismissed with costs."

The point at issue having been put to the Native Assessors Xabaniso Sigcau (Lusikisiki), Simayile Toki (Flagstaff), Nobulongwe Masipula (Flagstaff), Maxaka Nqwiliso (Libode), Tolikana Mangala (Libode) they state:—

" If a woman marries a man, bears him children and after his death returns to her people and remarries, a second dowry being paid for her, the dowry originally paid for her is not recoverable by her previous husband's heir."

This opinion is in conformity with many previous decisions of this Court in regard to Pondo Custom.

The appeal is dismissed with costs.

KITO MAMPEYI vs. SISWENYA RARAI.

Kokstad: 5th February, 1937. Before H. G. Scott, Esq., President, and Messrs. H. M. Nourse and G. Kenyon, Members of the Court.

Dowry—Restoration—Desertion of wife—Essential for woman to be produced to her people before husband can claim return of dowry.

(Appeal from Native Commissioner's Court, Umzimkulu.)

(Case No. 231/1936.)

This was an action by plaintiff for the return of his wife or the dowry paid for her less the usual deductions for the children born of the Union.

The Assistant Native Commissioner entered a judgment of absolution from the instance with costs, holding that before plaintiff could succeed he must show that his wife deserted him and that she refuses to return to him.

The evidence in the case is extremely scanty and unsatisfactory, but the following facts are clear:—

1. That plaintiff married defendant's sister Mararyi after East Coast Fever and paid eight head of cattle, one horse, £15 and twenty goats as dowry for her.
2. Plaintiff went to work and remained away twenty months returning in September, 1936.
3. Mararayi left plaintiff's kraal in the green mealie season of 1936 and it is not known where she is.
4. Neither plaintiff nor any of his relatives made any attempt to find Mararayi nor was a formal report made to defendant of her absence. Plaintiff says his brother Mdindimane went to defendant about this matter but he was not called and this Court is not satisfied that he did go.

5. Plaintiff returned in September, 1936, and issued summons in the same month.

6. Since the issue of summons defendant has made efforts to trace Mararayi without success.

The facts of the case having been put to the Native Assessors, they state:—" When a woman leaves her husband's kraal it is his duty to look for her first and when he finds her to take her to her people and she will then say whether or not she wishes to go back to her husband. It is essential for the woman to be produced to her people before the husband can claim the return of his dowry."

This Court is of opinion that this statement of custom is particularly applicable to the present case where the plaintiff made not the slightest effort to trace his wife nor did he report to defendant to enable him to institute a search. It is by no means clear that the woman is alive and that it would be possible for her to be returned to the plaintiff.

In the circumstances we are of opinion that the judgment in the Court below was correct and the appeal is accordingly dismissed with costs.

SIPANGO NABILEYO vs. MPENTSU CONA.

Umtata: 19th February, 1937. Before H. G. Scott, Esq., President, and Messrs. W. J. G. Mears and J. H. Steenkamp, Members of the Court.

Damages for slander—Ikxa—defendant's failure to express regret or withdraw words uttered before pleading renders him liable—measure of damages, costs.

(Appeal from Native Commissioner's Court, Mqanduli.)

(Case No. 400/1936.)

Plaintiff sued defendant for £10 as damages for slander and in his particulars of summons stated:—

1. That he is a son born of the lawful customary union between the late Cona (his father) and the late Nonesi (his mother).

2. That on or about the 9th August, 1936, and at a gathering of Natives at the kraal of one Mlungu Ngqekeza in the presence and hearing of a number of Natives, whom he names, the defendant speaking in the Xosa language addressed to the plaintiff the following false, malicious and slanderous words: " Suka andi funi ku teta Nomngqakwe, itole lika Maye ".

3. That the following is a literal translation into English of the above words: " Go away. I do not wish to talk to a bastard, Maye's calf ", thereby meaning that the plaintiff is an illegitimate son of one Maye.

In his plea defendant said he had no knowledge of the allegations in paragraph 1 of the summons and put plaintiff to the proof thereof.

He admits using the words mentioned in paragraph 2 by way of retort but denied that they were used maliciously and pleaded specially that they were used in rixa in as much as they were uttered after plaintiff had said to him "Tole lenja" meaning thereby that defendant was "the son of a dog".

The Native Commissioner entered judgment in favour of plaintiff for £5 damages and costs.

Against this judgment an appeal has been noted on the grounds—

(1) that the judgment is against the weight of evidence and the probabilities of the case;

(2) that the words were used solely as a retort to equally abusive and/or defamatory words used by plaintiff about defendant;

(3) that under the circumstances the plaintiff had no right to recover;

(4) that in any event the damages awarded were excessive, and

(5) that the judgment is in conflict with the law governing the principles of libel and slander.

In regard to the first ground of appeal it is difficult to understand in what way the judgment is against the weight of evidence in view of the fact that defendant admits, both in his plea and in his evidence, that he used the words upon which the action is based. The appeal on this ground must fail.

The second, third and fifth grounds of appeal may for convenience be dealt with together.

The Native Commissioner has found as a fact that in the course of an altercation between plaintiff and defendant at a beerdrink plaintiff directed the words "Tola lenja" at the defendant and that the latter in rixa and by way of retort replied with the words complained of.

It remains therefore only to ascertain whether in the circumstances the defendant was liable in damages.

The words used by defendant of plaintiff are clearly defamatory *per se* and the law presumes the existence of *animus injuriandi* from the mere fact that the defamatory words were published and this presumption the defendant can only rebut by proving that his case falls within certain definite and recognised categories of privilege, exemption or excuse. Neither privilege nor justification have been pleaded and the sole defence is that the words were used in rixa and that the defendant was thereby absolved.

A plea that the words were spoken in rixa, however, does not avail the defendant, unless the words spoken by way of retaliation were moderate and proportionate to the injury inflicted by the plaintiff and were not subsequently persisted in (McKerron: The Law of Delicts in South Africa, p. 138. See also Kernick *vs.* Fitzpatrick, 1907, T.S. 389 and Rabie *vs.* Fourie, 1914, T.P.D., 99).

In the present case the words used by plaintiff towards defendant were mere meaningless abuse and to impute illegitimacy in reply can scarcely be called moderate and proportionate to the injury inflicted by plaintiff, more especially when the defendant admits, as he does in his evidence, that there is no truth in his statement that plaintiff was the illegitimate son of Maye.

In the case of Cooper *vs.* Nixon (1874 Buchanan 5) it was laid down that if there had been a quarrel, and the words had been used in rixa the defendant might have freed himself from damages if, before pleading, he had withdrawn what he said (see also Scott *vs.* Kretzman, 15, E.D.C., 48).

The defendant in the present case has not at any time withdrawn his words nor has he expressed regret for them and, according to the decisions quoted, he is consequently not freed from the liability to pay damages.

In the opinion of this Court the appeal on ground 2, 3 and 5 must also fail.

It remains only to consider the fourth ground of appeal that the damages awarded are excessive.

In his reasons for judgment the Native Commissioner stated that he found that the words complained of were used "*in rixa*" by defendant and were spoken by way of retort to insulting and abusive language used previously by the plaintiff towards defendant on the same occasion and held that if defendant had withdrawn the words before pleading, he would have been entirely freed from liability. In assessing damages the Native Commissioner took into consideration the fact that defendant at no time expressed any regret for the use of the defamatory words and in fact persisted therein right up to the time judgment was delivered and he considered this was a sufficient reason for awarding aggravated damages which he assessed at £5. Now it is true that defendant did not at any time express regret for the use of the words used but when it is borne in mind that he is an ordinary raw Native it is not surprising that he omitted to do so. That he persisted in the allegation that plaintiff was illegitimate right up to the judgment is not correct for under cross-examination he stated "Plaintiff is not the illegitimate son of Maye".

It was argued before this Court that because defendant said in cross-examination that he did not know who plaintiff's mother was it showed that he was persisting in his allegation of illegitimacy. But this is not so as the question was not who plaintiff's mother was but who was his father.

This ground for awarding aggravated damages therefore falls away.

The parties in this case are Natives of no particular rank and the incident happened at a beer drink when everyone had had a good deal of beer to drink and in the circumstances we consider that the award of £5, which to a Native is a very substantial amount, was excessive. It would have been a very different matter if defendant had maliciously spread the rumour that plaintiff was illegitimate, but when he made use of the defamatory words in the heat of the moment and after abusive words had been used towards him immediately before by plaintiff it would not appear to be a case for aggravated damages.

The respondent's attorney admitted before this Court that the case is one which should never have come into Court and stated that if defendant had tendered an apology no action would have been taken.

If that is so it is strange that he never asked defendant for an apology but immediately issued summons for very substantial damages.

In all the circumstances of the case we are of opinion that an award of £1 would have been ample.

The appeal is allowed and the judgment in the Court below altered to one in favour of plaintiff for £1 and costs of suit.

As the appellant has succeeded in obtaining a substantial reduction in the judgment of the Court below he is entitled to the costs of appeal.

JONATHAN TOLI SINAKU vs. MOSES and ELIAS SINAKU.

KINGWILLIAMSTOWN: 7th April, 1937. Before H. G. Scott, Esq., President, and Messrs. J. J. Yates and M. L. C. Liefeldt, Members of the Court.

Native Estate—Driving away of Great Wife and her family does not destroy Great House—Rights of son born prior to driving away not affected thereby—Disinherison must be of heir himself for good cause and with due formality—Right Hand Wife does not become principal wife when Great Wife and family driven away—Succession—On failure of heir in Great House eldest son of Qadi of that house succeeds.

(Appeal from Native Commissioner's Court, Keiskama Hoek.)

File No. 2/5/2/13/36.

This is an appeal against a finding by the Acting Assistant Native Commissioner at Keiskama Hoek in an enquiry held to determine the person or persons entitled to Lot No. 4 situate near Fort Cox in that district registered in the name of the late Witboy Oliphant.

There were three claimants, namely:—

1. Moses Sinaku who claimed that he was the heir in the Great House of Witboy Oliphant.
2. Toli Sinaku, who claimed that he was an heir in the Right Hand House, which had become the Principal House owing to Witboy Oliphant having driven away the wife and family in the Great House.
3. Elias Sinaku, who claimed as heir of the third wife of Witboy Oliphant it being alleged that Moses Sinaku was illegitimate.

The Acting Assistant Native Commissioner found that Moses Sinaku's father was illegitimate and consequently he could not succeed. Against this finding no appeal has been brought and there is no necessity to deal with the evidence in regard to his (Moses) claim.

In order to understand the position it is necessary to set out the history of the family.

Witboy Oliphant, whose other name is Sinaku had three wives Nokona, Nomenti and Nomagcwabe.

By Nokona he had a son, Matshele, and two daughters, Kuku and Jemima. Matshele had a son, Magomolo and the latter's eldest son was Moses Sinaku (claimant No. 1). Sinaku drove away his wife, Nokona, because she was suspected of having caused the death of later children by means of witchcraft. It is alleged that at this time he also drove away the children of that house and by his action in doing so extinguished that house.

The second wife, Nomenti, had a son Matshipa, whose eldest son was Lawu and the latter's eldest son is Toli Sinaku (claimant No. 2). It is alleged on behalf of this claimant that Nomenti was married after Nokona was driven away but the Acting Assistant Native Commissioner has found as a fact that Nomenti was married before Nokona was driven away and there is sufficient evidence to support that finding.

The third wife, Nomagcwabe, was married some time after Nokona was driven away and her eldest son, Bonaparte *alias* Buti, first married a woman by Christian Rites by whom he had no male issue.

After her death he had at his kraal a woman No-nice, daughter of one Tentyi, by whom he had a son Elias Sinaku (claimant No. 3).

It is asserted on behalf of claimant No. 2, that this woman was never married by Bonaparte but there is clear evidence, amongst others that of No-nice's uncle that six cattle were paid as dowry for her, that she lived at Bonaparte's kraal, died and was bureid there and in our opinion this is sufficient proof that there was a valid marriage acording to native custom and that, consequently, Elias is a legitimate son of Bonaparte, and therefore heir in the house of his grandmother, Nomagewaba. Whether he is also heir of the Great House depends on the effect which the driving away of Nokona had in respect of the Great House.

In the ordinary course the three wives married by Sinaku would rank as follows, he being a commoner:—

Nokona, the Great Wife,
Nomenti, the Right Hand Wife,
Nomangewabe, the Qadi or Supporting House to the Great House.

It is urged, however, on behalf of Toli Sinaku (claimant No. 2) that if Sinaku drove away Nokona *and her family* he thereby entirely extinguished his Great House and the Right Hand House automatically became the principal house and Nomagewabe's house would be the Right Hand House and her heir could not inherit to the exclusion of Nomenti's heir.

At the request of Appellant's attorney the following questions were put to the Native Assessors:—

A man marries a Great Wife and a Right Hand Wife. By the Great Wife he has a son and two daughters.

1. If he drives away the Great Wife and her family, after having married the Right Hand Wife, is the Great House completely destroyed and the heir disinherited even though he may be guilty of no fault?
2. What is the position if the wife is driven away but not the whole family?
3. If the Great Wife and her family are driven away does the Right Hand Wife automatically become the principal wife and would her eldest son succeed to the Estate?
4. What is the status of a third wife married after the driving away of the first wife? Would she be a "Qadi" to the Great House or to the Right Hand House
5. On failure of heirs in the Great House who would succeed to the property in that house?

The Native Assessors expressed the following opinion:—

1. There is nothing we can find to disinherit the heir of the Great House when he committed no fault. Even if the wife is driven away if it is not done according to custom we say that she is not properly driven away. It must be clear that the men of the family have been called together and thereafter the matter reported to the Great Place and her sin told there and if the Chief considers that the husband is justified in driving her away his action is confirmed. Even if the wife and her family is driven away with all due formalities that would not affect the rights of the heir if he was not at fault. In order to disinherit him it would be necessary for his father to show that he had committed some fault meriting disinherison and carry out the necessary formalities.

2. The Great House still exists and the heir of the Great House would inherit.
3. According to custom it never happens for a Right Hand Wife to take the place of the Great House Wife.
4. The third wife married would be the "qadi" of the Great House.
5. On failure of Heirs in the Great House the heir would come out of the Qadi House.

With this statement of the custom this Court in the main agrees, and, therefore, even if the first wife and her whole family were driven away, the rights of the son born to her prior to that would not be affected. In order to deprive him of these rights his father would have to show that he had good cause for doing so and follow out the usual procedure for disinheriting his heir. There is no suggestion in the present case that Matshele had been guilty of any fault or had been properly disinherited and consequently up to the date of his death he was heir to the Great House.

On his decease, without leaving legitimate male heirs, the eldest son of the "Qadi" of the Great House would succeed [see the cases of Noseyi *vs.* Siyo Gobozana, 1, N.A.C., 214; Ngwebi Zito *vs.* Ntlungo Zito, 4, N.A.C., 135; Nokoyo Maneli *vs.* Jolinkomo Mlonyeni, 6, N.A.C., 41; Stanford Ntlangano *vs.* Nocizela Ntlangano, 1931, N.A.C. (Cape & O.F.S.), 47; Rasmeni *vs.* Rasmeni, 1935, N.A.C. (Cape & O.F.S.), 70].

In the opinion of this Court the finding of the Acting Assistant Native Commissioner is in accordance with the evidence and native custom and the appeal is accordingly dismissed with costs. The costs to be borne by the Estate.

MAXWELL LOBISHE vs. McKINNON SANA.

KINGWILLIAMSTOWN: April, 1937. Before H. G. Scott, Esq., President, and Messrs. J. J. Yates and M. L. C. Liefeldt, Members of the N.A.C.

Native Commissioner's Court—Jurisdiction—Objection to—Estoppel—Document—Extrinsic evidence admissible only to explain ambiguity.

(Appeal from Native Commissioner's Court, Kingwillamstown: Case No. 47 of 1936).

In the Court below plaintiff sued defendant for the sum of £17 which had become due and payable in terms of a certain agreement of sale and purchase or alternatively for cancellation of the agreement and £10 as damages for breach of contract.

In the summons defendant is described as resident at Mdizeni in the District of Kingwilliamstown. Objection was taken by defendant's attorney to the jurisdiction of the Native Commissioner's Court at Kingwilliamstown on the ground that defendant ordinarily resides in the Magisterial Sub-district of Middledrift and that in terms of the proviso to section 10 (3) of Act No. 38 of 1927, the Court of Native Commissioner at Middledrift has jurisdiction over defendant.

Plaintiff's attorney stated in reply to the objection that the action was founded upon a written agreement which shows the domicile of defendant as being at Mdizeni district of

Kingwilliamstown and defendant is now estopped from denying that fact or from leading any evidence to vary the terms of the written agreement.

Without deciding on the plea of estoppel the Assistant Native Commissioner allowed evidence to be called on the question of defendant's residence. The only witness called on this point was Caledon Nyikani who described himself as the Headman of Mdizeni Location in the District of Middledrift and stated that defendant lived in that location and that it was his ordinary place of residence. In cross-examination he stated that defendant had been born and brought up in that location and had never removed from there. He went on to say that part of Mdizeni Location is in the Middledrift District and part in the Kingwilliamstown District. This evidence was objected to by Mr. Cook, plaintiff's attorney, on the ground that it would tend to add to the terms of the written contract. No note appears on the record in regard to this objection and it would appear that it was intended to overrule it. It does not appear from the record whether the whole of the Headman's evidence was objected to or only that portion of it which referred to the fact that portion of Mdizeni Location fell in Middledrift and portion in Kingwilliamstown.

The Assistant Native Commissioner dismissed the exception with costs and against this judgment an appeal is brought on the following grounds: —

1. That the Assistant Native Commissioner erred in disregarding the legal maxim " actor sequitur forum rei " and the principle of law that " where there has not been *litis contestatio* or joinder of issue ", the defendant cannot be compelled to submit against his will to a jurisdiction which the Court does not possess.

2. That the Assistant Native Commissioner erred in taking cognisance of the terms of a written contract alleged to have been signed by the defendant when such contract had not been proved.

3. That the Assistant Native Commissioner erred in disregarding the rules for the interpretation of contracts and in construing the word District without the necessary qualification imposed by the provisions of section 10, Act No. 38 of 1927.

4. That the Assistant Native Commissioner erred in deciding that defendant had either expressly or tacitly consented to the jurisdiction of this Court and by not giving effect to the terms of the proviso to section 10 (3), Act No. 38 of 1927.

The second ground of appeal was not pressed in this Court and it is, therefore, not necessary to deal with it.

In dealing with Mr. Cook's objection to the leading of evidence to vary the agreement the Assistant Native Commissioner states: " Having raised the question of jurisdiction the *onus* is clearly on him to establish his objection and the evidence of the Headman has, therefore, been correctly admitted (Union Market Agency *vs.* Glick, 1927, O.P.D.) ".

It seems to us that the stage in the proceedings at which the question of estoppel should have been considered was immediately after Mr. Cook raised the point. If the Assistant Native Commissioner found that estoppel did apply he should not have admitted evidence to vary the contract.

In Lowrey *vs.* Steedman (1914, A.D., 532), Solomon, J. A., said: " The rule is that when a contract has once been reduced to writing, no evidence may be given of its terms except the document itself nor may the contents of such

document be contradicted, altered, added to or varied by oral evidence ". (See also Baumann *vs.* Thomas, 1920, A.D., at p. 435).

This rule is subject to the exception that parol evidence is admissible to explain the construction of a document where words occur which are ambiguous in themselves or as read with their context. (Schlosberg—South African Cases and Statutes on Evidence, p. 171).

As was said by Innes, C. J., in Richter *vs.* Bloemfontein Town Council (122, A.D., 57):—The rule itself is clear: Apart from cases where words or expressions are used in a technical or special sense, extrinsic evidence is only admissible to explain the construction of a document where words occur which are ambiguous either in themselves or as read with their context . . . . . The evidence admitted must relate to the ambiguity. For it is only allowed in order to explain the meaning of language which, as it stands, is capable of more than one meaning. The object is to ascertain the intention of the parties, not in the abstract, but as embodied in the language of the instrument ".

Applying the principle of the last mentioned case to the present one, we have to ask ourselves whether there is any ambiguity in the agreement between the parties.

The defendant is described as being " of Mdizeni Location, District Kingwilliamstown ", that is, that he lives in the location of that name which is situated in the District of Kingwilliamstown. It was not attempted to show in evidence that there was any ambiguity in these words or that they were capable of two meanings and, therefore, they must be taken in their ordinary meaning. In the Standard Dictionary, " District " is defined *inter alia*, as " a portion of territory specially set aside or defined for certain purposes " and in Proclamation No. 298 of 1928, constituting Courts of Native Commissioners the area of jurisdiction of the Court of Native Commissioner of Kingwilliamstown is defined as the Magisterial District of Kingwilliamstown excluding the sub-districts of Middledrift and Keiskama Hoek and Mncotshe Location ". There is nothing in the record to show that " District of Kingwilliamstown " has any other meaning.

We are of opinion, therefore, that defendant was estopped from leading evidence to show that he actually resided in another district. But even assuming that that evidence was correctly admitted the position is not altered. The defendant's witness says: " Part of Mdizeni Location is in Middledrift and portion is in the Kingwilliamstown District ". He clearly had in mind two separate and distinct areas and there is no suggestion that the two might be confused.

As the defendant was born and brought up in the Mdizeni Location he must have known that the portion in which he lived was within the jurisdiction of the Native Commissioner at Middledrift and should have made that clear. As he did not do so but gave the plaintiff to understand that his residence was in Kingwilliamstown District, he cannot be heard to say now that that is not the case. The position would have been different if the Mdizeni Location in Kingwilliamstown District had been especially excluded from the jurisdiction of the Native Commissioner of that area as was done in the case of the Mncotshe location for then the fact of such exclusion would have been apparent immediately on reference to the Proclamation and the plaintiff could not have blamed anyone if he had neglected to refer to the Proclamation.

The question of the Territorial jurisdiction of the Native Commissioner as laid down in the proviso to section 10 (3)

of Act No. 38 of 1927, does not, in the circumstances of this case, come up for consideration for the defendant by his express representation in the agreement has precluded himself from taking the objection which would otherwise be open to him.

In the course of his argument Mr. Cook submitted that, even if this Court held that the judgment in the Court below was wrong, it should not be set aside unless it had been shown that substantial prejudice had resulted and referred to section 15 of Act No. 38 of 1927.

That section gives the Native Appeal Court full power to review, set aside, amend or correct any order, judgment or proceeding of a Native Commissioner's Court, provided that no judgment or proceeding shall, by reason of any irregularity or defect in the record or proceedings, be set aside unless it appears to the Court of appeal that substantial prejudice has resulted therefrom. Now the meaning of this clearly is that the irregularity or defect must be in the record or proceedings themselves, for example, by the admission of inadmissible evidence. If in such a case the Court of Appeal was satisfied that no substantial prejudice had resulted by the admission of that evidence it could refuse to interfere on that ground alone. But the assumption or rejection of jurisdiction is not merely defect in the record or proceedings, it is something which goes to the root of the action.

For there reasons we do not agree with Mr. Cook's contention in this regard.

In the opinion of this Court the judgment in the Court below was correct and the appeal is accordingly dismissed with costs.

MAGWANYA QUNTA vs. RALARALA TATAYI.

KOKSTAD: 26th May, 1937. Before H. G. Scott, Esq., President, and Messrs. H. M. Nourse and V. Addison, members of the N.A.C.

Seduction—Scale of fines for, amongst Hlubis.

(Appeal from Native Commissioner's Court, Mount Frere.)
(Case No. 423 of 1935.)

In the Court below Magwanya sued Ralarala for five head of cattle or their value £25 and in his summons alleged that the parties are Bacas; that in 1933 his son, Vetyeka, married defendant's niece, Nomhama, and paid five head of cattle as dowry; that six months later Vetyeka died and Nomhama returned to defendant's kraal who subsequently gave her in marriage to one Matontsi who paid dowry for her and he (plaintiff) claims that according to custom he is entitled to the return of the full dowry paid by him.

The plea alleges that the parties are Hlubis and are governed by Hlubi custom; denies the marriage and says that the five head of cattle were paid as a fine for the seduction and pregnancy of Nomhama by Vetyeka and are consequently not returnable.

The Acting Native Commissioner entered judgment for plaintiff for the return of two head of cattle with costs.

He found as a fact that there was no marriage between Vetyeka and Nomhama; that five head of cattle were paid as fine but as a further beast was paid and a marriage was

agreed upon the five head merged into dowry; as the marriage did not take place owing to Vetyeka's death defendant was bound to return the cattle paid less any due to him as fine for seduction and pregnancy and that according to Hlubi custom the fine for seduction and pregnancy is only three head of cattle and plaintiff was entitled to the return of two head.

Against this judgment an appeal has been noted on the following grounds:—

1. That the judgment of the said Acting Native Commissioner is against the weight of evidence.
2. That the judgment of the said Acting Native Commissioner is wrong in Law.
3. That the said Acting Native Commissioner erred in basing his judgment on the assumption that the fine for seduction and pregnancy according to Hlubi custom, is three (3) head of cattle.
4. That the fine for seduction and pregnancy, according to Hlubi custom, is five head of cattle, and that such being the case, respondent failed to pay anything over and above such fine (the Court holding that the mare originally paid by respondent was taken back by him and not replaced), wherefore such fine did not merge into dowry, and, therefore, was not subject to the Law affecting dowry.
5. That as the five head of cattle paid by respondent represented a fine, according to Hlubi custom, for seduction and pregnancy, they are not returnable to him.

The following facts emerge clearly from the evidence. That the plaintiff and defendant are Hlubis. In 1932 or 1933 Vetyeka seduced Nomhama and rendered her pregnant. Defendant demanded five head of cattle as damages for the seduction and pregnancy. Through his messengers plaintiff paid in two instalments stock to the equivalent of five head of cattle. The messengers thereupon asked for Nomhama in marriage and defendant told them to pay earnest cattle. A horse was paid and defendant then agreed to the engagement and killed a sheep to signify his acceptance, but it was agreed that the marriage could not take place until ten head of cattle had been paid. Plaintiff was unable to pay more dowry. Thereafter Vetyeka eloped with Nomhama without defendant's consent and took her to plaintiff's kraal. Defendant sent for her but she refused to return. Defendant then went to Capetown to work and was away about a year and meanwhile Nomhama remarried at plaintiff's kraal. On his return from Capetown defendant again sent for her and got her back, Vetyeka having died while defendant was away. During the time she was at plaintiff's kraal Nomhama had a miscarriage. The horse which had been paid as an engagement beast was returned to plaintiff's kraal during defendant's absence and was never replaced although plaintiff promised to do so.

It is also clear that there was not a marriage but only an engagement. The facts of the case having been put to the Native Assessors, they state:—The Hlubi custom in a case such as this is that when a girl has been seduced and pregnancy follows a fine of five head of cattle and a horse is payable. That is the original Hlubi Custom. In regard to what the young man said, that he was marrying, if he intended to marry he should have paid more than five head, for we regard the horse as having been paid for the elopement and we call it the "feet of the young man".

This statement of Hlubi Custom is in agreement with that given in the case of Gidwell Kesa *vs.* Dubula Ndaba (1935, N.A.C., 64).

It would seem, therefore, that even if the agreement to a marriage converted the five cattle paid as fine into dowry, the defendant was entitled to retain them as damages for seduction when the marriage did not take place owing to the death of the young man.

Even if it were the Hlubi Custom that only three head of cattle are payable as fine for seduction and pregnancy, we are satisfied from the evidence in this case that when the five cattle were paid they were paid as a fine and nothing else, and plaintiff cannot now be heard to say that he should have paid only three head.

The appeal is allowed with costs and the judgment in the Court below altered to one in favour of defendant with costs.

MOKHOLOKHOTHA NTAMANE vs. KHEHLEO MATLALI.

KOKSTAD: 26th May, 1937. Before H. G. Scott, Esq., President, and Messrs. H. M. Nourse and V. Addison, members of the N.A.C.

Basuto Custom—Dowry Payment—Customary for father of bride to slaughter beast to signify acceptance but beast must be replaced by bridegroom—Any person present at ceremony may offer to replace and thereupon becomes entitled to meat of slaughtered animal—Legal obligation on offerer to implement promise—Dowry payer is proper person to sue.

(Appeal from Native Commissioner's Court, Matatiele.)
(Case No. 83 of 1936.)

In the Court below respondent sued the appellant for delivery of a certain cow and calf or their value £7. 10s.

The plaintiff's contention was that, in accordance with Basuto Custom, when dowry was being paid for his wife a beast was slaughtered as an acceptance of dowry and that defendant offered to give another beast in place of it and actually subsequently delivered it and its calf but now refuses to do so on account of a quarrel which occurred.

Defendant's contention is that plaintiff's dowry was paid by his brother Mafonyoka (now deceased) and that he is the proper person to sue, that the agreement was between him as agent for his brother, Paul, and Mafonyoka and not between plaintiff. personally, and defendant personally; that in any case the obligation is merely a moral one and not enforceable at law, and further that the obligation is based upon good family relationship and good feeling which was put an end to by plaintiff and his sister.

The Assistant Native Commissioner entered judgment for plaintiff as prayed with costs and the appeal is against the whole of that judgment.

The Basuto Custom on the points at issue in this case is set out fully in the evidence of Jeremiah Moshesh, Chief of the Basuto Tribe in the Matatiele District and an expert on Basuto Law and Custom. He says that the Custom as stated by him is that which now prevails and has prevailed for many years among the Basuto in the Matatiele District.

Chief Moshesh's evidence is as follows:—

"When dowry is paid over in connection with a Native Basuto marriage a beast is slaughtered in acceptance of dowry if it is available. . . . In the first instance the girl's father provides the beast in acceptance of the dowry. The prospective bridegroom ties the gall of the beast aronnd his own wrist. The prospective bride ties the (fat) suet from the stomach round her neck. Then we know she is married, that the bride and bridegroom have been married. It sometimes happens that the prospective bridegroom is not there and his relatives pay over the dowry on his behalf. The first step is that the maternal uncles of the bridegroom are called and when they come they bring a beast, often there are two beasts. The first beast is part of the dowry and is a contribution by them towards the dowry payable by the bridegroom. The other beast is also a contribution but when the father of the girl gives the beast which is to be slaughtered marking acceptance of dowry, he becomes entitled to it to replace the one he has provided to mark acceptance of dowry. . . . When portion of the dowry is paid, it is customary for one of the relatives or even a person not related to offer a beast towards dowry if the maternal relatives have not brought one for slaughter. The person who offers this dowry is then said to have bought the meat of the animal, slaughtered as dowry. The volunteer then nominates the beast he is offering and if they trust him he takes away the meat. When the meat is taken away it is an obligation which the bridegroom can compel him to honour. It becomes a legal obligation on the man who has nominated the beast to pay it over to the bridegroom. . .

If the bridegroom provides the dowry himself the beast that was offered becomes payable to him and he, the bridegroom, in turn gives it to the father of the girl. . . . . If the father of the bridegroom is dead and the elder brother is paying dowry he has the right to claim this particular beast. His heir can claim it too so long as he hands it over to the girl's father. . . . Where the father of the man who is paying dowry is dead and the dowry which is being paid is the personal property of the bridegroom, he claims the particular beast and the father of the girl claims it from him. If a son has inherited from his father the elder son is not responsible for his dowry. If in that case the elder brother paid dowry he would not necessarily say that he was responsible. He would say he was paying the dowry on behalf of his younger brother so as not to tie himself down. I am the eldest son of my father and though I have contributed dowries for my younger brothers I have not made myself liable. I have contributed out of the goodness of my heart".

After careful consideration of the evidence this Court is satisfied that the following facts have been proved:—

The parties belong to the Basuto Tribe. Plaintiff married the daughter of one Mhlagati and stock to the equivalent of ten head of cattle was paid over as dowry. This payment was made during plaintiff's absence by his brother Mafonyoka (since deceased), but the stock was the personal property of plaintiff. On this occasion a beast out of the dowry paid was slaughtered by the bride's father to signify acceptance of dowry. Defendant was present and offered to give a beast to replace the slaughtered animal and the offer was accepted by Mafonyoka on behalf of plaintiff. Defendant was given the meat of the slaughtered beast and took it to his kraal. Plaintiff made good to Mhlagati the beast he had killed.

In 1929 defendant admitted to plaintiff that he had offered to pay certain beast then at Mvenyane but did not deliver it. In 1934, after Mafonyoka's death, defendant brought

to plaintiff's kraal a certain black heifer stating it was the beast from Mvenyane. Plaintiff's younger brother, who was the only male at home, accepted the beast but asked defendant to look after it until he could inform plaintiff who was away at work. In the same year plaintiff returned home and this beast, which then had a calf, was pointed out by defendant and plaintiff earmarked the calf but not the cow as it already bore earmarks somewhat similar to his. At defendant's request the cow and calf were left with him under the "mafisa" custom. The calf was subsequently sold by plaintiff to one Matikita while still in the possession of defendant, and the purchaser left it with defendant.

Later plaintiff went to fetch the animals but a quarrel arose over some domestic matter and a fight ensued and defendant then refused to give delivery of the animals.

If the law as set out by Chief Moshesh is applied to these facts it is clear that plaintiff was the right person to sue and defendant the right person to be sued.

In regard to the contention that the quarrel put an end to the obligation it is sufficient to say that the obligation having been fulfilled in 1934, before the quarrel by the delivery of the two animals, which thereupon became plaintiff's property, defendant cannot now refuse to deliver them.

The appeal is dismissed with costs.

MAFUTA MATE vs. SISHUBA MPETWANA.

Port St. Johns: 3rd June, 1937. Before H. G. Scott, Esq., President, and Messrs. E. W. Thomas and M. W. Hartley, members of the Court.

Animals—Maiming of by minor—Undertaking to deliver cattle to be obtained from mother of minor as compensation for does not impose personal liability on person undertaking delivery unless he unequivocally substituted himself for original debtor—Agreement—Parties must be ad idem.

(Appeal from Native Commissioner's Court, Port St. Johns.) (Case No. 48 of 1936.)

The plaintiff (respondent) sued defendant (appellant) for the delivery of two bull tollies or their value £4. 10s. on the ground that on 4th May, 1936, an ox belonging to him valued at £4. 10s. had been so seriously injured by one, Mtetunzima, a relative of defendant's, that it had to be killed and thereafter on 15th May, 1936, defendant agreed to compensate plaintiff by delivering to him two black tollies which are valued at £4. 10s.

In his plea defendant admitted that Mtetunzima had injured plaintiff's ox but denied that it was necessary that it should be destroyed. He alleged further that plaintiff (the plea says defendant, but this is evidently a clerical error) slaughtered the ox, ate the meat and kept or sold the skin. He denied the value placed on the ox and denied having agreed to compensate the plaintiff by delivering two tollies.

Evidence was then led for plaintiff. The first witness is John Daniel le Roux, a Constable in the S.A. Police, who stated that he was acting as Public Prosecutor on the 15th May, 1936, when a charge was pending against Mtetun-

zima for maiming a beast, which was destroyed. He then proceeds:—"The case was withdrawn on the ground that the mother of the young boy agreed to pay complainant two tollies. . . . I was present when the agreement was made. The Sub-Headman was present. His name is Sishuba. He came to me and told me that the woman had agreed to hand over two tollies to him and he would hand them over. You (referring to Mr. Bouchet, plaintiff's attorney) were present. I remember you were not satisfied. I interpreted and when you intervened Sishuba agreed to deliver the two tollies himself".

In cross-examination he said:—"The Sub-Headman Sishuba made it clear that the woman was going to pay him and he would pay them over", and in re-examination:—Although the cattle were actually to come from the woman, Sishuba undertook to deliver them".

Mr. Bouchet's evidence is as follows:—"I was present on 15th May, when last witness (le Roux) spoke to Sub-Headman Sishuba concerning this matter. On that occasion I definitely insisted that Sishuba was to be responsible for the delivery of these cattle. As far as I was concerned that was agreed to. As a result of a report made to me by my client I subsequently sent a demand to defendant. Defendant came into my office some days after the demand was sent and said that the boy's people refused to hand over the cattle. He suggested we should sue the boy's relatives. I pointed out that our action was against him and not the boy's relatives".

The plaintiff's case was then closed and defendant's attorney applied for a dismissal of the summons on the ground that there was no evidence to show that defendant undertook to compensate plaintiff.

The application was refused and a postponement was granted owing to the illness of defendant. On resumption defendant's attorney closed his case without calling any evidence.

Judgment was entered in favour of plaintiff as prayed with costs and against this judgment an appeal has been noted, the main ground being that the Acting Native Commissioner erred in holding that the defendant undertook to pay or compensate the plaintiff by payment by him and by delivery by him of two tollies for the ox which was killed, whereas the evidence clearly discloses that the mother of the boy, Mtetunzima, undertook to pay the same and defendant had merely undertaken to deliver same. In the view this Court has taken of the case it is not necessary to set out or consider the other grounds of appeal.

The Acting Native Commissioner found as a fact that defendant agreed to hold himself responsible for the delivery of two black tollies to plaintiff. This finding of fact is fully borne out by the evidence, but there is nothing in the evidence to show that defendant made himself personally responsible if the mother of Mtetunzima did not pay. It is clear that Mr. Bouchet, plaintiff's attorney, thought that was the position but that defendant did not do so is borne out by the fact that on receipt of the letter of demand, he came to see Mr. Bouchet and said the boy's relatives refused to hand over the cattle and suggested that they should be sued. Now the action is one in which it is sought to make responsible someone who originally was not responsible and before a judgment could be obtained against defendant the evidence must show that he had substituted himself unequivocally for the original debtor. In the opinion of this Court all that the evidence shows is that defendant undertook to deliver the tollies when he received them from Mtetunzima's mother and not that if she did not deliver them he would himself pay. The plaintiff has, therefore, failed to prove that defendant

undertook himself to compensate plaintiff, and the appeal is accordingly allowed with costs and the judgment in the Court below amended to one of absolution from the instance with costs.

MATSUPELELE vs. DOBOLIYATSHA NOMBAKUSE.

Port St. Johns: 4th June, 1937. Before H. G. Scott, Esq., President, and Messrs. E. W. Thomas and M. W. Hartley, members of the Court.

Marriage dissolution—Dowry restoration—Acceptance by husband of full dowry paid entails loss of rights in children of marriage which can only be regained by payment of further cattle and maintenance—Pondo Custom.

(Appeal from Native Commissioner's Court, Ngqeleni.)

(Case No. 193 of 1936.)

In the Court below the plaintiff (appellant) sued defendant (respondent) for an order declaring him to be the guardian of and entitled to the custody of certain four children and in his particulars of claim stated:—

1. About twenty years ago plaintiff married a woman, Datini, according to Native Custom which marriage was never dissolved.
2. Plaintiff had by the said Datini two daughters, Nomaba (his own child) and Nomadizete (an illegitimate child) and there have been born by his said wife two illegitimate children whose names are unknown to plaintiff and two other illegitimate children.
3. Plaintiff is the lawful owner and guardian of all the said children.
4. The said Nomaba and Nomadizete and the other said two children are now living at the kraal of defendant who claims that he is guardian over them, and refuses to allow plaintiff to assume the custody and control over them to which he is entitled.

Defendant filed the following plea:—

1. He admits the marriage set out in clause 1 but denies that it still exists. He states that the dowry paid by plaintiff for such said girl was one beast only, namely a black cow white face. That during 1921 plaintiff sued one Makawuse, guardian of defendant's elder brother for return of the said woman alleging that two head of cattle were paid as dowry for her, and judgment of absolution with costs was granted plaintiff on 13th April, 1921.

   That thereafter during winter of that year, the said marriage was dissolved by the return to plaintiff of one beast in the form of £5 cash, to dissolve the said marriage. The defendant contends that he thereby returned the whole of the dowry paid by plaintiff in respect of the said marriage, and is, therefore, entitled to retain the children born of the said marriage or during the existence of the said marriage, whether they were legitimate or illegitimate.

2. He admits that there were two children born up to 1921, namely Nomaba and Nomadizete, and states that the other two children mentioned in clause 2 of the summons are born of a marriage between the woman Datini and Ncose, and that such other two children are, therefore, the property of Ncose, and not of either plaintiff or defendant.
3. He denies that plaintiff is the owner of any of the said children born to the woman Datini.
4. He admits that the two children named are living with him at his kraal and claims that he is entitled to them. Should the Court, however, rule against him then and then only he contends that before he can be ordered to deliver them to plaintiff, he is entitled to be paid such cattle in respect of each girl as to the Court may seem fit.

In his replication plaintiff stated that two head of cattle were paid as dowry and denied that £5 or anything was paid by defendant in respect of the return of the said dowry.

During the hearing of the case plaintiff's attorney withdrew the claim for the two children born after the woman's marriage to Ncose.

The Assistant Native Commissioner entered the following judgment:—

"The defendant is declared to be the guardian and entitled to the custody and control of the two daughters of plaintiff until such time as plaintiff shall pay a reasonable dowry. Plaintiff to pay costs".

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

The appellant contends that, as the children were born during the subsistence of his marriage, he is entitled to them subject to payment of maintenance fees and the cross-appellant contends that the Assistant Native Commissioner was wrong in holding that £5 to mark the dissolution of the marriage had not been paid and that as it had been paid he is the person entitled to the children.

The record of a case heard in 1921 between the present plaintiff and one Makase, present defendant's guardian, was put in. In that case plaintiff claimed the return of his wife, the woman Datini, failing which the dowry paid for her, namely, two head of cattle.

Plaintiff further alleged that he had tendered an additional two head of cattle as dowry. Defendant admitted the marriage but said that only one beast was paid as dowry, denied that Datini had deserted plaintiff but alleged that she had been "telekaed" for further dowry and denied the tender of further dowry. The judgment in that case was one of absolution from the instance.

In view of the decision in the 1921 case the only evidence led in the Court below in this case was in regard to the return of £5 to plaintiff. During the course of this evidence plaintiff's attorney admitted that he could not lay claim to the two children born by Datini to Ncose as no teleka beast was ever paid by plaintiff and because the woman was subsequently married to Ncose.

Three witnesses speak to the payment of £5 as the equivalent of one beast to plaintiff to cancel the marriage and to the fact that from 1921, plaintiff has never made any attempt to claim either his wife or her children, nor did he bring any action against Ncose although he knew that he was living with Datini.

The Assistant Native Commissioner found that the evidence with regard to the payment of the £5 was not adequate in view of the following doubtful circumstances:—

(*a*) It is not usual for such transactions to be negotiated by comparative youths.

(*b*) The alleged payment in cash took place when defendant had cattle available.

(*c*) As two girls were born of the marriage it is improbable that plaintiff would accept such a small sum in view of his claim that two head were paid as dowry.

(*d*) The matter had recently been before the Court and had been handled by attorneys acting for the parties but no receipt or witnesses are available to the dissolution.

As to reason (*a*) it would appear from the evidence that defendant must have been about 18 years or so old while one other witness was 25-30 years old and the third was still older. Two of them can scarcely, therefore, be described as comparative youths.

As to reason (*b*) an explanation is given as to why cash was paid instead of a beast and plaintiff's father himself admits that he did not pay a teleka beast as cattle were scarce owing to East Coast Fever. It is, therefore, not improbable that cash was paid. At that time, owing to the scarcity of cattle, even dowry was paid in cash.

As to reason (*c*) even if plaintiff's claim that two head of cattle were paid as dowry is accepted as being correct he still was not entitled to the return of any dowry beyond one beast to mark the dissolution of the marriage and he was, therefore, not in a position to refuse the offer.

As to reason (*d*) the evidence for defendant shows that the payment was made at the kraal of plaintiff's father and this would explain why no receipt was obtained there being nothing to show that the parties are able to write. The plaintiff's statement that if anything had been offered in settlement of the dowry he would have had the matter settled before his attorneys is not very convincing because he must be presumed to know the Native Custom and that all he was entitled to was one beast. What reason then was there for him to consult his attorney?

The three witnesses who spoke to the returning of the £5 appear to have given their evidence in a straightforward manner and were not shaken in cross-examination.

As the Assistant Native Commissioner has not based his somewhat qualified rejection of their evidence on their demeanour this Court is in as good a position to judge of their credibility as he was and we are of opinion that their evidence should have been accepted.

The following factors in the plaintiff's case show that he is not a reliable witness:—

1. In his particulars of claim he stated that his marriage with Datini had never been dissolved but abandoned this position during the hearing.
2. He claimed the two children born of the union between Datini and Ncose but also abandoned this claim because his marriage had been dissolved, showing that he had made a claim which he knew was incorrect.
3. In the 1921 case he denied that Datini had been "telekaed" for more dowry, whereas in the present case he admits that she was and that he had not paid the teleka cattle demanded.

This applies also to the evidence of plaintiff's father.

If the plaintiff has had to abandon one position after another taken up by him and is shown to have falsely denied allegations by defendant very material to the case there seems to be no reason why his evidence in regard to the payment of the £5 to mark the dissolution of the marriage should be accepted as against that of three witnesses against whom no criticism has been made.

We have come to the conclusion, therefore, that the marriage was dissolved in 1921 by the payment of £5 to represent one beast.

The Assistant Native Commissioner held also that as the beast to denote the dissolution had not been paid the marriage must be held still to subsist.

If the marriage still subsisted then plaintiff would have a claim to all the children born to Datini, but plaintiff himself has abandoned the claim to two of the children on the ground that his marriage was dissolved. A marriage cannot both subsist and be dissolved. The Assistant Native Commissioners ruling is, therefore, clearly incorrect.

The facts of the case having been put to the Native Assessors they state:—

" If the beast to mark the dissolution of the marriage was paid, the husband, if he wanted to obtain the children, would have to pay the guardian the same number of cattle as he would if he had merely seduced the girl, i.e. five head for each child and in addition one beast for each child for isondlo. Until he paid these cattle the children would belong to the guardian. If the dissolution beast was not paid the husband would still have to pay nine head of cattle plus isondlo.

When there is seduction and also when a man has not paid a sufficient dowry the position is the same. The difference comes when a man has paid more than one beast as dowry. When only one beast has been paid, we do not take it into account but regard it as damages for spoiling the girl because the woman is always supplied with a wedding outfit and when she returns the wedding outfit is not returned ".

It is clear from this that as plaintiff accepted the full dowry paid by him he lost all claim to the children born of his marriage and this is in accordance with previous decisions of this Court. It appears also that plaintiff may obtain possession and control of the children, but in order to do so he must pay cattle for them, but such payment cannot be described as dowry.

The appeal is dismissed and the cross-appeal allowed in regard to the finding of the Assistant Native Commissioner in regard to the repayment of the beast to mark the dissolution of the marriage. This, however, does not really affect the judgment as delivered in the Court below. It is quite clear though that the judgment cannot stand in its present form and it is altered to read as follows:—

" The defendant is declared to be the guardian and entitled to the custody and control of the two girls, Nomaba and Nomadizete, and entitled to any dowry paid or to be paid for them.

If plaintiff desires to obtain possession and control of the said children, he must pay to defendant five head of cattle and one isondlo beast in respect of each child or their value at £3 each. Plaintiff to pay costs ".

The appellant will have to pay the costs of the appeal.

MAHENDENI NATU vs. MJOJO TSHATI.

PORT ST. JOHNS: 4th June, 1937. Before H. G. Scott, Esq., President, and Messrs. E. W. Thomas and M. W. Hartley, members of the Court.

Marriage—Dissolution at suit of wife—Rejection by husband is ground for—Procedure—Native Commissioner's reasons for judgment—Rule 12 (1), *G.N.* 2258 *of* 1928.
(Appeal from Native Commissioner's Court, Flagstaff.)

(Case No. 44 of 1936.)

Appellant instituted proceedings in the Court below against her husband (respondent) to have her marriage with him by Native Custom dissolved and for a declaration that he had forfeited all rights to the return of the dowry paid by him alleging that he had driven her away from his kraal on the ground that she did not bear children.

Defendant in his plea denied emphatically that he at any time drove his wife away from the kraal on the grounds alleged or on any other ground.

The Native Commissioner dismissed the summons with no order as to costs and against this judgment an appeal was noted on the following grounds:—

1. "That the judgment was wrong and bad in law.
2. That it has been clearly proved and the Native Commissioner found as a fact that the defendant had driven away his wife, the plaintiff, on the ground that she did not bear him children, the actual words used by the Native Commissioner in his judgment being: 'I am quite satisfied that the defendant drove away his wife on the ground that she was not bearing children'.
3. That having arrived at this finding of fact, the Native Commissioner should have entered judgment for plaintiff in terms of her summons, since in Native Custom the driving away of a wife dissolves the marriage, and the husband forfeits his rights to the dowry.
4. That the Native Commissioner gave as his reason for dismissing the summons, "that he felt plaintiff had come to the Court too soon"—presumably thereby meaning that her action was premature—because insufficient time had elapsed to show that defendant had prematurely discarded her, that that ought to have been the defence and for that reason he would dismiss the summons without any order as to costs. It is submitted that in coming to this conclusion, the Native Commissioner has gone outside the pleadings, he being not entitled to import other defences into the case. The defence was a bare denial of the driving away and that the plaintiff left defendant on other grounds—which defence was not believed, and in any event, the defence evidence is at variance with the plea. It is further submitted that the Native Commissioner's reasoning was fallacious and not applicable where there has been a direct and overt act of driving away, as is present in this case.
5. That in spite of objection taken at the time—which has not been recorded, apparently by an oversight—the Native Commissioner wrongly admitted the letters of the parties' attorneys, dated 18th May, 1936, as evidence, which letters are wholly inadmissible as such, the one being an expression of opinion and suggestions on the part of the defendant's attorney.

6. That the Native Commissioner further found as a fact that a meeting of relatives did take place at the defendant's kraal in the circumstances described by plaintiff. If the Native Commissioner was influenced by the letter above referred to, as he appears to have been, as being an attempted reconciliation, then it is submitted that he was again wrong. Attempted reconciliation was not pleaded, since there was a denial of the driving away, and in any case it was not proved is not a good defence.

7. Finally in law and on the facts, plaintiff was entitled to a judgment in her favour".

The case came before this Court at its session on the 9th February, 1937, but as the Native Commissioner's reasons for judgment did not comply with Rule 12 (1) of the Native Appeal Court Rules (Government Notice No. 2254 of 1928), the record was returned in order that he might comply fully with the requirements of the rule referred to. He has now furnished additional reasons and finds the following facts proved: —

1. "That on a certain day in March, 1936, plaintiff and defendant quarrelled over the former's neglect to provide the latter (her husband) with food, that during the course of the quarrel the defendant in the heat of the moment told his wife to go away and that he did not love her because she had not borne him any children.

2. That thereafter, on different days, (*a*) a hasty meeting of the defendant's relatives took place in the circumstances mentioned by plaintiff, and (*b*) an inquiry was held by the Headman.

3. That at the meeting of defendant's relatives and at the Headman's inquiry the plaintiff was ordered to return to her husband, but she refused to return to him".

The Native Commissioner's reasons for his findings of fact are: "Under (1) above, there is no way in which to test the credibility of the evidence for the plaintiff and the defendant as to (*a*) the cause of the quarrel, and (*b*) the words used by the defendant in the course of that quarrel, as their evidence stands alone. The Court must needs, therefore, consider the probabilities in the case and draw its own conclusions therefrom in order to arrive at a finding of facts upon these two points. And it follows that it is competent for the Court to accept or reject any portion of the evidence given by either witness in order to arrive at a finding. Dealing with the evidence on the above principle, the Court prefers to believe (*a*) that the plaintiff neglected to provide her husband with food on the day in question rather than believe that the defendant is a person who habitually refuses food cooked for him by his wife, the plaintiff, and, moreover, that on the day in question he refused to eat the food his wife had cooked for him after he had asked for it. The Court feels that if the plaintiff could be believed in this regard, it would be difficult to understand why the kraal, before the day of the first and only quarrel between the parties, had been so singularly free of those domestic wrangles and disputes which so often occur on the slightest pretext in affairs of the table. The Court is of opinion that the plaintiff's evidence is but a poor attempt to disprove the defendant's plea—*vide* paragraph 3 (*b*) thereof. As regards (*b*), the Court feels that the defendant, in expressing his annoyance at his wife's neglect to provide him with food when he needed it, might have given voice in the heat of the moment to expressions of his general displeasure in her by adopting the old time expedient among mere mortals of raking up some imaginary

grievance of the past. And, as would be expected from a member of the backward races, he would be quick to seize upon some supposed physical weakness or defect in his wife in order to make it the butt of his verbal thrusts. The Court is of opinion that the defendant's reason for denying that he used the words which he is said to have used has sprung from the not unnatural fear that the Court might well constitute them to mean that he intended to drive his wife away with a view to permanently discarding her. The finding of fact under (*a*) of 2 above is supported by the plaintiff's and the Headman's evidence, and under (*b*) of 2 above by the evidence of all the witnesses.

The finding of fact under (3) above is supported by plaintiff's own evidence in so far as to what transpired at the meeting of the defendant's relatives.

The finding of fact in regard to the Headman's final order at his inquiry is supported by the evidence of the Headman and that of the defence witnesses; and, also, by the probabilities and surrounding circumstances of the case. The plaintiff's witnesses made a pitiful exhibition of themselves under cross-examination as to the demeanour of certain members of her party on their way home from the Headman's inquiry. This fact is borne out by the record. The Court, moreover, finds it difficult to believe that the Headman who is the defendant's uncle, could have gone so far as to have ordered the plaintiff to return to her father in the circumstances of the present case—an order the effect of which to the Pondo mind would be a judgment for plaintiff ".

In regard to the first finding of fact this Court is of opinion that there was sufficient material on which to test the credibility of these witnesses.

The plaintiff states that when defendant returned from the mines about September, 1935, he did not fetch her from her father's kraal where she had gone on account of sickness prior to his departure for the mines. He returned in the ploughing season and she went back of her own accord in the weeding season. He appeared cool towards her and refused to have sexual intercourse with her and he refused to eat the food she cooked for him. He told her to go back to her people as he did not love her any more as she was not bearing him children. The next day she collected defendant's relatives and explained what had happened and they told her to go back to her husband's kraal. She refused to stay on the ground that he had driven her away for not bearing children. When defendant was questioned as to whether he had driven her away he admitted that he had said so. Plaintiff then told the meeting that she intended to report to the Headman that she had been driven away, and she did so. The Headman instructed her to go and fetch her husband but she refused. She then went to her father and reported to him and the next day they went to the Headman who appointed a day for the hearing of the case. Plaintiff, her father, her brother and a cousin attended at the Headman's kraal and defendant was also present.

After hearing plaintiff's statement the Headman questioned defendant who stated that he had driven plaintiff away as she was not bearing children. This is corroborated by the other witnesses for plaintiff. The Headman who was a witness for defendant says that defendant admitted to him that a meeting of his relatives had been called.

The defendant's version is that he had a quarrel with his wife over food. Next morning he left home and on his return found his wife had gone. The next day a message came from the Headman that his wife had sued him. He attended the case. He denies that his wife accused him

of driving her away on account of barrenness but says that she only mentioned the question of food. He denies absolutely that a meeting of his relatives was called and gives the lie to his own witness by denying that he made any admission of such a meeting to the Headman.

It is very unlikely that plaintiff would have gone to the lenght of calling a meeting of relatives over a trifling quarrel about food and there must have been something more serious behind the action.

Everything she did shows that she was greatly disturbed at what defendant had done and it is, therefore, probable that the reason given by her for leaving is the correct one. The Native Commissioner accepts the plaintiff's evidence that a meeting of relatives was held and, also as to the reason for driving her away. He does not believe defendant on these points but says that he is of opinion that defendant's reason for denying the use of the words he is said to have used, sprang from the most unnatural fear that the Court might well construe them to mean that he was driving away his wife with a view to permanently discarding her. But the defendant does not give that explanation and it is not for the Court to advance a reason which was not advanced by the person concerned. The Native Commissioner has not commented on the defendant's denial as to the meeting of his relatives, which was also a material matter.

Is it not more probable that defendant's denial is due to the fact that he knew his wife was justified in leaving him on account of the grave insult he had offered her and his story about the food was an attempt to get out of an awkward situation brought about by himself?

We are of opinon that the Native Commissioner was not justified in accepting defendant's evidence in preference to that of plaintiff in view of his untruthfulness on the material matters referred to above.

The second fact found is in accordance with the evidence, except that there appears to be no justification for describing the meeting as a hasty one.

In regard to the third fact found proved there is a very direct conflict of evidence as to what happened at the enquiry before the Headman. Plaintiff's story, in which she is supported by her father, brother and cousin, is that after she had made her statement defendant explained that he had driven her away because she was not bearing children and the Headman then told her to go back with her father.

Defendant's story is that after hearing the parties the Headman instructed plaintiff to go back with her husband and she refused to do so. This is supported by the Headman and defendant's brother, but an examination of the evidence discloses several discrepancies.

In his evidence defendant denies that plaintiff said he had driven her away because she was barren and says the reason given by her was that there was no food when he asked her for some. He admits, however, that she complained that he did not love her because she was bearing no children. He says "I told the Headman I had not driven the woman away. The Headman is wrong if he says that I admitted to him that I had driven my wife away. I am not related to the Headman not even by marriage. My mother is not the sister of the Headman's wife. The Headman is lying if he says that my mother is the sister of his wife".

The Headman's evidence is as follows :—

"I am not related to defendant not even by marriage. My wife and his mother are sisters. . . . At my meeting I asked defendant why he drove his wife away. He told

me that he had driven her away because she was not cooking for him. I then asked him what he had to say further and he said he wanted his wife ".

Myekelwa, defendant's brother, states that the reason given by plaintiff to the Headman for her being driven away was that defendant alleged that he did not want her because she did not stay at his kraal but always stayed at her people's kraal.

These discrepancies must raise some doubt as to the correctness of the version given by defendant and his witnesses, but when regard is had to the evidence called by plaintiff in rebuttal the credibility of defendant's witnesses is still further shaken.

The Native Commissioner has accepted the Headman's evidence without qualification. He has not, however, taken into consideration the evidence of the witnesses Cingo and Nqunqa, who speak to a statement he is alleged to have made at Mr. Attorney Stanford's office.

If their evidence is correct then the Headman is not telling the truth. The Headman admits that he was called to Mr. Stanford's office but denies that he there made any statement to the Interpreter and when the statement was read to him in Court, he again denied making it and in answer to the Court he said " I made no statement in Mr. Stanford's office, on the merits of the case ", thus emphasising his denial.

Merriman Cingo, Clerk and Interpreter to Mr. Stanford, said that the Headman (Silevu) came to the office to make a statement in connection with the case which he took down in writing. The statement was put in and in that Silevu said " The defendant in my presence and to the hearing of many people stated he did not want the plaintiff any more ". Before he completed his statement, Silevu was called out to go to the Magistrate's office, but as he went out he said defendant had admitted to him that he had driven plaintiff away because she was not bearing him any children.

Cingo says that the reason he did not include this in the statement was because Silevu was walking out as he uttered the final words and promised to come back again.

Rutherford Nqunqa corroborates Cingo as to what Silevu said as he was walking out.

Here we have a direct conflict of evidence on a most material point for, if Cingo and Nqunqa are speaking the truth, then the Headman's evidence of what happened at the enquiry goes by the board and also that of defendant and his brother.

The Native Commissioner should have said whether or not he believed Cingo and Nqunqa and, if he did not believe them, given his reasons for rejecting their evidence, but it should not have been entirely ignored.

In cross-examination Headman Silevu stated that plaintiff's father, Natu, had not asked him to give evidence, but admits that on two occasions Natu had told him the date when the case was to be heard.

This seems to indicate that Natu regarded him as a witness for plaintiff and would explain why he was called to Mr. Stanford's office.

If the statement Silevu is alleged to have made is a fabrication then it was a clumsy fabrication. It would have been just as easy to have made out a complete statement. The fact that the statement was incomplete and the reason advanced for that incompleteness is strong testimony to the truthfulness of Cingo's evidence. Silevu says that the Interpreter told him he wanted him as a witness and when he asked on what point was told that he would hear from Natu. It is not at all likely that having specially sent for him

the Interpreter would have made such an absurd reply. It is much more probable that the version given by Cingo is the correct one. This Court is, therefore, of opinion that it has been clearly proved that Silevu made a statement to Mr. Stanford's Interpreter directly opposite to his evidence given at the trial and that he is consequently not a credible witness.

The defendant and his principal witness have been proved to be unreliable and their evidence should not have been accepted in preference to that of the plaintiff and her witnesses which, on the whole, was consistent and without serious discrepancies except on minor points.

This Court finds that plaintiff was deliberately driven away by defendant on account of barrenness. It has been held by the Native Appeal Court that the driving away of his wife by her husband dissolves the marriage and entails forfeiture of dowry.

In the case of Nyauzeka Didi *vs.* Thomas Maxwele (4 N.A.C.198) it was held that repudiation or rejection cannot lightly be assumed and that it is necessary for a period sufficiently lengthy, according to the circumstances, to have elapsed before such a presumption arises, but that these principles are not applicable to a case where a direct and overt act of repudiation has occured and where efforts at a reconciliation have failed.

In the present case there has been such a direct and overt act of repudiation and there has been no real effort made by defendant to effect a reconciliation. He had the opportunity of effecting a reconciliation when the meeting of his relatives was called and also before the Headman but did not take advantage thereof.

In view of the decision this Court has arrived at on the evidence it is not neccesary to consider the 5th ground of appeal.

The appeal will be allowed with costs, and the judgment in the Court below altered to one in favour of plaintiff declaring her marriage with defendant to have been dissolved and that defendant has forfeited all rights to return of dowry with costs of suit.

ANDREW RAMNCWANA vs. GOLI SIYOTULA.

Umtata: 12th June, 1937. Before H. G. Scott, Esq., President, and Messrs. W. J. G. Mears and W. F. C. Trollip, members of the N.A.C.

Marriage—Expenses of wedding ceremony not claimable where girl married without guardian's consent—Dowry must be dealt with under Native Law and Custom—Kraal head is responsible for dowry paid at his kraal and must account to dowry owner therefor—Also responsible for dealings by inmates of his kraal with dowry cattle—Balance of dowry —Claim for—Ilubi Custom—Estoppel—Plea of must be raised in Lower Court and not for first time on Appeal.

(Appeal from Native Commissioner's Court, Qumbu.)
(Case No. 74 of 1936.)

In the Court below plaintiff (respondent) sued defendant (appellant) for the delivery of 12 head of cattle or their value £60 being dowry paid to defendant for plaintiff's daughter Margaret.

Defendant eventually filed an amended plea to the following effect:—

1. He admits Margaret's marriage but says only eleven head of cattle of her dowry are in existence. He says the dowry was paid to plaintiff's wife Regina and is registered in her name.

2. He says that Regina, to whom plaintiff was married by Christian rites in 1910, pledged seven head of the dowry cattle to a trader for the wedding outfit of Margaret and that he is not responsible for her actions and that the parties are of good social standing and the wedding outfit purchased is not excessive and are necessaries.

3. That in regard to the balance of four head of cattle admitted to be in existence by defendant he says that when plaintiff married Regina he paid 10 head of cattle and one horse as dowry and undertook to pay the balance of six head when his daughter married and he pleads a set off in respect of these cattle.

4. That Regina was driven away 20 years ago by plaintiff and ever since then defendant has maintained her and her two children and he claims to set off against Margaret's dowry "isondlo" due under Native Custom.

5. In the event of his contention in paragraph 2 being disallowed he prays that any stock which is due in terms of paragraph 3 of her plea be set off.

The Assistant Native Commissioner entered judgment in favour of plaintiff for 9 head of cattle or their value £45 (after making allowance for 2 head for maintenance and one which died).

Against this judgment an appeal has been noted on the following grounds:—

1. (*a*) That the Assistant Native Commissioner erred in law in holding that defendant was liable in respect of the 7 head of cattle pledged by Regina, the lawful wife of plaintiff, to Mr. C. G. Burn. That the said Regina is in law by reason of her status as a spouse by Christian rites entitled to bind her husband for necessaries, as in fact, the wedding outfit of plaintiff's daughter Margaret, was proved in the circumstances, to be, that plaintiff was liable for her said action and cannot now claim to be re-imbursed from the defendant.

(*b*) Erred in law and fact in respect of the 7 head of cattle pledged to Mr. C. G. Burn by the said Regina in that no effort was made as stated by the Assistant Native Commissioner, by the defendant to deprive the plaintiff of possession, solely with the purpose and whereas in actual fact it was proved that plaintiff knew of the pledging of the said 7 head of cattle and took no immediate action to restrain his wife, Regina or defendant from doing so. That plaintiff's silence and subsequent inactivity was a tacit ratification of his wife's action and he is now estopped from claiming the said 7 head from the defendant; that defendant has not benefited from the pledging of the said stock and the action of plaintiff's wife was one that plaintiff would have had to take if the said Regina had lived with him and he was in charge of the said Margaret's marriage. That the same applies to the stock slaughtered for the wedding ceremony.

2. That the Assistant Native Commissioner erred in holding that defendant was liable under Native Custom for 7 head of cattle pledged to Mr. Burn, particularly by

reason of plaintiff's civil liability ensuing from plaintiff's action in the circumstances arising from the Christian marriage and generally on the ground that the time has now come to put into effect the Policy of Native Administration slowly to mould Native Custom to our Common Law. That the evidence goes to show that the parties are educated Natives who have adopted European habits and mode of living and are ripe subjects for the aforesaid avowed policy of our Administration.

3. (*a*) That the Assistant Native Commissioner erred in fact in holding that there was no balance of dowry due by plaintiff to defendant for his wife Regina, and that his judgment hereanent for plaintiff was against the weight of evidence and probalities of the case.

(*b*) That the Assistant Native Commissioner erred in law in holding that by awarding defendant the balance of dowry claimed he would be acting contrary to Custom as it would have the effect of placing defendant in possession of the woman and the dowry as this custom presupposes; that the marriage in question has been dissolved and without fault of the husband which are not facts in the present case.

4. That the Assistant Native Commissioner erred in placing an alternative value of £5 per head on the 9 head of cattle found by him to be due.

The Assistant Native Commissioner has found the following facts proved: —

1. That plaintiff married Regina by Christian Rites about 1910.
2. That some six or seven years later Regina returned to her father's kraal, taking with her her daughter, Margaret, and a son.
3. That defendant, Regina's younger brother, is now head of the kraal at which Regina resides.
4. That Regina and her two children have lived at defendant's kraal for some twenty years.
5. That Margaret has recently married and that twelve head of cattle were paid as dowry.
6. That of these one died and seven were pledged by Regina in respect of Margaret's wedding outfit.

We are in agreement with his findings of facts but we are of opinion that the evidence discloses the additional facts: —

1. That the dowry for Margaret was paid at defendant's kraal, and that he is head of the kraal and in control of the stock.
2. That plaintiff was not consulted in regard to the marriage of Margaret or the disposal of the dowry paid for her.
3. That the parties are Hlubis and follow Native Custom.

The evidence as to the amount of dowry paid by plaintiff for his wife, Regina, is contradictory. Defendant alleges that only 10 head and a horse were paid and that plaintiff specially agreed to pay a further six head when his daughter got married. Plaintiff, on the other hand says that he paid 14 head and a horse, that the 14 head increased by four before marriage and that according to Hlubi Custom the increase count as dowry. He denies that he made a special agreement to pay a further six head, but admits that there was no necessity for a special agreement in view of the fact that according to Hlubi Custom, dowry is fixed at 20 head of cattle and a horse. He contends that as his wife deserted him no further dowry is payable.

It does not seem to make any difference which of the two stories in regard to dowry is the correct one for in either case there would still be a balance of six head unpaid.

In regard to the statement about the increase this is denied by the defence and we are not satisfied that there was any increase. The question as to whether according to Hlubi Custom any increase of dowry cattle before marriage counts also as dowry does not come up for consideration.

Plaintiff's assertion that his wife deserted him is not credible in view of the fact that for 20 years he had made no effort to get her back nor has he taken any steps in regard to her alleged adulteries.

Regina's story that she was driven away is the more propable. His claim in respect of Margaret's dowry would not be affected in any case.

In regard to ground 1 (*a*) of the appeal, the claim in this case is one for dowry which must be treated under Native Law and Custom. Defendant is head of the kraal and is the proper person to account for the dowry paid at his kraal in respect of Margaret. He cannot avail himself of the defence that plaintiff's wife had authority under common law to pledge her husbands credit and incur expense at Burns' shop in respect of a wedding outfit thereby disposing of certain 7 dowry cattle. Further, the expression "necessaries" does not in law apply to such transactions as those mentioned, and in any case is not a matter which defendant can raise against the plaintiff.

Ground 1 (*b*) raises a plea of estoppel. This is one which should have been raised in the Court below and cannot be taken for the first time on appeal.

The second ground of appeal falls away as the parties admit that they have not abandoned Native Custom and under that custom a person who marries off a girl without the consent of her guardian does so at his own risk and has no claim to re-imbursement of wedding and other expenses.

In regard to the third ground we are of opinion that the Assistant Native Commissioner erred in finding that the fact of plaintiff and his wife having lived apart for 20 years disentitled defendant from claiming the balance of the dowry due in respect of the marriage of plaintiff to Regina. Plaintiff admitted that six head of cattle were due thereon but claimed set off of four increase to the dowry before the marriage took place.

As already stated the Court is not satisfied that there was any such increase. Notwithstanding their protracted separation there is nothing in European or Native Law to preclude plaintiff's claiming the return of his wife nor is defendant on the contrary barred by Native Custom from claiming the balance of dowry due.

The Assistant Native Commissioner rightly found that defendant is entitled to two head of cattle for "isondlo" in respect of the two children, Margaret and her brother.

In so far as the fourth ground of appeal is concerned this Court is of opinion that defendant suffers no prejudice owing to the value of the cattle having been fixed at £5 each as they are still in existence and he can deliver them.

The appeal is accordingly allowed with costs and the judgment of the Assistant Native Commissioner is amended to read:—

Judgment for plaintiff for three head of cattle or their value £15 (that is, 12 head less 6 due as balance of Regina's dowry, 2 isondlo cattle and one which is dead) with costs of suit.

NDABAZAKE DLUNGE vs. SILUMKO DLUNGE.

UMTATA: 12th June, 1937. Before H. G. Scott, Esq., President, and Messrs. W. J. G. Mears and W. F. C. Trollip, members of the N.A.C.

Wives—Ranking of—Not customary to appoint a Qadi to an existing Qadi House—Ubulunga cattle—Not usual to use in payment of dowry except in cases where the dowry is to be paid for son.

(Appeal from Native Commissioner's Court, Umtata.)

(Case No. 661 of 1936.)

In the Court of the Chief Regent for Tembuland, Silumko sued Ndabazake for 60 sheep, 16 head of cattle, 2 horses, a machine and defendant counterclaimed for 29 bags of mealies.

Judgment was entered for the defendant and the plaintiff appealed to the Court of the Native Commissioner at Umtata.

Judgment was entered in favour of plaintiff for 21 sheep, 3 cattle and the machine with costs. Absolution was granted in regard to the balance of the claim. On the claim in reconvention judgment was entered in favour of plaintiff in reconvention for 24 bags of mealies or their value £12 with costs.

Defendant in convention has noted an appeal against the whole of the judgment in convention on the following grounds: —

1. That the evidence and the probabillities establish that Nosamana was married as a support to Nobali.

2. That as the Native Commissioner accepted the evidence of the defence generally on the facts, and accepted fully the evidence of Ncakaca, the fact that Nosamana was asked for as a support for Nobali; that she was married from Nobali's kraal, from which kraal the dowry was paid, all clearly indicate the status of Nosamana at the time of her marriage.

3. That these factors establish that status, even without an actual public declaration by the late Dlunge, for the reason that the "acts" of the marriage proclaimed the intention and no pronouncement was required in view of the fact that Nobali had her own kraal, separate and distinct from the great kraal, at the time Nosamana was married.

4. That the marriage of Nosamana as a support for Nobali is clearly cognisable in Native Custom and the desire and intention of Dlunge in respect of any wife after the 4th wife, evidenced by witnesses, probabilities and by conduct after marriage should be recognised and confirmed.

5. The Trial Court having found against plaintiff on a material question of fact, the plaintiff should not in the circumstances have been awarded the costs, or all the costs in the claim in convention.

6. That in the circumstances of this case a judgment of absolution in relation to the balance of the sheep and cattle claimed is not a competent judgment.

The plaintiff has noted a cross-appeal against that portion of the judgment granting absolution to the balance of the claim for cattle, sheep and horses and against the award to plaintiff in reconvention of 24 bags of mealies or £12 and costs on the following grounds:—

1. That the Court having found that there was no proof of variation of the usual procedure as to the ranking of houses and that there could be no Qadi to a Qadi and that Nosamana's house was a Qadi to the Great House, should have accepted the evidence led for plaintiff on all points.

2. That there was ample and sufficient evidence to entitle plaintiff to an award of the amount of cattle, sheep and horses claimed by him.

3. That in this respect the judgment is against the weight of evidence and probabilities of the case.

4. That the judgment for the mealies was against the weight of evidence and the probabilities of the case and that it was proved that the grain in question, not in existence now, came from Nosamana's land and was the property of plaintiff.

5. That plaintiff in reconvention failed in his case hereon.

It appears from the record that the late Dlunge, the father of the parties to this action, was a wealthy man and had eight wives the first of whom were married in the following order: 1. Nohenkile, 2. Nonqanala, 3. Nobali, 4. Nowezile, 5. Notanli, 6. Nosamana.

The dispute is in regard to the position held by Nosamana. As Notauli was the wife of the Xiba House, Nosamana would be Dlunge's fifth wife in the ordinary course would be the second Qadi of the Great House. It is asserted, however, on behalf of the defendant that the dowry for her was paid out of the property belonging to the House of Nobali, the first Qadi of the Great House; that she was married at that kraal; that she was consequently allied to that house and not to the Great House and that defendant, being Nobali's eldest son, would inherit the property in Nosamana's house, she having died childless.

The plaintiff asserts that Nosamana's dowry came from the Great House and that in accordance with Custom she was the second Qadi to the Great House and plaintiff would be the heir.

On the evidence the Additional Native Commissioner has found that Nosamana's dowry was paid from Nobali's house; that defendant was in charge of her kraal after Dlunge's death; that Nosamana had her own garden and building lots, the latter adjoining that of Nobali; that the two women used a common stock kraal; that Nosamana's status was not publicly announced at the time of her marriage and that there is not sufficient evidence to support the allegation that she was married as a qadi to Nobali.

After dealing with the evidence the Additional Native Commissioner states:—

"On these facts it is necessary to determine whether or not Nosamana was married as a qadi to Nobali. The status of the first four wives of a Native is well established by custom, i.e. the first is Great Wife, the second Right Hand

Wife, the third is qadi to the Great Wife and the fourth is qadi to the Right Hand Wife. But this order is subject to the general rule that a subordinate wife is allied to the house which furnished her dowry. The Native Appeal Court, in Mgudlwa *vs.* Paliso—4 N.A.C. 378, has accepted the statement of the law by Native Assessors that a man may marry a qadi to the Right Hand Wife before marrying a qadi to the Great House when there is no stock in the latter house, but that such variation of the usual practice must be carried out with due formalities and that it must be supported by strong and convincing evidence. In Mhlwili Kwaza *vs.* Nofesi—2 N.A.C. 17, the Native Assessors were asked whether it is customary to appoint a seed bearer to a qadi house, there being an heir to the principal house. They replied "It is not customary to establish a seed bearer to a qadi; there cannot be one qadi upon another qadi".

Even if the assessors have overstated the law, strong and convincing evidence to support defendant's contention that Nosamana was married as a qadi to Nobali is almost entirely absent. The only evidence we have on this point, besides the fact that the dowry was paid at Nobali's kraal, is that of Ncakaca as to what was said at his father's kraal. One would have expected that if it were Dlunge's intention to depart from usual custom he would have made a formal public announcement of her status in the presence of his relatives. But there is a total absence of evidence of such announcement. Moreover, I have searched the Appeal Court records and have failed to find any precedent for his alleged action. The fact that, at the time of Nosamana's marriage, Nobali was not definitely past child bearing, as her youngest child, Nosisi, was only about three years of age, is also against defendant's contention that Nosamana was her qadi.

The object of marrying a supporting wife is, as I understand it, to ensure the continual fruitfulness of the Principal house, especially when such principal wife is no longer able to bear children, and to make such house numerically and materially strong. There can be no such object in marrying a qadi to a woman who is herself a subordinate wife.

I have, therefore, come to the conclusion that, even if it were legally permissible for a Native to marry a supporting wife to his qadi house (which I doubt), there is not sufficient evidence to prove that Nosamana was married as a qadi to Nobali and, therefore, plaintiff is her heir".

At the request of the attorneys appearing in this Court the following questions were put to the Native Assessors:—

A man marries eight wives

1. In what order would these wives rank?

2. In this case the fifth woman married was made the wife of the Xiba house. This being so would not the sixth woman married ordinarily be the second qadi to the Great House?

3. Is it permissible according to custom to change this order? If so, what formalities are necessary to effect the change?

4. Assuming that the sixth wife was married at the kraal, and the dowry for her paid from stock belonging to the house of the fourth wife, would she thereby become a supporting house to the fourth wife?

5. Can there be a qadi to a qadi wife? If so, are any formalities necessary.

6. Is it customary to use ubulunga cattle in the payment of dowry?

The Native Assessors gave the following replies:—

1. The first four wives would rank as the Great Wife, Right Hand Wife, Qadi of Great Wife and Qadi to the Right Hand Wife respectively.

2. Then comes the fifth wife known as the wife of the Xiba House. The sixth wife would be generally known as the qadi of the Great House.

3. We know of no right a person can exercise in changing the usual status of those women.

4. A wife married in that way is not the qadi of the wife whose house provides the dowry. There is no such custom. Even if the evidence shows that a woman is married at a particular kraal and the dowry for her paid from the stock of that kraal that does not affect the position.

5. That cannot be.

6. It is not usual to pay away ubulunga cattle as dowry except in cases where the dowry is to be paid for a son. A man cannot pay away ubulunga cattle as dowry for his other wife.

It will be seen, therefore, that, even if the Additional Native Commissioner's finding that the dowry for Nosamana was paid from stock belonging to Nobali is correct, the status of Nosamana is not affected and she would be regarded as a supporting house to the Great House. We are, however, satisfied that the evidence discloses that the dowry for Nosamana came from the Great House. This is deposed to by the witnesses Nqonongwana, Qumbelo and Lutsheto, all full grown men, as well as plaintiff.

Opposed to this we have the defendant and his younger brother Tshonana, both of whom at the time of Nosamana's marriage were very young and would, therefore, probably know nothing of the circumstances attending it. The only other witness for defendant is Ncakaca. His evidence is evidently coloured to suit the defendant's case for he says that when Nosamana was asked for in marriage, it was said that she was to be a qadi to the qadi of the Great House and that he was not surprised as this was quite a usual thing. He must have known that this was not true. The Additional Native Commissioner rejected the evidence of Nqonongwana and Lutsheto because they were to a certain extent dependent upon plaintiff, but this scarcely seems a sound reason, in the absence of anything otherwise to show that they were not speaking the truth. We have come to the conclusion, therefore, that the evidence of these witnesses should have been accepted. They also depose to the number of stock that is at Nosamana's kraal and having found that they are credible witnesses in regard to the marriage of Nosamana we do not see any good reason for rejecting their evidence on this point.

In regard to the mealies we find that the defendant (plaintiff in reconvention) has failed to prove that they are his property. On the other hand, there is insufficient evidence that they all came from Nosamana's land.

The result is that the appeal is dismissed with costs. The cross-appeal is allowed with costs and the judgment in the Court below amended to read: For plaintiff for 16 head of cattle, 60 sheep, two horses and one machine. On the claim in reconvention there will be absolution from the instance. Defendant in convention to pay costs.

GILBERT and JACKSON BAKU vs. RWALA ZAKUMBA.

KINGWILLIAMSTOWN: 16th August, 1937. Before H. G. Scott, Esq., President, and Messrs. H. B. Myburgh and N. A. Ogilvie, Members of the Court.

Procedure—Native Appeal Court Rules do not provide for Review of Proceedings in Courts of Native Commissioner—Contempt of Court—Unjustified attack on Judicial Officer in grounds of Appeal and Review.

(Appeal from the Native Commissioner's Court, Port Elizabeth.)

(Case No. 113 of 1936.)

(The judgment on the facts is immaterial.)

In the Court below the plaintiff sued the defendants for three head of cattle or their value £15 as damages for seduction of his granddaughter, Ethel, by first defendant. The second defendant being sued as father and kraal head of first defendant. In the summons as originally drawn a claim was made for £1. 10s. lying-in expenses and £3 for loss of wages but these claims were withdrawn during the hearing.

When the case came on for hearing in February, 1937, defendant's attorney objected to the summons on the ground that plaintiff was not the guardian of Ethel, she being the illegitimate child of plaintiff's daughter by one Freddy Dodo, who had paid a fine for the seduction and pregnancy, and that consequently Freddy Dodo was the only person who could sue for damages for the seduction of Ethel.

The objection was upheld with costs and plaintiff appealed to this Court. Defendants thereupon abandoned this judgment and the record was returned in order that the clerk of Court might comply with Rule 7 of the Native Appeal Court Rules (Government Notice No. 2254 of 1928). The clerk of the Court thereupon entered a judgment setting aside (it should be "overruling") the objection with costs. On the 23rd April, 1937, the case again came on for hearing and the Additional Native Commissioner entered judgment in favour of plaintiff for three head of cattle or their value, £15, and costs.

Against this judgment an appeal has been noted on the following grounds:—

1. That the judgment is against the weight of evidence and is not supported by the evidence.
2. That the Additional Native Commissioner has drawn inferences from the evidence to which he is not entitled in law as also inferences which are not supported by evidence on the record.
3. That the Additional Native Commissioner has introduced into his reasons for judgment findings based on matters which are not reflected in the record and which have not been dealt with in evidence.
4. That the action being directed under Native Custom and the parties themselves according to the evidence having followed Native Custom in dealing with the claim, the Additional Native Commissioner erred in failing to deal with the matter in accordance with such Native Custom, or alternatively, be guided by features arising from such Native Custom and erred in ignoring in conclusions to be drawn from such Native Custom and practices.

5. That the Additional Native Commissioner has introduced into his reasons for judgment a knowledge or alleged knowledge of Native Custom not drawn from or reflected in the evidence (apparently obtained from extraneous sources), to which he is not entitled to refer and of which in fact he has no knowledge as will more fully appear from the application for the review of the judgment hereinafter set forth.

6. That on the pleadings the plaintiff has no *locus standi in judicio* to take action in the above matter for and on behalf of the seduction of the said Ethel Rwala even if such seduction did take place, he being merely the maternal grandfather, and that on the facts the said Ethel Rwala is not a member of his kraal. The Additional Native Commissioner erred, therefore, in his conclusions of law thereanent.

Appended to the notice of appeal is a notice that, at the hearing and argument of the appeal, application would be made for the review and setting aside of the judgment on the ground that the same is grossly irregular in that:—

(*a*) That the Additional Native Commissioner has misdirected his mind to the proceedings, has made findings upon matters not set forth in evidence and in fact directly in conflict with the evidence and as such the judgment is grossly irregular.

(*b*) That the Additional Native Commissioner has introduced into his reasons for judgment findings based on an alleged knowledge of Native Custom in urban areas which is not based on evidence and as such the judgment is grossly irregular.

(*c*) That the Additional Native Commissioner has misdirected his mind to the proceedings and his judgment is grossly irregular in that, in the absence of evidence thereto he attributes to the District of Port Elizabeth practices and/or customs for which he has both in fact and in law no foundation.

(*d*) That the Additional Native Commissioner is in fact personally ignorant of any practices or customs relating to Port Elizabeth such as referred to in the reasons for judgment *inter alia*, e.g.:—

(*aa*) That Native girls are in the habit of kapa-ing one another to the places at which they meet their admirers.

(*bb*) That sexual intercourse takes place amongst Natives in urban and industrial areas in the presence of other females.

(*cc*) That full-blooded young men employed in industry in Port Elizabeth go out at night.

(*dd*) That choir practices are not held in the daytime.

(*e*) The Native Commissioner erred in allowing evidence to be led of intercourse at places other than at Defendants' room at Durban Road, Korsten, despite objection by the Defendants. That such wrongful admission of evidence is grossly irregular."

Attached to the application for review are two affidavits, one by defendant's attorney of record and the other by one Manuel Zibonda. The affidavit by defendant's attorney is as follows:—

I, Jacob Hyman Spilkin, do hereby make oath and say:—

1. That I am an attorney of the Supreme Court of South Africa, practising and residing at Port Elizabeth.

2. That as will be borne out by the records of the Native Commissioner and by the Criminal Courts, I have the largest native practice in Port Elizabeth, and as such practice very frequently in the Native Commissioner's Court.

3. That the Additional Native Commissioner informed me when he first came to Port Elizabeth in April, 1937, that he had no judicial experience whatsoever of court practice and that he had never acted on the bench, and that as a fact he had hitherto been engaged in departmental work at Head Office, Pretoria; that furthermore this was the first time he was stationed in this area.

4. That in the circumstances, I respectfully submit that without evidence, the Additional Native Commissioner is not entitled to make any pronouncements about the practices and customs in Port Elizabeth with regard to the matters raised in the application for review.

5. That I accordingly submit that the judgment was grossly irregular and that the Additional Native Commissioner misdirected his mind to the proceedings.

6. That if this Honourable Court requires it, the Defendant can obtain evidence on the practices obtaining in Port Elizabeth on the matters and things raised in the evidence and the matters set forth in the Reasons for Judgment.

7. That the above facts are true and correct.

It is not necessary to set out the terms of Manuel Zibonda's affidavit, but there is one statement therein to which reference must be made, namely:—

"That I have in all my experience never heard of any occasion when a Native male has had sexual intercourse with a Native female in the presence of another person. That such a custom or practice in Port Elizabeth is absolutely unknown."

Could any person with any regard for accuracy have made the statement contained in the last sentence truthfully? It must be obvious that he could not possibly know what went on in every house in Port Elizabeth on each night of the year.

When Mr. Atherstone, who appeared for the Appellant, commenced his argument, was asked whether he proposed to press the application for review in view of the decision of this Court in the Case of Mngondiso Mkontwana *vs.* John Mutabani [1932, N.A.C. (Cape & O.F.S.), 1], he stated that he did not wish to do so and would confine his argument to the grounds of appeal. At the same time he intimated that he dissociated himself entirely from the methods adopted by the attorney of record for appellant in the Court below in this matter. The application for review accordingly fell away. This Court, however, considers it necessary to make some remarks on the actions of Mr. Spilkin, the attorney referred to.

In order that the position may be made clear it is desirable to set out shortly the nature of the evidence given, and the remarks thereon by the Additional Native Commissioner in his reasons for judgment.

The case was one of intercourse with an unmarried girl, Ethel Rwala. In her evidence Ethel stated that the intercourse had taken place firstly at first defendant's room in which at the time several other persons were present, and secondly at Western Road and Westborne Road, Port Elizabeth, in a room which she occupied jointly with one Mabel Nogoli and while the latter was in the room. Mabel Nogoli corroborated her in regard to the events at Western Road and Westborne Road and further stated that she had accompanied Ethel by bus on her visits to defendant's room but had never gone in. She would leave Ethel outside first defendant's room and then return to Port Elizabeth and take a bus to her own place of residence. The defence was a denial of the intercourse at any of the places mentioned

and it was stated that the first defendant never went out at night without his father's permission and then only to attend concerts.

In commenting on the evidence the Additional Native Commissioner made the following remarks in his reasons for judgment: —

"While there is no proof *aliunde* of intercourse having taken place at Korsten I believe Mabel's statement that she accompanied Ethel upon her visits to that place from June, 1935 onwards as it is well known that native girls are in the habit of 'Kapa-ing one another to the places at which they meet their admirers', and, in regard to the statement made by Ethel and Mabel that intercourse had taken place in the presence of the latter.

"In this respect the testimony of neither witness was shaken although they were subjected to heavy cross-examination and I see no reason to disbelieve it as sexual intercourse under the conditions described is not uncommon among natives in urban and industrial centres, and finally dealing with the statement by first defendant that he does not go out at night: —

"So strict is his father that unlike other full-blooded young natives employed in industrial centres such as Port Elizabeth, this young man never goes out at night except to church concerts."

Now nowhere in any of these remarks does the Additional Native Commissioner pretend to have a special knowledge of the habits of the natives of Port Elizabeth.

In view of the fact that the application for review was not proceeded with this Court is not called upon to say whether or not the Additional Native Commissioner had committed any irregularity, we are only dealing with the methods adopted by defendants' attorney in bringing the matter to the notice of this Court.

We will now deal with those portions of the grounds of appeal, application for review and affidavits in support of the latter which we consider require comment.

In paragraph 3 of his first affidavit Mr. Spilkin, in support of his application for review, has made use of a statement made to him by the Additional Native Commissioner in what was evidently merely a friendly conversation.

His action in doing so we regard as being unworthy of a person belonging to an honourable profession and who is an officer of the Court.

Paragraph 5 of the grounds of appeal and paragraphs (*b*) and (*d*) of the application for review constitute an unjustified attack on the Additional Native Commissioner and in the opinion of this Court, amount to a serious and deliberate contempt of Court.

The mere fact that the Additional Native Commissioner had had no previous judicial experience does not preclude the possibilty of his having a knowledge of native habits and customs. In our opinion it amounts to a contempt of Court for an attorney to refer to a judicial officer in his capacity as such as having "an alleged knowledge of native custom", and to suggest that that "alleged knowledge" was "apparently obtained from extraneous sources" without furnishing a title of evidence in support of such a suggestion.

The suggestion is clearly made with a view to belittling the officer concerned.

In paragraph 2 of his first affidavit Mr. Spilkin says he has "the largest native practice in Port Elizabeth".

This statement is contained in a public document forming part of a record open to the public. This appears to offend against the rule of the Law Society that no practitioner shall advertise.

The Additional Native Commissioner furnished the following additional reasons for judgment after the notice of appeal and application for review had been filed:—

(*a*) With regard to defendant's reasons for appeal, such comments and allusions as I have made in my reasons for judgment to practices followed by natives were made and intended as bearing upon the credibility of the evidence upon which in my view the whole case depended. Dealing particularly with paragraph 6, it will be noted from the record that defendant abandoned the objection to plaintiff's *locus standi* which he took when proceedings in the case first commenced, in February, 1937.

(*b*) With regard to the affidavit of defendant's Attorney, this of course is a purely *ex parte* statement and is not evidence. It is, however, possibly of some value to the members of the Native Appeal Court as an indication of the conduct and methods of the deponent upon which I will make no further comment beyond stating that they appear to me to be neither in conformity with the rules of procedure nor the ethical principles and conduct which I submit should govern the actions of a member of the Side-bar of the Eastern Districts Local Division.

(*c*) With regard to affidavit No. 2, the propriety of the first deponent in obtaining and submitting this seems to me to be in conformity with the methods and conduct governing his submission of the first affidavit.

These additional reasons resulted in a further affidavit by Mr. Spilkin in which he, amongst other things, said that the remarks of the Additional Native Commissioner are a personal and unwarranted attack upon him. The only comment we feel called upon to make is that in our opinion, the Additional Native Commissioner's comments were, in the circumstances, commendably dignified and restrained.

In this affidavit Mr. Spilkin complains that he was never given a copy of the Additional Native Commissioner's additional reasons or " reply " as he styles it. It is only necessary to say that Mr. Spilkin was not entitled to obtain a copy of the additional reasons unless he applied and paid for it.

Mr. Spilkin also complains that as the review was made by way of affidavit the Additional Native Commissioner had not given his reply by affidavit. There is nothing in the Native Appeal Court Rules requiring the judicial officer to furnish a reply by affidavit, and he was, therefore, quite in order in making his comments in the manner he did.

In this latter affidavit Mr. Spilkin aggravates his offence by saying " I cannot see anything improper in the fact that objection is taken to the findings by the Native Commissioner as to facts for the findings whereon there is no evidence on the record and for which the Native Commissioner could not possibly have used his own personal knowledge *as he has no such knowledge* ".

This can only be regarded as a further attempt to belittle the Additional Native Commissioner.

The papers in this matter will be submitted to the Solicitor-General and the Law Society for such action as they may, respectively deem necessary.

KEKE and SAMUEL MKWANE vs. JANE and RICHARD BANGANI.

KINGWILLIAMSTOWN: 16th August, 1937. Before H. G. Scott, Esq., President, and Messrs. H. B. Myburgh and N. A. Ogilvie, Members of the Court.

Seduction—Damages—Practice—Widow has no locus standi *under Native Law and Custom to sue for damages for the seduction of her daughter—Proper person to sue is heir of girl's father or, if he is minor, his guardian.*

(Appeal from the Native Commissioner's Court, Stutterheim.)

(Case No. 20 of 1936.)

In the Court below, Jane Bangane sued Keke Mkwane and Samuel Mkwane, the latter as kraalhead of Keke, for five head of cattle or their value £25 as damages for the seduction and pregnancy of her daughter, Lilian, by the first defendant.

In the plea first defendant denied the seduciton and second defendant admitted he was the kraal-head of first defendant but denied liability for his delicts. Both defendants pleaded specially that plaintiff had no power or authority under Native Law and Custom to institute the action against them.

When the case came on for hearing, plaintiff's attorney applied to join Richard Bangani, eldest son of plaintiff as co-plaintiff.

Defendants' attorney objected as the case is one under Native Law and Custom and two people cannot be joined as plaintiffs.

The following note then appears on the record:—

"The amendment was allowed and plaintiffs entered as Jane Bangani, assisted by her major son Richard Bangani."

This left the position almost exactly as it was before the application was made, i.e. Jane Bangani still remained the plaintiff and her son was only joined as assisting her. This did not make him a co-plaintiff.

After hearing evidence the Native Commissioner entered judgment for plaintiffs as prayed with costs against both defendants.

Against this judgment an appeal has been noted on the ground that plaintiff (Jane Bangani) had no *locus standi* to sue.

The case was tried under Native Law and Custom and under that custom a woman has not the right to sue for damages for the seduction of her daughter. The proper person to sue is the heir of the girl's father, or, if he is a minor, his guardian.

The Native Commissioner in his reasons for judgment stated that both parties accepted that Richard Bangani is 21 years of age but Jane Bangani in her evidence stated that he is only 19 years old.

This being so, neither he nor his mother had any *locus standi* and the proper person to sue was Johnson Bangani, the head of the family.

The appeal will be allowed with costs and the judgment in the Court below altered to "Summons dismissed with costs".

JAMESON BANA vs. EVLYN BANA.

KINGWILLIAMSTOWN: August, 1937. Before H. G. Scott, Esq., President of the Native Divorce Court.

Marriage—Nullity—Admission of impotence by husband—Costs.

(Case No. 101 of 1937 from the Native Divorce Court, Kingwilliamstown.)

Jameson Bana issued summons against his wife, Evlyn Bana, alleging that she had maliciously deserted him and claiming an order for restitution of conjugal rights failing which a decree of divorce.

The defendant filed a plea denying desertion and counter-claimed for a nullity of the marriage on the ground of plaintiff's impotence.

When the case came on for hearing the claim for restitution of conjugal rights was withdrawn and in a plea to the counter-claim defendant in reconvention admitted that at the time of the marriage he was incapable of consummating the marriage and was then and has been ever since unable to have sexual intercourse with the plaintiff in reconvention.

The marriage took place on the 24th December, 1935, so that the period of three years required by Roman-Dutch law to elapse before a presumption of impotence can arise has not expired [see B (otherwise S) *vs.* S.1916, C.P.D. at p. 113]. In that case, however, there was a denial of impotence by the husband. In Van Zyl's Judicial Practice (3rd Edition, Volume 11, page 696) the following appears:—

"When the defect to procreate is not visible, and is not otherwise known, or immediately ascertainable, or there is no immediate hope of success by means of medical or surgical treatment, then three years must intervene from the date of the marriage before such marriage can be set aside on the ground of impotency."

This applies to the woman as well as the man but, when the incapacity to procreate is visible or ascertainable at once, the marriage may be set aside at any time, or immediately after its celebration. And "In a suit for impotency there must be proof that the party is absolutely incapable of consummating the marriage, and where the defect is not visible three years' interval is necessary before this decree can be applied for, and then only if the medical evidence show frigidity or other incapability to have children; and there must be proof that no carnal connection took place during that period."

In the case of H (otherwise C) *vs.* H (1906, 23, S.C. 609) it was held that if proof was given of a defect, visible on inspection, at the time of the marriage and since which would render the husband unfit to perform his matrimonial function, the lapse of time without the performance of such function would be of no importance.

In the case of B (otherwise S) *vs.* S (1916, C.P.D. at p. 113) Kotze, J., said: "By our law (Voet 24.2.15) if no consummation of the marriage has taken place for three years after the marriage, and the wife has been proved to be well-formed and a virgin, a presumption of impotence through latent defect on the part of the husband will arise."

In this case the husband had denied that he was impotent and asserted that he had had sexual intercourse with his wife on several occasions and called a medical witness to testify that he was apparently capable of having sexual intercourse. The Court accepted the plaintiff's evidence that there had been no sexual intercourse and granted a decree of nullity.

In the case of H (otherwise C) *vs.* H (*supra*) the defendant was in default and in the case of B (otherwise S) *vs.* S (*supra*) as already stated, the husband denied impotence; and consequently, the presumption of impotence had to be gathered from the evidence and the surrounding circumstances and the duration of the marriage was of importance. In my opinion, however, where there is a direct admission of impotence by the husband as in this case, there is no necessity to delay the application for a decree of nullity until after the expiration of three years and the case of H *vs.* H (*supra*) seems to me to be direct authority for that opinion.

In the present case the applicant has had intercourse with another man and at the date of the trial she was in her eighth month of pregnancy. Mr. Randell for the respondent (the husband) submits that in these circumstances she should not be awarded costs.

In the case of B *vs.* S (*supra*) the applicant had also had connection with another man, but the Court held that this did not debar her from obtaining a decree of nullity and granted it with costs. I see no reason for not following the decision in that case.

It is ordered: That the marriage between plaintiff and defendant be and is hereby declared null and void, *ab initio*, with costs.

SMAYILE QABUKA vs. DLISONDABAMBI.

BUTTERWORTH: 27th September, 1937. Before H. G. Scott, Esq., President, and Messrs. A. G. Strachan and H. F. Marsberg, Members of the Court.

Dowry, return of—Death of husband—Remarriage of widow—Number of cattle returnable when children born of first marriage.

In this case the plaintiff (respondent) in his capacity as guardian of the minor son and heir, named Mbovane, of his deceased younger brother, Mtsotsotse, sued defendant for the delivery of the said Mbovane and seven head of cattle or their value £35 and in his particulars of claim alleged:—

1. That about six years ago his said younger brother, named Mtsotsotse married the defendant's daughter according to Native Law and Custom, and paid to him as dowry nine (9) head of cattle.
2. That the issue of the said marriage was 1 child, namely the minor son Mbovane, above named, who is in the possession of the defendant.
3. That Mtsotsotse died in the third year after the consummation of the above described marriage.
4. That defendant has given late Mtsotsotse's widow in remarriage and has received dowry for her.
5. That late Mtsotsotse's heir is therefore entitled to the restoration of the dowry paid by late Mtsotsotse, that is nine head of cattle, less 1 deduction for 1 issue born of the marriage, i.e. 8 head of cattle.
6. That plaintiff has also demanded the delivery to him of the minor child, named Mbovane, offering to deduct a further beast as "isondlo" for the said Mbovane, from the above 9 head of cattle and thus reducing the claim to:—The delivery of the minor child, Mbovane, and 7 head of cattle, but defendant neglects or refuses to comply therewith.

In his plea defendant admitted paragraphs 1, 2, 3 and 4 of the particulars of claim except in regard to the number of dowry paid and the number of children born. In regard to the remaining paragraphs of the claim he contended that, as the dowry was being returned as the result of the death of the husband, the plaintiff is not entitled to a return of more than half the said dowry and that as defendant is entitled to the deduction of one beast for "isondlo", the plaintiff is not entitled to more then four head even should the Court hold that the dowry paid consisted of the equivalent of nine head.

No evidence was led but argument was directed to the legal point raised as to the division of dowry.

The Native Commissioner ruled that plaintiff was entitled to a return of the whole dowry paid less the usual deductions for any children born and maintenance for the said children and ordered that the dispute as to the number of cattle paid and the number of children born should go to trial.

Against this ruling an appeal has been noted on the ground that the Native Commissioner erred in ruling that the plaintiff was entitled to more than half of the dowry, the Appeal Court having ruled that in such cases the plaintiff is not entitled to a return of more than half the dowry.

The Native Commissioner gave the following reasons for judgment:—

This appeal is against the ruling of the Court that upon remarriage of a widow, and dowry having been paid by the second husband, the whole of the first dowry is returnable less the usual deductions for children and maintenance of any such children.

Appellant (defendant) relies on the case of Dlunge *vs.* Jaza (N.A.C., 4, 91) and respondent (plaintiff) relies on the case of Gwetyiwe Jonas *vs.* Tandatu Yalezo (N.A.C., 4, 92) decided nine months later in the same Appeal Court by the same presiding officer.

There is a distinct difference between the two cases above quoted. The former case refers to a division of the dowry *on the death of the husband shortly after marriage* and the Appeal Court upheld the Magistrate for a division of the dowry. In the latter case quoted 3 children were born and two were maintained by the defendant. The Native Assessors were consulted on the point as to whether, where there have been children, the balance of dowry should be divided on the remarriage of the widow. They stated that "Where a widow, having had children, remarries, the heir of the late husband is entitled to recover the dowry less a deduction of one beast for each child born.

The learned President who heard both cases within nine months makes no reference to the first case quoted, which obviously was a different issue and was not distinguished or compared though of quite recent date.

The point now before the Court is identical with the case of Gwetyiwe Jonas *vs.* Tandatu Yalezo (N.A.C., 4, 92) and is the latest decision and is in accord with true Native Custom that no man may hold two dowries for one woman. Moreover, it is to the disadvantage of the heir, for if there were 6 children born and 7 head paid only one beast would be returnable.

The Court therefore followed the decision on page 92, N.A.C. 4 and ruled accordingly."

There have been a number of decisions on this point by the Native Appeal Court which at first sight appear to be in conflict.

In the case of Gwente *vs.* Smayile (1, N.A.C., 71), a case also from Idutywa, the President stated:—"In cases where the return of dowry is sued for on account of the death of the

husband it has become customary in this Court not to restore more than half. In the present case, although Nojaji had no children, she lived with Qalani for a period of fourteen years, which must be taken into consideration and for which one beast is deducted." The Court then awarded plaintiff three head out of a dowry of eight head.

In the case of Lobi *vs.* Noyo (1, N.A.C., 269), also from Idutywa, the President in the course of his judgment referred to the case of Noante *vs.* Ngoyoto, heard at Butterworth on 22nd March, 1904 (not reported), in which it was laid down that when a woman leaves her husband's kraal on account of the death of her husband the heir of the latter is not entitled to recover the whole of the dowry, which is usually divided. In this case the husband died immediately after the marriage and there was no child. The Court allowed plaintiff three head out of a dowry of six head which the Magistrate found had been paid. The case of Gwente *vs.* Smayile (supra) was cited as authority for awarding only half the dowry paid. Then follow the cases referred to by the Native Commissioner in his reasons for judgment. The first one, Dlunge *vs.* Jaza (4, N.A.C., 91), was a case from Idutywa and plaintiff sued for the return of ten head of cattle paid as dowry on behalf of his son who had died a few months after the marriage. The defendant resisted the claim on the ground that, as he alleged, only eight head of cattle had been paid and four were dead and, therefore, only four were returnable. It will be seen that the defence was based on the death of some of the dowry cattle not on the ground that only half the dowry was returnable. The Magistrate relying on the cases of Gwente *vs.* Smayile (supra) and Lobi *vs.* Noyo (supra) gave judgment for the return of five head, on the ground that the established practice of the Court was to allow the return of not more than half the dowry.

In giving judgment the President of the Native Appeal Court said:—

"Whatever the custom as practised among Natives may have been in regard to the return of dowry on the death of the husband shortly after marriage this Court said in its judgment in 1904 in the case of Gwente *vs.* Smayile (1, N.A.C., 71), that it had become customary in that Court not to restore more than half the dowry in such cases. That ruling was followed in the case of Lobi *vs.* Noyo (1, N.A.C., 269).

"No decision in conflict with those cases has been produced before this Court.

"In the present case the woman lived with her husband at his kraal for about two months when she returned to her people where she remained for a period of eight months before returning to her husband, who died almost immediately thereafter."

"This Court is of opinion that no sufficient cause has been shown for departing from the general principles laid down and followed by this Court for seventeen years. The appeal is dismissed with costs."

In the case of Gwetyiwe Jonas *vs.* Tandatu Yalezo (4, N.A.C., 92), a case from Kentani in the Transkei, where the woman had given birth to three children during the subsistence of the marriage, judgment was given for the return of the full dowry, less three head for the three children born and two for maintenance.

This case would appear to be in direct conflict with all the cases cited above, but we are of opinion that it is clearly distinguishable. In nearly all the previous cases the husband had died shortly after marriage and there were no children while in Jonas' case there were. While the learned President in giving judgment did not refer to any specific cases it is evident that he had them in mind for he said:—"None of

the cases quoted in argument lays down that where there have been children the balance of dowry should be divided on remarriage of the widow".

The Native Assessors in that case stated emphatically that where a widow, having had children, remarries, the heir of the late husband is entitled to recover the dowry less a deduction of one beast for each child born.

Lastly in the case of Amos Sisilana *vs.* Mbuso Galo (6, N.A.C., 12), a case from Matatiele, the Native Assessors from Matatiele, Mount Frere, Umzimkulu, Mount Fletcher and Mount Ayliff stated that according to Native Custom in these districts when a widow remarries and dowry is paid for her by her second husband the heir of the former husband is entitled to recover the previous dowry paid subject to the usual deduction of one beast for each child born of the marriage.

The deciding factor in determining the number of cattle returnable on the death of the husband and the remarriage of, and payment of a second dowry for the widow, seems to be whether or not any children have been born of the first marriage. When this is borne in mind the apparent conflict between the various cases disappears.

It should be remembered that the cases in which the return of only half the dowry has been ordered apply only to the Transkei and not to the territories of East Griqualand, Tembuland and Pondoland.

In the present case the marriage had lasted for about three years and there was at least one child of the marriage. In these circumstances we are of opinion that the Native Commissioner correctly followed the case of Gwetyiwe Jonas *vs.* Tandatu Yalezo (4, N.A.C., 92) in holding that the plaintiff is entitled to a return of the whole dowry less the usual deductions for any children born and for maintenance.

The appeal is dismissed with costs.

MPAMBANI TSHAMBU vs. MSHWESHWE KONDLO.

BUTTERWORTH: 27th September, 1937, before H. G. Scott, Esquire, President, and Messrs. W. H. P. Freemantle and A. G. Strachan, Members of the Court.

Trespass of Stock—Damages—Allegation in summons as to amount of when not denied in, or not inconsistent with, plea taken to be admitted—Rule 3, Order XIV, Proc. No. 145 of 1923—Duty of Judicial Officer to find whether or not trespass actually occurred—Distances or other measurements mentioned in evidence—Manner in which to be recorded.

In this case plaintiff sued defendant for £4 as damages for trespass and in his particulars of claim alleged:—

1. Both parties hereto are aboriginal natives of the Union of South Africa and as such are subject to the jurisdiction of this Court.
2. On night of Friday, the 23rd April, 1937, a flock of sheep belonging to the defendant trespassed upon plaintiff's cultivated land by which damages to the extent of £4 were done to the crops growing thereon, consisting of mealies and beans and pumpkins.
3. Wherefore plaintiff prays the judgment of the Court for the sum of £4 with costs of suit.

The plea was as follows:—

1. He admits the first paragraph of the particulars of claim.

2. He denies the trespass alleged in the second paragraph; he denies the damage alleged by the plaintiff as having been caused by his, the defendant's, sheep, and he furthermore says that, even if stock belonging to the defendant had trespassed, as alleged, in the plaintiff's land, he, the plaintiff, is not entitled to claim from the defendant for that he did not observe and carry out the provisions of section 77 of Proclamation No. 387 of 1893, as amended by Proclamation No. 60 of 1910.

3. Wherefore the defendant, again totally denying the alleged trespass, prays for the judgment of the Court in his, the defendant's, favour with costs of suit.

After hearing evidence, the Native Commssioner entered judgment of absolution from the instance with costs and gave the following reasons for judgment:—

Facts found to be Proved.

That plaintiff has a land on which crops were growing, including beans, pumpkin vines and mealies.

That there was a heap of beans under a certain tree in this land (admission by Philemon Mcikizeli).

That 22 of defendant's sheep were absent from his kraal on a certain Friday night, and that they probably trespassed in plaintiff's land.

Reasons for Judgment.

In arriving at a decision, the Court rejected defendant's version of the events. The law followed by the Court was as follows:—

(*a*) The amount of damages to be awarded is a question of *fact* to be decided by the Court sitting as a jury.

(*b*) In the case of damages to property the measure of damages will be the *actual pecuniary loss sustained.*

Plaintiff was unable to show any measurable damage to mealies or pumpkins. In regard to the quantity of beans stated to be damaged he is at variance with the estimate of his wife, viz., 5-6 bags as against 2-3 bags. No evidence was offered regarding the monetary value of the crops damaged.

The observations of the Headman and the men as to their inspection were far too unreliable. On the plaintiff's side the Headman Llewellyn Ntsimango and Mbokotwana Ludonga contradict one another, *vide* statements regarding pumpkins.

Plaintiff's word is not beyond reproach—*vide* his denial of the proved fact that there was a heap of beans under the tree. Actual pecuniary damage was not proved.

Against this judgment an appeal has been noted on these grounds:—

1. That respondent in his plea did not deny or dispute the amount of damages suffered by appellant, nor in cross-examination were any questions asked of appellant or his witnesses to disprove their assessment of the damages, and the Native Commissioner did not give due significance to this fact.

2. That as the Native Commissioner rejected the respondent's version of the facts, and not the appellant's, then he did not give due significance to the finding of the Headman and men, especially as it was proved that the meeting was called for the special purpose of assessing the damages.

3. That it was unnecessary to call any evidence as to the monetary value of the crops damaged as the value of these by appellant and his witnesses was not challenged by respondent, and, therefore, the Native Commissioner must allow appellant's claim.

4. That although the evidence given on behalf of appellant is not free from minor discrepancies, having regard to all the circumstances, they are not of such a character to nullify the appellant's claim and therefore the Native Commissioner erred in not holding amount of damages proved.

5. That in any case, if the Native Commissioner was not satisfied of the amount of damages then he should at least have awarded nominal damages or trespass fees at least according to the schedules of the Pound Regulations, viz., Proclamation No. 387 of 1893.

The Native Commissioner has not given a definite finding as to whether or not there was a trespass. This was the first point he was asked to decide and it was his duty to examine the evidence with a view to arriving at some decision. Merely to say that certain things "probably" happened is not sufficient. His reasons for judgment are illogical for he defintely says that he rejected the defendant's version of the events. If that is so it would seem to follow that he should have accepted plaintiff's version that there had been a trespass. There is certainly ample evidence on which he could have arrived at such a finding. Plaintiff's wife and a boy named Philemon both describe how they found sheep in the land. They drove out first 100, and took them to defendant's kraal. Defendant's wife and her two boys then went to the lands with them and a further 200 were driven out and taken by defendant's wife to his kraal. Subsequently 20 more sheep were found and taken to defendant's kraal. It may well be that plaintiff's wife and Philemon are exaggerating as to the number of the sheep but it seems clear that there was quite a large number. Philemon says that they recognized the sheep by their brands and defendant's son, Bill, admits that defendant's sheep are branded. The identification of the sheep seems to be complete.

The defendant, his wife, daughter and two sons all deny that plaintiff's wife and Philemon came to the kraal and they are practically unanimous that only 22 sheep were missing on the night of the alleged trespass.

An examination of their evidence reveals discrepancies and evasions which lead us to the conclusion that they are not speaking the truth.

We are satisfied that a certain number of defendant's sheep did trespass on plaintiff's land and the only other question to decide is as to whether or not any damages have been proved.

Before dealing with the evidence on this point it may be remarked that in his plea the defendant did not dispute the amount of damage which had been done to plaintiff's land but merely denied that his sheep had caused that damage.

In terms of Rule 3, Order XIV, of Proclamation No. 145 of 1923, the allegation by plaintiff that damage to the extent of £4 had been done to his land, not being inconsistent with the plea, must be taken to be admitted. Even if this were not so there is other evidence which goes to show what the extent of the damage was, namely, that of the Headman Llewellyn Ntsimango and Mbokotwana who were called in, with others, to assess the damage. Both these witnesses fix the amount at £4. The witnesses for the defence, while admitting that they were called specifically for the purpose of assessing the damage, say that the damage was never discussed and that no amount was fixed. If these witnesses had said that that question was discussed but that the damage was not fixed at the figure of £4 but at some lesser figure one might have been inclined to believe them but when they say that the people who had been called for a particular purpose did not carry out that purpose they are stretching the credulity of the Court too far.

The defence witnesses admit that an examination of the land was made, and it is highly improbable that the damage was not assessed at the same time.

This Court is satisfied on the evidence that an assessment of the damage was made and the amount fixed at £4. In these circumstances we fail to see how the Native Commissioner could arrive at the conclusion that actual pecuniary damage had not been proved.

The contention that even if defendant's stock had trespassed in plaintiff's land the latter is not entitled to claim damages as he did not comply with section 77 of Proclamation No. 387 of 1893 as amended by Proclamation No. 60 of 1910, is fully met by the decision in the case of Sikiti *versus* Sinambu (1.N.A.C.4), and there is ample evidence also that the trespassing stock was taken to the owner.

It was argued in this Court by respondent's attorney that in any case plaintiff was not entitled to succeed as he had not carried out the provisions of section 32 of Proclamation No. 387 of 1893 (the reference should of course be to Proclamation 408 of 1896) in having the damages assessed. This defence was not pleaded in the Court below and cannot be raised for the first time on appeal.

The appeal is allowed with costs and the judgment in the Court below altered to one in favour of plaintiff for £4 and costs of suit.

It is observed that certain of the witnesses in illustrating the distance between certain points referred to in the evidence indicated the distance between the Court-house and certain houses in the Village of Butterworth. No doubt the Native Commissioner and the attorneys for the parties, who are well acquainted with the locality, had not difficulty in understanding what was meant but to this Court the statements of the witnesses conveyed nothing. It is essential when witnesses give evidence in regard to distances in this manner that the judicial officer should indicate, in parenthesis, the actual approximate distances in yards, miles or as the case may be.

JOEL KETABAHLE vs. MANGALISO MPAMBA.

Butterworth: 29th September, 1937. Before H. G. Scott, Esq., President, and Messrs. W. H. P. Freemantle and A. G. Strachan, Members of the Court.

Practice—Objection to hearing of Appeal—Rule 9 (2) *Government Notice No.* 2254 *of* 1928.—*Action for restoration of cattle alleged to have been disposed of by person left as "eye" of kraal during owner's absence—Distinction between "eye" and "Keeper" of kraal—Native Assessors opinion as to respective duties, rights and liabilities—"Eye" of kraal not liable to restore cattle unless he benefitted personally.*

(Appeal from Native Commisioner's Court, Willowvale.)

(Case No. 223 of 1935.)

Respondent's attorney objects in *limine* to the hearing of this appeal on the ground that appellant has not notified the Clerk of the Court with whom the notice of appeal was lodged, of the time and place of service of the notice on the respondent, and applies to have the appeal struck off the roll with costs.

The notice of appeal is dated 27th April, 1937. Appended thereto and on the same page as the two final grounds of appeal the following appears:—

J. D. Mitchell, Esqr.,
Plaintiff's Attorney,
Willowvale.

"The Clerk of the Court,
Willowvale.

I certify that on the 27th day of April, 1937, I served a copy of this notice upon J. D. Mitchell, Esqr., Attorney for Plaintiff and Respondent, by handing it to him personally in the presence of the undersigned witnesses.

(Sgd.) H. J. McLaren.

As Witness:

(Sgd.) S. D. Mbuto.

To the Clerk of the Court,
Willowvale.

Received the within notice of Appeal this 27th day of April, 1937.

(Sgd.) J. D. Mitchell,
Attorney for Plaintiff and Respondent."

Rule 9 (1) of Government Notice No. 2254 of 1928, permits of the party to an action who has noted an appeal, in person, serving, serving notice of appeal upon the other party personally in the presence of a witness and Rule 9 (2) provides that after such service the party effecting it shall forthwith notify the Clerk of the Court of the time, place and manner of service and that on his failure to do so, the service shall be of no effect whatever.

There is no definition of " party " in the Rules of the Native Appeal Court, but in the Case of Beriman Gxagxa *versus* Sisa Maku (1932, N.A.C. 3) which was a case from the Ciskei, this Court took cognizance of the Rules for Native Commissioners' Courts outside the Transkeian Territories and held that " party " would include the representative of a party and, logically, the legal representative of a party although there is no provision in those rules for the representation of a party by a legal practitioner.

In the rules for Native Commissioners' Courts in the Transkeian Territories contained in the Schedule to Proclamation No. 145 of 1923 " party " is defined as including the legal representative of a party. Following the decision quoted above it is clear that service by the legal representative of the appellant on the legal representative of the respondent is a good one.

In the case now before the Court Mr. Mitchell, respondent's attorney, in issuing the summons stated thereon his address for the purpose of service of any notice or process of the Court as " Willowvale ". The certificate in regard to the service is addressed " J. D. Mitchell, Esqr., Plaintiff's Attorney, Willowvale,", and the Clerk of Court is advised that a copy of the notice of appeal was served upon " J. D. Mitchell, Esqr., Attorney for Plaintiff and Respondent ", personally and Mr. Mitchell acknowledged in writing on the same document that he had received the copy of the notice of appeal.

What then is the position? Mr. Mitchell had stated an address for service in terms of Rule 2 (2), Order VII of Proclamation No. 145 of 1923, the certificate of service gave the address and advised the Clerk of the Court that service had been effected on Mr. Mitchell, the plaintiff's attorney, thus identifying him with the person who had signed the summons. In these circumstances we are of the opinion that there has been a sufficient compliance with Rule 9 (2) of Government Notice No. 2254 of 1928 in regard to notifying the " place " of service.

In regard to the " time " of service it is not easy to appreciate what the framer of the rule had in mind. It must be evident however, that the Rule was framed with a view to enabling a native litigant himself to effect service in an inexpensive manner and it would be absurd to expect a raw native to know anything about the " hours " of the day. On

the other hand he is well acquainted with the days of the week and could quite easily comply with the Rule by stating the date of service whereas he probably could not state the actual hour of service.

If it is contended that "time" refers only to the hour of service then the rule would be reduced to an absurdity, for it would be ridiculous to notify the Clerk of the Court that service had been effected at, say, 3 p.m., without mentioning the date.

In the supplement to Strouds Legal dictionary the following definition occurs:—

"Time in its computation, generally means the day on which the fact or offence occurred and not the moment of its occurrence" and we are of opinion that, for the purposes of the rule under consideration it must be interpreted to mean "date" especially as the actual hour when service was effected is of no consequence and that there has therefore been a sufficient compliance with the rule.

The objection is overruled with costs.

In this case plaintiff (respondent) sued defendant (appellant) for the delivery of certain 13 head of cattle or their value £52.

In his particulars of claim he alleged:—

(1) About September, 1931, plaintiff left his home in this district and proceeded to work on the goldfields and returned home on or about the 19th November, 1935.

(2) Before his departure for the goldfields plaintiff appointed the defendant, who is a close neighbour of his, as eye to his kraal and property with authority only to look after the same, and defendant accepted the mandate.

(3) During plaintiff's absence defendant exceeded his authority and without plaintiff's knowledge or consent disposed of certain cattle belonging to plaintiff as follows, to wit:—

He sold or caused or allowed to be sold one animal to Dodwana, four animals to H. I. Wood, two animals to Robert Mpepo, one animal to Sophia Lubaxa and one animal to Nwenkwe Ntsomi; the animal sold to Dodwana has since had one increase, thus making a total of ten cattle.

He slaughtered or caused or allowed to be slaughtered three animls, two oxen and one cow.

(4) As plaintiff's agent defendant is legally responsible to plaintiff for the restoration of the said thirteen cattle or payment of their value the sum of £52.

5. Though legally demanded the defendant neglects to restore to plaintiff the said thirteen cattle or their value.

In his plea defendant admits that he agreed as a favour to keep an eye on plaintiff's kraal but denies that he was given sole control of plaintiff's livestock and property or that he was in any way invested with proper authority in regard thereto; he denies disposing of any of the animals and says such dispositions were made by plaintiff's wife or relative without reference to him; he denies that he is in law liable to plaintiff in any sum or action whatever and says finally that if any liability does exist in law plaintiff should have sued him for damages and as plaintiff may legally vindicate the cattle if they were disposed of without authority he denies that plaintiff has suffered damages in the sum claimed.

During the course of the case questions were asked of some of the witnesses as to the difference between what is termed an "eye" of the kraal and a "keeper" of the kraal.

One witness, Minto Mazamisa, a headman, stated: "Being placed in charge and being an eye of a kraal is different; an eye does not take any active part in affairs . . . . An eye of a kraal is called 'the eye' and the person placed in charge is called 'the keeper' ". He admitted that this was merely his opinion and that he had no experience.

Defendant also indicated that there was a difference and stated as "eye", family matter did not concern him, and that he could not interfere with the disposal of any stock; his duties being merely to control the herd boys and mend breaks in the cattle kraal.

The Native Commissioner found as a fact that defendant had agreed to act as "eye" to the plaintiff's kraal during his absence. He did not, however, base his decision on the liability according to native custom of an "eye" as he had been unable to find any recorded case on the point, but on the evidence as to the agreement made between plaintiff and defendant he found that the latter accepted a trust to look after plaintiff's kraal, including stock, during his absence and had assisted in the disposal of plaintiff's cattle and was accordingly liable to him for any loss of stock.

Judgment was entered in favour of plaintiff for eleven head of cattle or their value £44 with costs of suit and the appeal is against that judgment.

In this Court the Native Assessors were asked what was the difference between a "keeper" and an "eye" of a kraal and what were their respective rights and liabilities.

The Assessors, unfortunately, did not give a clearcut or unanimous opinion; one stating that "an eye" and "a keeper" were the same thing, while the others indicated that there was a difference. The majority stated that an "eye" was a person, usually not a relative, appointed during a short absence of the kraal owner and who had no authority whatever in regard to the disposal of stock and, in fact, could not prevent it, while a "keeper" is a relative who is put in charge and who has to consult the wife and other relatives in regard to matters at the kraal.

The opinion of the majority of the Native Assessors seems to be that neither an "eye" nor a "keeper" would be liable to replace any stock disposed of for the benefit of the kraal, he would only be liable if he disposed of it for his own benefit.

The opinion expressed by the Assessors is not of much assistance in the present case and the Court must decide on the evidence what was the agreement between the parties and whether defendant did assist in disposing of the stock in question and, if so, whether he is liable to replace it.

In regard to the first point the plaintiff's evidence is that he arranged with defendant to look after his stock and family during his absence and took him to the headman to confirm the arrangement where defendant admitted that he had agreed to look after plaintiff's stock and family; whereas the headman says that the stock was not mentioned but that plaintiff merely said he was leaving defendant in charge of the kraal.

Plaintiff alleges that he told defendant he was not to dispose of any of his stock without permission but admits that he did not mention this until after they had left the headman. As plaintiff went there especially to confirm his agreement with defendant it is extraordinary that he should not have made this important stipulation at the time. Defendant denies that he was placed in full charge of the kraal and says that he was appointed merely as an "eye" to control the herdboys and repair any damage to the stock kraal. Plaintiff says he also told the dipping foreman, William Venge, that defendant was the only one who would have the right to transfer his cattle. In this he is flatly contradicted by Venge. In view of the fact that defendant is not a relative of plaintiff we are of opinion that much stronger evidence

of the onerous agreement alleged should have been adduced. We find that defendant was appointed only as "eye" of the kraal and not "keeper" or "custodian".

This being so there can be no question that he is not liable unless he disposed of stock for his own benefit and only to the extent to which he benefitted.

The Native Commissioner has found as a fact that defendant assisted in the disposal of plaintiff's stock during his absence but does not find that he benefitted personally and, indeed, it would be difficult to do so on the evidence.

In arriving at his finding of fact on this point the Native Commissioner seems to have been influenced very strongly by the fact that the defence witnesses assert that plaintiff's wife alone disposed of the stock and that it is contrary to Native Custom for a woman to be a party to the disposal of stock without a man or men being present. It certainly is unusual but in this case the woman in question is a Christian who was married by Christian rites and whose ideas as to the position of women is very different from that of the ordinary native woman. In any case the mere fact that a thing is unusual is no reason in itself for discarding evidence that it took place.

Now the only witness for the plaintiff in regard to the disposal of the stock, apart from an alleged admission by defendant, is plaintiff's wife. She retails the disposals as follows:—

One animal to Dodwana, which has had one increase.

Four animals to H. I. Wood, two animals to Robert Mpepo, one animal to Nkwenkwe Ntsomi, one animal to Sophia Lubaxa. Three slaughtered.

She says that the animal to Dodwana was sold for £2 and she and defendant divided the money.

Dodwana denies that he bought a beast from plaintiff's wife or defendant. He says he bought a beast from one George Ketabahle.

In regard to the disposal of the cattle to Wood she says that defendant arranged the sale and she got some of the proceeds and he took the rest. Mr. Wood on the other hand says that defendant never had anything to do with this transaction, that he dealt only with plaintiff's wife and that no cash was paid out for the cattle.

With regard to the animals disposed of to Mpepo, Nkwenkwe and Sophia Lubaxa, plaintiff's wife says defendant took part in all these transactions and authorized the transfer of the cattle. Both Nkwenkwe and Sophia Lubaxa deny that defendant appeared in any way in these transactions and plaintiff's own witness, Minto Mazamisa, states that Robert Mpepo paid the purchase price to plaintiff's wife and that defendant was not present. If these witnesses are not speaking the truth then there must be a widespread conspiracy to defraud the plaintiff for the benefit of defendant and there is no evidence or any suggestion of such a conspiracy.

Plaintiff asserts that on his return defendant, in the presence of three men named, admitted that he had disposed of the cattle and asked for pardon and yet he did not call any of them to corroborate him. Two of the men mentioned gave evidence for defendant and both deny that he asked for pardon. These two witnesses are both related to plaintiff. We are satisfied on the evidence, as it stands, that plaintiff's wife disposed of the cattle, the proceeds of which according to her own statement were used for a wedding outfit for her daughter, that defendant did not authorize the disposal and, in the absence of evidence that he benefitted personally, that he is not liable to replace the cattle.

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

MATHEW NDABA vs. SAUL NDABA.

KOKSTAD: October, 1937. Before H. G. Scott, Esq., President, and Messrs. H. M. Nourse and G. Kenyon, Members of the Native Appeal Court.

Claim for ejectment—Agreement for extension of time within which premises to be vacated—On main claim falling away which party to pay costs.

(Appeal from Native Commissioner's Court, Matatiele: Case 49/1937).

Plaintiff sued defendant for ejectment from certain premises belonging to plaintiff and costs of suit.

Summons was issued on 12th February, 1937, and served at defendant's place of residence on his wife on the 15th February, 1937. On the last-mentioned date plaintiff and defendant appeared before a Police officer and entered into an agreement by which defendant undertook to vacate the premises by the 1st March, 1937, which he did.

Nothing further appears to have been done until the 4th March, 1937, when a plea was filed stating that plaintiff was not entitled to the order asked for "inasmuch as plaintiff agreed in writing to give defendant time until 1st March, 1937, in which to remove himself" and applying for a dismissal of the summons with costs.

Plaintiff's attorneys on 6th March, 1937, applied for further particulars and asked for a copy of the agreement referred to in the plea. Defendant's attorneys replied to this on 9th March, 1937, pointing out that one of the partners in the firm of plaintiff's attorneys had informed them that he knew about the arrangements and that as defendant signed the document he must be well aware of the contents. Plaintiff's attorneys on the 10th May, 1937, filed a reply as follows:—

1. That at the date of the summons plaintiff was entitled to the Order claimed.
2. That after summons was issued plaintiff agreed to give defendant until on or about the 1st March, 1937, to remove, but in no case did he waive his claim for costs.
3. That defendant has now removed from the farm and plaintiff no longer claims the Order of ejectment but claims costs of suit.

On the 3rd June, 1937, the case came before the Court, notice of trial having been issued by plaintiff'e attorneys on 14th May, 1937. No evidence was taken but it was agreed between the parties that when the extension of time to remove was given nothing was said about costs of the summons and defendant's attorney admitted the facts set out in the reply to the plea.

It is clear from the pleadings that the right of the plaintiff to an order for ejectment as at the date of issue of summons was not in dispute and as defendant had prior to that been called upon to remove and had failed to do so plaintiff was fully justified in issuing the summons.

The sole question to be decided is whether because plaintiff did not stipulate at the time the agreement was made that defendant should pay the costs already incurred, he should be deprived not only of his own costs but be made to pay defendant's costs as well.

In his reasons for judgment the Additional Assistant Native Commissioner (erroneously describing himself as Additional Assistant Magistrate) states:—

"There is nothing on the record to show that when defendant entered into the agreement to vacate the premises he had already been served with the summons or that he even knew of it at the time of entering into the agreement. Plaintiff knowing that he had already incurred costs should have stipulated in the agreement that defendant pay those costs and should have withdrawn the summons; or he should have demanded that the defendant file a consent to judgment in terms of the agreement.

Instead of adopting either of the above courses, he said nothing about the summons and left the defendant to incur the expense of instructing an attorney and filing a plea. The Court, therefore, came to the conclusion that the plaintiff had acted wrongly in not adopting the correct procedure after he had invoked the aid of the Court in enforcing his rights and that he should, therefore, pay own costs and further that the costs incurred by the defendant were also incurred by reason of plaintiff's irregular procedure and that plaintiff should pay those costs as well".

This Court cannot agree with the reasoning of the Additional Assistant Native Commissioner. If the plaintiff was justified in issuing summons, there seems to be no reason why he should lose those costs, at any rate merely because he did not specially stipulate that they should be paid. If the defendant was in mora, as he undoubtedly was, then he was liable for the costs incurred up to that date. It was not incumbent on the plaintiff immediately to withdraw the summons, for, if defendant failed to comply with the agreement to remove, it would have necessitated the issue of a fresh summons and he would most probably then have been met with the objection that he had incurred unnecessary expense.

We are of opinion, therefore, that he was justified in not withdrawing the summons at that stage.

We come then to the question as to who should pay the costs after the date of the agreement to remove.

At the time that defendant filed his plea he knew that he had complied with the agreement and that the main action would consequently fall away and it was his duty to tender the costs up to date of the plea unless he contended, which he did not do, that the summons had been wrongly issued.

If he had tendered costs there is no doubt that the proceedings would have ended at that stage. As he had made no tender the plaintiff was bound to go on with the case in order to obtain a judgment for his costs.

It is difficult to appreciate why the plaintiff should be condemned to pay the costs of both parties because he did not stipulate in the agreement that defendant should pay the costs or demand that defendant should file a consent to judgment. It is suggested that this should have been done as there is nothing on the record to show that defendant knew of the issue of the summons, but the defendant does not say that he was unaware of this and it seems that plaintiff was reasonably entitled to assume that he did know in view of the fact that the summons had been issued three days prior to the agreement.

The plaintiff had succeeded in obtaining the object for which he invoked the assistance of the Court and must, therefore, be regarded as the successful party. In order to recover his costs he had to proceed with his action for the costs (Develing *vs.* Central White Lime Works, 1912 W.L.D. 23). The general rule of Law is that a successful party is entitled

to his costs and it is only exceptional circumstances that the Court will depart from that rule and deprive him of his costs and then only on the ground of some misconduct on his part. There is nothing in this case to show that plaintiff has been guilty of any misconduct whatever or that the litigation initiated by him was needless or vexatious.

In the opinion of this Court the Additional Assistant Native Commissioner did not exercise a judicial discretion in ordering plaintiff to pay the costs of the action.

The appeal will be allowed with costs, the judgment in the Court below is set aside and the following judgment entered: —

" No order is made in regard to the claim for ejectment but defendant is ordered to pay the costs of suit.

MILLICENT NDUDANE vs. NICHOLAS MAQWATI.

KOKSTAD: October, 1937. Before H. G. Scott, Esq., President, and Messrs. H. M. Nourse and G. Kenyon, Members of the Native Appeal Court.

Practice—Judgment dismissing summons with costs equivalent to absolution.

(Appeal from Native Commissioner's Court, Mount Frere: Case 237/1936.)

This was an action for breach of promise of marriage, lying-in expenses and maintenance of a child born to plaintiff (appellant).

After hearing evidence, the Acting Native Commissioner entered the following judgment: " Whole of plaintiff's claim dismissed with costs ".

Immediately after judgment was delivered, plaintiff's attorney applied for it to be altered to absolution from the instance, but the Acting Native Commissioner refused to do so.

An appeal has been noted to this Court on the following grounds: —

1. That a final judgment was given against the plaintiff, whereas an opportunity should have been given to her to bring the case again if further evidence could be obtained: From the reasons of the Native Commissioner given at the time of the judgment it was clear that he was dissatisfied with plaintiff's own evidence and stated that no evidence was adduced to support her statement; plaintiff's attorney immediately the judgment was delivered applied for same to be altered to one of absolution from the instance with costs, but this the Native Commissioner refused to do.
2. That the evidence adduced by defendant was not such as to entitle him to a final judgment in his favour.
3. That under section 38 of Proclamation No. 145 of 1923 the judgment given, namely, that the " summons is dismissed with costs ", was not a competent judgment after the trial of the action.

The third ground of appeal was the one most strongly urged before this Court, it being contended that section 38 of Proclamation No. 145 of 1923 applied to Native Commissioners' Courts in the Transkeian Territories by virtue of Proclamation No. 299 of 1928.

The section in question reads as follows:—

"The Court may, as the result of the trial of an action, grant—

(*a*) judgment for the plaintiff in respect of his claim in so far as he has proved the same;

(*b*) judgment for the defendant in respect of his defence in so far as he has proved the same;

(*c*) absolution from the instance, if it appears to the Court that the evidence does not justify the Court in giving judgment for either party;

(*d*) such judgment as to costs as may be just."

It was argued that as only four types of judgment were laid down and as evidence had been led it was not competent for a Native Commissioner's Court to enter any other judgment, reliance being placed upon the case of Kohlo *vs.* Qata and Gabelana (4, P-H.M. 17) in which it was held that "claim dismissed with costs" is not a competent judgment in terms of this section, as it may mean either judgment for defendant or absolution from the instance.

In the view which this Court has taken of this case, it is not considered necessary to decide whether or not section 38 of Proclamation No. 145 of 1923 applies to Native Commissioners' Courts.

The effect of a judgment "case dismissed with costs" has been considered in several cases (Thwaites *vs.* van der Westhuyzen, 6, S.C. 259; de Jager *vs.* Vorster, 10, C.T.R 239; Cloete *vs.* Greyling, 24, S.C. 57; Municipality of Christiana *vs.* Victor, 1908 T.S. 1117; and Rabe *vs.* Gaecia 8, P-H.L. 24).

The last-named case was heard in 1926. In that case, in an action in a Magistrate's Court, the magistrate had given judgment on the claim in convention and dismissed a claim in reconvention with costs. It was contended, *inter alia*, on appeal, that the magistrate's order on the claim in reconvention should be altered to one of absolution from the instance. It was held that, in accordance with Order 34, Rule 5, of the Magistrates' Courts Act (which is in precisely similar terms to Order XXXII, Rule 5, of Proclamation No. 145 of 1923), that the order dismissing the claim was equivalent to an order of absolution from the instance.

Rule 5 of Order XXXII provides, *inter alia*, that the dismissal of an action shall not be a defence to any subsequent action.

In the case of Thwaites *vs.* van der Westhuizen (*supra*), the plaintiff was in default and the Magistrate dismissed the case, stating that the plaintiff was not entitled to absolution. At a later date a fresh summons was issued and defendant excepted to it on the ground that the case had already been before the Court and was dismissed. On appeal it was argued that this was a final judgment. In giving judgment, de Villiers, C.J., said: "The only argument for the respondent is the circumstance that the magistrate premised his judgment by saying that the plaintiff was not entitled to absolution; but he gave a judgment which was tantamount to absolution, and had he really carried out what he is supposed to have intended he would have given judgment for the defendant. But the virtual judgment, notwithstanding the preliminary observations, was absolution from the instance.

It was quite competent, therefore, for the plaintiff to re-open the case, and the Magistrate was wrong in holding that he could not."

That is exactly the position in the case now under consideration. It would appear from the Acting Native Commissioner's reasons for judgment that he intended to enter final judgment for defendant, but he did not carry out that

intention, as the judgment he did enter was tantamount to absolution from the instance and there is nothing to prevent the plaintiff instituting a fresh action subject to the provisions of Rule 5 of Order XXXII.

The appeal is dismissed with costs.

The attention of the Assistant Native Commissioner is again drawn to the fact that, as the case is one between natives, he was in error in signing the judgment as "Acting Magistrate".

MAGQIRENI vs. SWELINDAWU BENENE.

Port St. Johns: October, 1937. Before H. G. Scott, Esq., President, and Messrs. E. W. Thomas and M. Adams, Members of the Native Appeal Court.

Adultery—Claim by first husband against second husband for damages—Dissolution of marriage—Mere intimation to first husband to fetch his dowry not sufficient to effect—Dowry must be driven to husband's kraal accompanied by woman—Pondo Custom.

(Appeal from Native Commissioner's Court, Ngqeleni: Case 404/1936.)

This was an action for three head of cattle or their value £9 as damages for adultery.

Plaintiff alleges that about six years ago he married according to Native Law and Custom one Nondlendlana, daughter of Nolomboza, which marriage still subsists; that Nondlendlana has left plaintiff and is living with defendant who claims that he has married her.

Defendant admits that some years ago plaintiff married Nondlendlana but denies that the marriage still subsists and says that she is now his (defendant's) wife and he denies the adultery.

After hearing evidence the Native Commissioner entered judgment for defendant with costs. Against this judgment an appeal has been noted on the following grounds:—

1. That the Native Commissioner erred in holding that the burden of proving the subsistence of the marriage between plaintiff and Nondlendlana was upon plaintiff in view of the fact that defendant in his plea admitted that such a marriage had been entered into and, therefore, the legal presumption is that such marriage still subsisted at the time plaintiff's claim accrued.
2. That the judgment is against the weight of evidence and the probabilities of the case.
3. That the facts alleged by the defendant (and denied by plaintiff) as dissolving plaintiff's said marriage do not even if true, constitute a dissolution of plaintiff's marriage in accordance with Native Custom as the mere sending of messengers calling upon the husband to fetch his dowry without any tender or delivery thereof is not in itself sufficient to dissolve a customary union.

In regard to the first ground of appeal it is true that the onus was upon plaintiff in the first instance to prove the subsistence of the marriage at the date of the alleged adultery, but that onus did not remain with him throughout. He called evidence to prove the marriage and the payment of

dowry and to show that the marriage still subsisted, and that evidence receives support from the fact that the dowry cattle are admittedly still at the kraal of the woman's father. The inference to be drawn from this evidence is that the marriage still subsisted. The onus was then upon defendant to prove that the marriage no longer subsisted. He called evidence to show that it had been dissolved by the offer to return the plaintiff's dowry. This was denied by plaintiff and it then became a question of credibility of evidence as to whether or not such an offer had been made.

It seems clear from the evidence that plaintiff married one Nondlendlana, daughter of Nolomboza, some six years ago and he paid eight head of cattle as dowry for her. Nondlendlana returned to her father about three years ago alleging that she had been ill-treated and she refused to return to her husband. She was not putumaed and Nolomboza then sent two men to plaintiff to tell him to come and fetch his cattle. As no one came he gave her in marriage to defendant.

The facts of the case are put to the Native Assessors and the following questions submitted for their opinion:—

1. Was the mere offer to return the dowry cattle sufficient to dissolve the previous marriage or
2. Should the cattle have been driven over accompanied by the woman to the previous husband's kraal or
3. Was it the duty of the husband to come and fetch the cattle?

The Native Assessors replied:—

"Pondo Custom is that as this woman married another man before dowry had been returned she is still the wife of the former husband. The woman should have driven the cattle to her former husband if she was rejecting him. It was not the duty of the husband to come and fetch his cattle on receipt of the message that he could get them".

With this expression of opinion this Court is in agreement and holds, therefore, that the mere intimation to plaintiff that he could get his cattle without some further effective step being taken to endeavour to return the dowry was not sufficient to dissolve the marriage.

It appears from the evidence of Nolomboza and his son Mzemana that defendant was well aware of the previous marriage and, although they say he was informed of the rejection, it was his duty to make sure that it had been dissolved before entering into the marriage.

It is to be observed also that defendant himself did not give evidence. If he entered into the marriage bona fide it was to have been expected that he would have explained all that had happened to satisfy him that the woman was free to marry instead of relying on a bald statement by her relatives that she had rejected her previous husband.

We are satisfied that there had been no proper dissolution of the marriage with plaintiff and that he is entitled to judgment.

The appeal is allowed with costs and the judgment in the Court below altered to one in favour of plaintiff for three head of cattle or their value £9 and costs of suit.

HENRY NOZINTABA vs. AARON KANDA.

Port St. Johns: October, 1937. Before H. G. Scott, Esq., President, and Messrs. E. W. Thomas and M. Adams, Members of the Native Appeal Court.

Vindicatory Action—Pledged cattle placed by pledgee with another for safekeeping—On debt being discharged caretaker refusing to hand over cattle—Who to be sued—In a vindicatory action owner, who has not divested himself of dominium, entitled to recover his cattle from person in whose possession they are at time of action.

(Appeal from Native Commissioner's Court, Ngqeleni: Case 81/1937.)

The facts of this case, briefly, are that plaintiff (appellant) had a cow and calf running with one Mhlekwa under the Ngqoma custom.

Mhlekwa contracted a debt with a trader named Harris and, with plaintiff's consent, pledged these two cattle together with an ox of his own as security. It was agreed that if Mhlekwa did not release plaintiff's cattle he would replace them. The cattle were placed with the defendant who at that time took charge of all cattle pledged to Harris. The debt was contracted in April, 1930, and was fully discharged in December, 1931. Plaintiff's case is that the cattle handed over in settlement of the debt did not include the cattle he had ngqomaed to Mhlekwa while defendant asserts that they were and that he no longer has any cattle belonging to Mhlekwa.

The Acting Assistant Native Commissioner has found as a fact that the cattle handed over to Mr. Harris in settlement of the debt were not those that were pledged and that the pledged cattle have not been returned to Mr. Harris or any other person which finding is fully supported by the evidence.

The position taken up by the defendant in his plea is that he did hold certain cattle on behalf of Mr. Harris but that he duly returned them to Mr. Harris. This has been found not to be the case.

As a second string to his bow he says he is the wrong person to be sued and that plaintiff's action is against either Harris or Mhlekwa.

After hearing the evidence the Acting Assistant Native Commissioner upheld the special plea and dismissed the summons on two grounds:—

1. That as plaintiff had agreed that if the cattle were not released they would be replaced and as that was not done he had given up the ownership and had an action against Mhlekwa.
2. That defendant was not the right person to be sued as he was merely the agent of Mr. Harris.

In regard to the first ground the Acting Assistant Native Commissioner says: "I consider that when plaintiff agreed to accept other cattle if the pledged cattle were not released, he agreed to give up his ownership in these particular cattle".

This statement of opinion would have been perfectly correct if as a matter of fact the cattle had not been released.

It is obvious that if Mhlekwa had handed over the pledged cattle to Harris in settlement of the debt plaintiff would not have any action against Harris and his only remedy would have been to sue Mhlekwa on his agreement to replace. The evidence shows that Mhlekwa did release the pledged stock by handing over other stock. He has carried out his agreement and the only obstacle to plaintiff getting possession of his cattle is that defendant has them and refuses to hand them over. If the Acting Assistant Native Commissioner's ruling is correct plaintiff would have to sue Mhelkwa and the latter would have to sue either Harris or defendant—an unnecessary duplication of actions.

In the opinion of this Court the Acting Assistant Native Commissioner has overlooked what is the real cause of action.

The dominium in the cattle has never passed from plaintiff and he is entitled to vindicate them from the person in whose possession they are, whether possession was rightfully or wrongfully obtained, together with their increase (Maasdorp Vol. II, 4th Edition p. 91).

In so far as the second ground of the Acting Assistant Native Commissioner's judgment is concerned it is perfectly clear that while defendant was at one time, possibly, Mr. Harris' agent, he was no longer such at the date of the action. He knew the debt had been paid and that the cattle were no longer under any restrictions in so far as Mr. Harris was concerned.

Moreover, the action is not one of contractual liability as between defendant and plaintiff but merely a vindicatory one, as pointed out above.

In the opinion of this Court the Acting Assistant Native Commissioner erred in dismissing the summons.

It remains only to decide what number of cattle is in possession of defendant. The original cow is dead. It had, according to Mhlekwa, three increase, namely (1) black bull white spots, (2) black heifer white underneath, (3) white heifer red spots; the first heifer (calf) had increase (1) a black bull white spots, and black heifer (dead).

According to Mr. Harris, after the debt was paid, defendant claimed from him dipping fees in respect of three cattle belonging to Mhlekwa. It is clear then that defendant is in possession of at least three cattle belonging to plaintiff. In regard to the other increase there is only the statement by Mhlekwa which is denied by defendant.

This Court does not consider the evidence sufficiently establishes that there was such a beast.

The appeal is allowed with costs and the judgment in the Court below altered to read: For plaintiff for three head of cattle or their value £9 with costs of suit.

GQAZA FATUSE vs. SILINGOTYWA MKAMBI.

Port St. Johns: October, 1937. Before H. G. Scott, Esq., President, and Messrs. E. W. Thomas and M. Adams, Members of the Native Appeal Court.

Spoliation—Where action purely spoliatory and not vindicatory plaintiff cannot succeed unless act of spoliation proved.

(Appeal from Native Commissioner's Court, Port St. Johns: Case 22/1936.)

In the Court below plaintiff (respondent) claimed from defendant (appellant) the return of a certain brownish grey ox, a black and white cow and its black tollie with white tail of which he claimed to be the owner and in lawful possession and which he alleged that defendant had taken from the vicinity of the kraals at which they were running by force against the wishes and despite the protests of the persons in charge of the stock.

In his plea defendant stated that some five years ago he married one Nomdluta Bungane according to Native Custom and paid three head of cattle as dowry to one Mgqingo on

behalf of the legal guardian of Nomdluta, who, he alleged, was one Kulakade Bungane; that during 1935 Nomdluta deserted from his kraal and notified him of her intention not to return and she requested Mgqingo to return her dowry cattle which he agreed to do and thereafter Mgqingo personally handed defendant the ox and stated he would arrange with Nkatana and Nafuti, who were in possession of the other cattle, to hand them over and they subsequently did so.

The plaintiff in his evidence denied that Kulakade was guardian and said he himself was and stated that only two cattle were paid as damages by defendant for rendering Nomdluta pregnant and not as dowry.

The Assistant Native Commissioner entered judgment for plaintiff as prayed with costs.

An appeal has been noted against that portion of the judgment holding that the black and white tollie was despoiled from the possession of plaintiff.

The grounds of appeal are: —

1. That the portion of the judgment in question is against the weight of evidence and bad in law.
2. That it was conclusively proved to the Court that the said beast was transferred from the kraal of Nkatana to the kraal of Nbukqeni as it had been sold by Payoyo Mnqinko to the said Mbukqeni for the sum of £1. 10s. and the evidence does not show that defendant was in any way concerned with this transaction.
3. That the evidence before the Court clearly indicates that, when the said beast passed to defendant, it was no longer in the possession of plaintiff, who thus could not succeed in a spoliatory action as against defendant, who was not the party who deprived plaintiff of possession.
4. That the Assistant Native Commissioner erred in holding that it was sufficient for plaintiff merely to show that the beast was not handed over by him freely and voluntarily whereas in order to succeed in his action the plaintiff must show that the said beast was in fact taken from his possession by force or by stealth.

From this it must be presumed that defendant accepted the position that there was no marriage between him and Nomdluta, that only two cattle were paid by him as damages for rendering her pregnant and that the ox and cow had been spoliated, although there is no evidence of spoliation in regard to the cow and only very meagre evidence in regard to the ox.

It is common cause that two of the cattle paid by defendant were a greyish brown ox and a black and white cow which had increase, first a black and white heifer and secondly a black bull tollie with white tail, the beast now in question.

Plaintiff allowed the cattle to remain with Mgqingo under the custom of Nqoma. Mgqinko sold the black and white heifer and placed the cow and the bull tollie with one Nkatana.

The defendant alleges that Payoyo, Mgqingo's son, sold the tollie to one Mbuqeni. This is denied by plaintiff, Mgqingo and Payoyo, but there is no doubt that defendant received the beast from Mbuqeni and plaintiff's witnesses were unable to account for it being in his possession.

Nkatana, to whom the cattle were nqomaed by Mgqingo, says that Payoyo sold the tollie to Mbuqeni in order to get money to release his horse and Payoyo told him to have it transferred to Mbuqeni.

Nkatana says he reported this to Mgqingo who said he had arranged the matter. As the cattle were with Nkatana for some years it is unlikely that Mgqingo would be unaware of the removal of the tollie to Mbuqeni.

Mbuqeni corroborates Nkatana in regard to the sale by Payoyo and says the tollie was dipped in the name of one Nafuti. He also says that he delivered the tollie to defendant on Mgqingo's instructions. Strong support is lent to this statement by the dipping foreman who produced his register showing the transfer and he says that he transferred it to defendant on the instructions of a boy from Nafuti's kraal. The Assistant Native Commissioner does not say in his reasons for judgment whether or not he believed the dipping foreman but merely remarks: "The Dipping Foreman produced his register showing when the cattle were transferred to defendant on a day when Mgqingo was present at the tank, but I do think he was influenced by defendant who is his assistant". The evidence of this witness was of the greatest importance. If he is telling the truth then the claim on the ground of spoliation fails completely.

It was the duty of the Assistant Native Commissioner to say definitely whether he accepted or rejected his evidence and to give his reasons for doing so. He should not have evaded the issue by suggesting a possible influence by defendant of which there is not the slightest evidence. The entries of which the Dipping Foreman speaks were made on the 1st April, 1936, at a time when there was no dispute in regard to these cattle and he gave evidence on the 16th July, 1936. If his evidence is not true then he must have falsified his books and there is not even a suggestion that he did so. In the opinion of this Court the Assistant Native Commissioner erred in disregarding his evidence.

The Assistant Native Commissioner has given no reason whatever for rejecting Nkatana's evidence. It is difficult to see why he should favour the defendant for his interest lay in supporting plaintiff who was the owner of the cattle which had been nqomaed to him. In these circumstances very good reasons should have been furnished for rejecting his evidence.

The Assistant Native Commissioner does not discuss Payoyo's evidence at all but accepts it without qualification.

Payoyo was called in rebuttal after Nkatana and Mbuqeni had given evidence. He denied that he had sold the tollie to Mbuqeni; that he had pledged a horse to a trader at Ludalasi; and that he wanted 30s. to release his horse. He says that he sold a horse to the trader at Ludalasi for £5 a long time ago. He denied that he had a horse at that store in March, 1936, or that he paid anything to release a horse or that his father had had a horse there under plege.

The trader in question Mr. Andreka was called and he states that he lent Payoyo £3. 10s. in January, 1936, who pledged a light red gelding in security. The amount was due on 27th February, 1936, and it is worthy of remark that, according to the I.O.U. put in by the trader, Payoyo paid off £1. 10s. on the 29th of the same month. Whether this is the 30s. he received from Mbuqeni it is of course, impossible to say. It may be only a coincidence.

Mr. Andreka's evidence clearly shows that Payoyo was not speaking the truth. It is difficult to see why the latter's evidence was accepted in preference to that of Nkatana whose credibility was not disturbed in any way.

In our opinion the evidence shows that Payoyo did sell the tollie to Mbuqeni and that the latter voluntarily handed it over to defendant. That being so there clearly was no act of spoliation committed.

The action in this case is a spoliatory and not a vindicatory one and as no act of spoliation was proved judgment should not have been granted in respect of the bull tollie.

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

For plaintiff for the return of the greyish brown ox and the black and white cow and for the defendant in respect of the black bull tollie with white tail. The defendant to pay costs except the expenses of the witnesses Nkakana Mbugeni and Andreka, which must be paid by plaintiff.

GANEKO MATO vs. SIBANGO MTLAKA.

UMTATA: October, 1937. Before H. G. Scott, Esq., President, and Messrs. C. J. N. Lever and J. H. Steenkamp, Members of the Native Appeal Court.

Nqoma stock—Right of owner to recover from person in physical possession—Practice—Where defendant sued in capacity as heir of Great House and stock nqomaed to Right Hand House of which he is also heir—Objection that judgment incompetent against him in capacity in which sued—Basis of action being possession capacity of defendant immaterial and statement in summons in regard thereto regarded as surplusage.

(Appeal from Native Commissioner's Court, Engcobo: Case 373/1937.)

In the Court below plaintiff (respondent) sued defendant (appellant) for the delivery of a certain cow and calf or their value, £6, and in his particulars of claim stated:—

1. Defendant is heir of the Great House of the late Ganga Mato and is sued in such capacity.
2. That about three years ago plaintiff nqomaed one Nogeni, Right Hand wife of the late Ganga Mato, a certain black-grey heifer (now cow) for milking purposes. That the said beast was driven along with one light red castrated tollie which was to return to plaintiff, but which subsequently died.
3. That the said black-grey heifer has now increased to two.
4. That the said two head of cattle are in possession of defendant who neglects or refuses to hand the same to plaintiff though requested so to do.

Defendant filed the following plea:—

"As and for a plea to plaintiff's summons defendant admits paragraphs 1, 2, and 3.

Defendant denies paragraph 4 *in toto* and puts plaintiff to the proof thereof.

Defendant denies that he is or has ever been in possession of the two head of cattle claimed. Wherefore defendant prays that plaintiff's claim be dismissed with costs of suit."

Plaintiff then led evidence from which it appeared that he had nqomaed a certain cow to the Right Hand House wife of defendant's late father; that defendant, in addition to being the heir of his father's Great House, is also heir of the Right Hand House and that since the issue of summons defendant had sold this beast.

At the close of plaintiff's case defendant's attorney applied for absolution from the instance on the grounds—

(1) that plaintiff's evidence was unsupported and as defendant had possession plaintiff must establish a claim thereto which he did not do; and

(2) that defendant is sued in his capacity as heir in the Great House and not also as heir in the Right Hand House or in his personal capacity. The late Ganga did not take the alleged cattle to the Great House and the Right Hand House would be responsible for them, particularly as the widow in that house is still alive.

The application for absolution from the instance was refused and defendant's attorney thereupon intimated that he did not propose of call any evidence.

Judgment was entered for plaintiff as prayed with costs, and against this judgment an appeal has been noted on two grounds. The first ground is merely a statement of fact and does not need to be considered. The second ground is that no liability attaches to defendant in the capacity in which he is sued and no judgment could be given against him in that capacity.

It will be seen on reference to the pleadings that while defendant is sued in his capacity as heir of the Great House it is also alleged that he is in possession of the cattle and refuses to hand them over. The only defence pleaded was that defendant was not nor had he ever been in possession of the cattle, but this defence was cast aside by the defendant's attorney in his argument on the application for absolution from the instance to the effect that as defendant was in possession of the cattle it was for plaintiff to establish his claim to them. Plaintiff's claim to the cattle was never disputed.

Before this Court it was urged that the evidence in regard to the possession by defendant of the cattle is insufficient, and that as the original beast was Nqomaed to Nogeni, she is the proper person to be sued. Neither of these points has been raised either in the pleadings or in the grounds of appeal, and it is not competent for the appellant to raise them for the first time on appeal.

The sole question which this Court has to decide is whether the Lower Court was justified in granting judgment against the defendant in his capacity as heir in the Great House seeing that the original beast had been nqomaed to the Right Hand House wife.

It is quite clear that the action was based on the *possession* by the defendant of the cattle in question, and once it was proved that he was in possession it did not matter one iota whether he was heir in the Great House or in the Right Hand House, and paragraph 1 of the particulars was therefore mere surplusage.

The real ground of action is to be found in paragraph 4 of the particulars of claim.

The uncontradicted evidence on record discloses that the cattle in question are the property of plaintiff, that defendant was in possession of them and disposed of them after issue of summons.

In these circumstances we are of opinion that the judgment of the Assistant Native Commissioner was correct and the appeal is accordingly dismissed with costs.

GOVU BUSAKWE vs. KOMENI TALIWE.

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UMTATA: October, 1937. Before H. G. Scott, Esq., President, and Messrs. C. J. N. Lever and J. H. Steenkamp, Members of the Native Appeal Court.

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Adultery—"Catch"—Ntlonze—Blankets of alleged adulterer's wife taken as—Wife acting as go-between for her husband and another woman—Credibility.

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(Appeal from Native Commissioner's Court, Engcobo: Case No. 387/1935.)

In the Court below Komeni Taliwe sued Govu Busakwe for damages for adultery alleged to have been committed with his wife, Nogawuti. Govu denied the adultery and counterclaimed for two blankets taken from his wife by Komeni.

The Additional Assistant Native Commissioner entered judgment in favour of Komeni for three head of cattle or their value £9 and in favour of Govu for two blankets and ordered him to pay costs.

An appeal has been noted against this judgment by Govu and came before this Court at its last session when, owing to the death of both Komeni and Govu since the noting of the appeal, the hearing was postponed to the present session.

Application has now been made by Mr. Ensor for the substitution of Govu Busakwe's heir, David Govu, as appellant and by Mr. G. Henning for the substitution of Komeni Taliwe's heir, Eaton Taliwe, as respondent. The application is granted.

In addition to the usual evidence of the wife and go-betweens as to various acts of adultery on different occasions Komeni bases his claim on a certain incident which happened at Govu's kraal. He states that after reaping season in 1935 he went to Govu's kraal with one Lingameni and that Govu told his wife, Nolauti to get them some beer but she refused to do so saying that he only wanted to give him (Komeni) beer as he was in love with his wife and was thinking about her private parts. Taking this to mean that his wife and Govu were committing adultery he went to Nolauti and took away her blankets as "ntlonze" leaving her practically naked.

Lingameni supports Komeni in regard to the words used by Nolauti in connection with Govu and Komeni's wife.

Nolauti's version of the incident is as follows: "When Govu asked her to get the beer she told him it was finished. He then asked her for the keys so that he could go and look for himself. She then asked Komeni why he did not intervene when her husband scolded her seeing that they had been drinking together and that Komeni replied: "You fool have I ever been called by name by a woman?" He got up and came towards her with a sjambok but on being remonstrated with threw it away and took her blankets leaving her practically naked before all the men. She says she was laughing all the time thinking Komeni was only playing and that she did not want to call on the men to intervene as she did not want to involve them.

Nolauti admits that it was a disgrace for Komeni to pull off her blankets in her own hut and yet asks the Court to believe that she thought he was only joking. She admits crying when she found she was naked. If he was joking why did he come towards her with a sjambok in the first instance? If the whole thing was merely a joke why did she cry? Her reasons for not calling on the men to intervene is also not satisfactory.

Govu's version of the incident is that he was in the kitchen hut when all this happened but when he was locking the door he saw Komeni leaving and called to him to come back as there was still some beer, that he replied that he was coming but did not even look round. When Govu got to the dwelling hut he was told that Komeni had taken his wife's blankets. Instead of going at once to Komeni's hut, which is only about 70 yards away, and demanding the return of the blankets and an explanation of the insult to his wife, Govu does nothing whatever and only later goes to the sub-headman and asks him to get the blankets and an explanation as to why they were taken. Govu says he also wrote to Komeni and asked him to return the blankets and that Komeni replied verbally that he was only teaching Nolauti manners as she was calling him by name.

It is difficult to believe that a man whose wife had been so grossly insulted would have submitted so tamely and made no real attempt to get the blankets back or to bring Komeni to book for his actions. We do not think that the evidence of Govu and Nolauti in regard to this incident is to be credited and are of the opinion that the version given by Komeni and Lingameni is correct. That being so it affords the strongest corroboration to the rest of the evidence.

Komeni's wife, Nogawuti, states that Govu is her Metsha and had connection with her on eight different occasions. She says that Govu's wife is the one who actually proposed love on his behalf. This is most unusual but this Court is not prepared to say that it is impossible or that for that reason the evidence of Nogawuti should be entirely discarded, when regard is had to the fact that there is other evidence which strongly supports her. There is at least one other recorded instance of an allegation that a man's wife has acted as go-between for him and another woman in the case of Ngabom *vs.* Maswili (2, N.A.C. 147).

The President of the Native Appeal Court in that case scouted the idea of such a thing happening. While this Court has the very greatest respect for the opinion expressed by an officer who was so well versed in Native habits and customs, we feel that the evidence in the present case does show that, while it is extremely rare for a wife to act as go-between for her husband, it is not impossible.

Nogawuti gives details as to the various acts of adultery and is supported by Nokaule and Nokayiloti. There are certain discrepancies in the evidence of these women which to a certain extent weakens it. There is one incident, however, which seems to us to show that they are speaking the truth. Nogawuti says that on one occasion Nolauti (Govu's wife) caught Govu sleeping with her and assaulted her with some keys and that one Nokayiloti intervened and took away the keys.

Nokayiloti corroborates her and says when she enquired the reason for the fighting Nolauti said it was because of her husband.

It may be asked why Nolauti should fight with Nogawuti seeing that she is the one who first proposed love to her. The answer is contained in Nokayiloti's evidence. She says: "A wife does sometimes propose love for her husband. If that other woman takes away my husband I would fight with that woman. I would know that my husband is in love with that woman and afterwards I would get jealous".

Where two married woman quarrel over the husband of one of them the husband of the other may regard it as a catch and claim damages (see Capuko *vs.* Ngazulwane, 2, N.A.C.

12 and Zenzile *vs.* Bokolo 2, N.A.C. 25). The incident at Govu's hut clearly shows that he and Nogawuti had been intimate and in view of the other evidence of adultery we are of opinion that the Additional Assistant Native Commissioner was correct in entering judgment in favour of plaintiff.

The appeal is dismissed with costs.

MHLETYWA NTOZINI vs. NOTSHANISI KAFULA.

UMTATA: October, 1937, Before H. G. Scott, Esq., President, and Messrs. C. J. N. Lever and J. H. Steenkamp, Members of the Native Appeal Court.

Assault—Damages—Measure of—Judgment entered in separate amounts for pain and suffering and contumelia—Objection that damages cannot be granted for contumelia unless pleaded—No necessity specially to allege contumelia.

(Appeal from Native Commissioner's Court, Engcobo. Case 53/1937.)

This is an appeal against a judgment awarding plaintiff (respondent) £20 as damages for assault.

The grounds of appeal are:—

1. That the damages awarded to plaintiff (now respondent) by the Assistant Native Commissioner, Engcobo, are grossly excessive and out of all proportion to the injuries received by her. Plaintiff did not seek to prove that her injuries had mulcted her in any expense for medical attention or otherwise, and the medical officer, Dr. Ernest Gardiner Girdwood, called to give evidence on her behalf, stated that the injury to her arm would take about three weeks to heal and that her arm was at the date of hearing, on the 6th July, 1937, again in perfect condition. The Assistant Native Commissioner erred in ignoring the fact that defendant (now appellant) was severely provoked, a factor which should have been taken into account in mitigation of damages. In the circumstances the tender of £2 made by defendant (now appellant) on receipt of summons, with costs to that date was ample compensation to plaintiff (now respondent) and the Assistant Native Commissioner should have found accordingly.
2. No allegation of contumelia nor claim for damages in respect of contumelia was made in plaintiff's summons, and in fact no element of contumelia was attached to the assault which plaintiff provoked and brought upon himself. The Assistant Native Commissioner erred in specially awarding plaintiff the sum of £5 as damages for contumelia.
3. Plaintiff should have alleged in the summons that her action was brought under Colonial Law as no claim for damages for assault lies under Native Law and Custom.
4. The decision of the Assistant Native Commissioner is against the weight of evidence and the probabilities of the case.

The plaintiff's case is that a certain grey ox belonging to defendant trespassed in her land causing damage. She sent a message to him and he came to her kraal to inspect the damage. As they were going out of the hut he swore at her and struck her on the head with a stick causing her to fall down. As she was raising herself he struck her on the left arm which she had put up to defend herself and he then struck her again between the shoulders.

The defendant's story on the other hand is that plaintiff swore at him by saying " Ra " to him. As a result he became very angry and struck her on the head and knocked her down. She got up, got hold of his stick and threatened to strike him with her fist. He pushed her back and she fell down sideways. He denies that he struck her on the arm and offers the suggestion that she might have broken her arm in the fall.

The District Surgeon, who examined plaintiff after the assault, says he found the ulna bone in the left arm fractured and a scalp wound on the left side of the head.

In his reasons for judgment the Assistant Native Commissioner says: " The District Surgeon definitely stated that only a severe blow with a stick could have broken the ulna bone ". This statement is not borne out by the evidence. What the District Surgeon did say was that the broken bone was *probably* caused by direct violence and that it is unlikely that it was caused by a fall.

After having carefully considered the evidence we are satisfied that the Assistant Native Commissioner was justified in finding that the assault was unprovoked. In so far as the first ground of appeal is concerned it remains only to be considered whether the damages awarded are excessive.

It has been frequently laid down that an Appeal Court will not interfere with the discretion of a judicial officer in assessing damages unless the award is grossly excessive or inadequate or he has violated some principle of law in arriving at the assessment.

In the case of Ramsanyana and Sipokolo *vs.* Mcapukiso (5 N.A.C. 32) referred to by the Assistant Native Commissioner, where the injuries inflicted were only slightly greater than those in the present case, the Native Appeal Court reduced the Magistrate's award of £50 to £20. In that case the injured person was a male and not an elderly, defenceless female as in the present case. In the case of Quntsa Gwadiso *vs.* Mtiti Poswa (1934 N.A.C. 40) the Native Appeal Court confirmed an award of £30 for an assault by a young man of good physique on an elderly man of slight build. The injuries inflicted, however, were somewhat more serious than in the present case.

Taking all the circumstances into consideration we are not prepared to say that the award by the Assistant Native Commissioner is excessive and the appeal on the first ground must fail.

To come to the second ground of appeal " Wrongs of violence to the person are twofold in their nature, that is to say, they may be such as merely inflict bodily pain and injury, in which case they are *damnum injuria datum*, or they may be such as are accompanied by circumstances of insult or contumely, in which case they fall under the heading of *injuria* proper. Under the later Roman Law the remedy for the latter wrong was the *Actio injuriarum* and for the former an equitable action under the *Lex Aquilia*. All cases of assault or intentional violence to the person fall under the class of *injuria* proper, whilst personal injury arising out of negligence or any other unintentional violence were included under *damna injuria data*. With us all these distinctions as to the forms of action have become obsolete, the difference between the two forms of wrong being merely of importance with reference to the measure of damage to be applied in each case." (Maasdorp, Vol. IV, Second Edition, p. 22.)

Every deliberate assault nearly always involves contumelia.

It has already been held that the assault was unprovoked but even if it had been proved that plaintiff swore at defendant this would have been no justification for the assault (Blou *vs.* Rose-Innes, 1914, T.P.D. 102; Edwards *vs.* Stewart, 1917, T.P.D. 159).

In regard to the contention that contumelia should have been pleaded, the case of McCalman vs. Thorne [P-H. 1934 (1) J. 10] is in point.

That was a case where the respondent sued appellant for damages for breach of promise of marriage. On appeal it was contended that the damages were excessive and that no award could be made for contumelia unless contumelia was specially pleaded. In giving judgment Carlisle, A.J., said: "For many years the practice in South Africa has been to permit a plaintiff to sue for a lump sum as compensation in breach of promise cases. In my opinion it is quite unnecessary to introduce any innovation into the practice which has existed for so long."

The remarks of the learned judge apply with equal force to the present case and no authority has been produced to this Court to show that contumelia should be specially pleaded and in fact, in cases of deliberate assault the law requires the award of damages for the insult (*contumelia*), even though there may have been no *actual bodily injury* (Maasdorp, Vol. IV, 2nd Edition, p. 26).

The contumelia involved is one of the factors always taken into account in assessing damages for an *injuria*, and there seems to be no necessity specially to plead it.

In entering judgment the Assistant Native Commissioner awarded £15 for pain and suffering and £5 for the contumelia.

In the opinion of this Court it would have been better if the Assistant Native Commissioner had entered judgment for a globular sum and had explained in his reasons for judgment how the amount had been arrived at. We are not prepared to say, however, that serious objection can be taken to the form of the judgment.

The third ground of appeal was very wisely not pressed before this Court. The appeal is dismissed with costs.

MAGOQWANA THOMAS vs. MBIKANYE DINISO and DINISO.

Umtata: October, 1937. Before H. G. Scott, Esq., President, and Messrs. C. J. N. Lever and J. H. Steenkamp, Members of the Native Appeal Court.

Damages—Adultery—Kraalhead responsibility—"Vee" kraal site obtained by father without authority and son placed in charge—Site subsequently ceasing to be used as Vee kraal and son continuing to occupy without formal transfer—Father not liable for torts of son—Land tenure laws do not affect position.

(Appeal from Native Commissioner's Court, Cofimvaba: Case 18/1937.)

In this case plaintiff (appellant) sued defendants for five head of cattle or their value, £20, as and for damages for adultery resulting in the pregnancy of his wife, the second defendant being sued as head of the kraal of which first defendant is an inmate.

First defendant consent to judgment and (it is pointed out) default judgment was entered against him. Second defendant pleaded that first defendant was not an inmate of his kraal and that consequently no liability attached to him.

The Acting Native Commissioner entered judgment for second defendant with costs, holding that first defendant was not an inmate of his kraal, and it is against this judgment that appeal is noted on the following grounds:—

1. That the judgment is against the weight of evidence.
2. That the Court erred in accepting the Native Assessors' expression of opinion, namely, that: "By custom a father used to apply for a kraal site and give it to his son, which does not mean father is liable for torts of son committed at that kraal. If father had lived at that kraal but decided to leave afterwards and went back to his other kraal he is no longer liable for torts of son living at that kraal. Although father applied for kraal personally, by leaving his son at that kraal he has given it to his son. It is for them to arrange about ownership of kraal just as he earmarks a beast for a son without calling people and saying 'I am allotting this beast to my son'. Native Law does not require any reporting by father to Administration that he has given kraal to son", inasmuch as such opinion is contrary to the law regarding land tenure in the Transkeian Territories, which must be applied in such matters.

From the evidence it appears that in about 1928 second defendant obtained permission from the headman to establish a "Vee Kraal" in the Qamata Basin area of the Qamata Location, in the St. Marks District, and that when his son, first defendant, returned from work in Capetown he was placed there by his father. It is not disputed that first defendant is married, that his father paid the bulk of his dowry, and that no certificate of occupation was issued in respect of this Vee Kraal. The second defendant admits these facts but says that he has long since ceased to use the site, and that he never personally resided on it.

Now, if he had continued to use this site for the purpose for which he secured it and his son had resided there temporarily only in order to tend the stock, it would be regarded as his kraal and he would be liable, according to the trend of the decisions of this Court in regard to tribes in Tembuland and the Transkei, for the torts of inmates of that kraal whether they be married or not.

The Acting Native Commissioner has found the following facts proved:—

1. That the kraal site occupied by first defendant was applied for and granted to second defendant about 1928.
2. That no certificate was ever issued in respect of the kraal site.
3. That second defendant has not resided at that kraal for many years if at all and visits it only occasionally for short periods.
4. That second defendant's wives have each their own kraals apart from the one in question.
5. That first defendant's mother resides at her own kraal, which is not the one in question.
6. That first defendant is established in that kraal with his own family;

and we consider there is evidence to justify these findings.

Plaintiff's case appears to be based upon the fact that the site was granted to second defendant and that in the absence of formal transfer to first defendant it must still be regarded as his. Beyond this there is no evidence to show that second defendant has used the site for himself over a considerable period and that there is every indication that he has owned no stock for some years in consequence of which the site has ceased to be used for the purpose for which it was allotted.

From the very nature of things the allotment of the site which was irregularly done by the Headman who had no proper authority to allot it, was purely temporary, so that there was nothing which second defendant could have transferred to his son.

Normally the first defendant would have returned to one or other of second defendant's two kraals and the site would have automatically reverted to commonage, but this did not happen and first defendant assumed possession of it and established his kraal there where he has since continuously resided with his wife.

The right of first defendant to the occupation of this site is an administrative matter with which this Court is not concerned.

The statement of the Native Assessors is a mere expression of the usage extant before any laws regulating the occupation of land in these territories were introduced and can in no way affect the conclusions which the Court draws from the facts surrounding this case, viz., that the first defendant has established a kraal of his own and apart from either of second defendant's two kraals and that he is thus not an inmate of second defendant's kraal.

The appeal is dismissed with costs.

UWALA ZANAZO vs. NOLAUTI MQANDANA.

UMTATA: October, 1937. Before H. G. Scott, Esq., President, and Messrs. C. J. N. Lever and J. H. Steenkamp, Members of the Native Appeal Court.

Native Commissioners' Courts—Jurisdiction—Section 10 (3) *Act* 38 *of* 1927—*Objection to jurisdiction—Defendant has absolute right to have an action against him determined in the Court of the district in which he resides and cannot be compelled to submit to jurisdiction of Court of another district—Section* 28 *of Proclamation No.* 145 *of* 1923 *not applicable to Courts of Native Commissioner in Transkeian Territories.*

(Appeal from Native Commissioner's Court, Cofimvaba: Case 103/1937.)

In the Court of the Native Commissioner for the District of St. Marks summons was issued against Uwala Zanazo described as "a Native peasant of Vetyu's Location, District Engcobo and subject to the jurisdiction of this Court by reason of the cause of action having arisen wholly within the said District of St. Marks".

Objection was taken to the summons "on the ground that in terms of section 10 (3) of Act No. 38 of 1927, the Court of issue of summons has no jurisdiction to try the action against the defendant who is a resident of Engcobo District".

The Assistant Native Commissioner overruled the objection and on an appeal being noted gave the following reasons for judgment:—

"In this case objection is taken to the summons on the ground that the Court has no jurisdiction because defendant resides in another district and by section 10 (3) of Act No. 38 of 1927, only the Court of Native Commissioner for the district in which defendant resides can try a case in which he is concerned. The Native Appeal Court has held in

Sibango Ncusana *vs.* Tshitshiza Silo, 1932 N.A.C. p. 50 and Hawulele Qoko *vs.* Zele Gcina, 1935 N.A.C. p. 74 that the sub-section of the Act is not exclusive as to deprive a defendant of his right to consent to the jurisdiction of any Court. And, indeed, I am forced to the conclusion that the sub-section is not exclusive at all, but is permissive only. The Native Appeal Court, per Barry, President, said in Sibango's case: 'The proviso cannot be interpreted in such a drastic and revolutionary manner, because the effect would be to operate, in many conceivable instances, to the direct detriment of a defendant, to whom the law is designed to give protection'. While entirely agreeing that a defendant may always consent to the jurisdiction of a Court other than that of the district in which he resides, I am prepared to go further and to say that he must, in certain cases, submit to the jurisdiction of other Courts. I can conceive of cases where it would be extremely inconvenient for both parties to have a cause tried in the district in which defendant resides, but where an unscrupulous defendant might insist on its being heard in such Court in the hope thereby of so embarrassing a plaintiff as to have the action withdrawn. The Appeal Court in the case quoted has pointed out that the law is designed to give protection to a defendant but I am sure no Court would allow its protection to be abused by a defendant's insisting on an action being heard by the Court of its own district where this would manifestly be to his own disadvantage, and his object was obviously only to embarrass the plaintiff.

Both Act No. 32 of 1917 and Proclamation No. 145 of 1923 divide into seven classes the circumstances in which a Court shall have jurisdiction and it is obviously the intention to provide for the trial of cases with the least inconvenience to litigants. If it had been the intention of the legislature to introduce, in the words of the President, 'so drastic and revolutionary', and, I would add, so undesirable a change into the law I think the Act would have said very plainly that *only* the Court of the district in which the defendant resides should have jurisdiction; and I am quite sure that this was not the intention. I have come to the conclusion this is a saving clause only, and that the intention of the legislature was simply to ensure that the right of the defendant in a proper case to have his action tried in the district in which he resides, should not be interfered with by regulations which the Governor-General might make under section 10 (4) (*h*) of the Act, and that the provisions of section 28 (1) of Proclamation No. 145 of 1923 have not been repealed. I, therefore, hold that this Court has jurisdiction to try this action, but that it may be transferred to the Court of the District of Engcobo on application and for good cause shown.

It is clear from these reasons that the Assistant Native Commissioner has entirely failed to grasp the real meaning of the decisions in the cases he has relied on for his decision.

In the case of Sibango Ncausana *vs.* Tshitshiza Silo (1932 N.A.C. 50) the headnote clearly shows what the position is, namely, that a defendant *has the right* to have an action against him determined in the district in which he resides, but he may *voluntarily* submit himself and his case to any other Court having competent jurisdiction.

The position is still more forcibly put in the case of Riversdale Divisional Council *vs.* Pienaar (3 Juta at p. 252) quoted in the case of Hawulele Qoko *vs.* Zele Gcina referred to by the Assistant Native Commissioner in his reasons for judgment where it is stated "a person cannot in the ordinary course be sued in the Court of a Magistrate in whose district he does not reside; but if he has expressly or tacitly submitted to the jurisdiction he cannot, in civil cases at all events, object to the exercise of such jurisdiction".

A defendant has the inherent right at Common Law to have cases tried in the Court of the district in which he resides and is the only person to say whether he will waive that right and submit himself to the jurisdiction of another Court. He certainly cannot be compelled to do so. The whole of the argument in Ncausana's case was directed to show that the proviso to section 10 (3) of Act No. 38 of 1927 had taken away this right, which was the change in the law which the learned President characterized as "drastic and revolutionary".

A change in the direction of taking away the right of a defendant to have the case tried in his own district would be still more drastic and revolutionary and no statute could possibly be interpreted in that way unless the intention of the legislature to do so was stated in the clearest language. No such change has been brought about by the proviso above referred to. A perusal of the Assistant Native Commissioner's reasons for judgment leads one to the conclusion that in his opinion when the legislature passed the proviso it meant something entirely different from what is stated. His opinion, of course, is entirely wrong.

It would seem from the manner in which the citation is framed and from the penultimate paragraph of the Assistant Native Commissioner's reasons for judgment that an impression seems to have got abroad that the case of Hawulele Qoko *vs.* Zele Gcina (1935 N.A.C. 74) decided that the whole of Proclamation No. 145 of 1923 applied to civil cases in a Native Commissioner's Court and consequently that a Native Commissioner had jurisdiction over a person or persons who fell within the provisions of section 28 (1).

This is clearly a wrong impression. A perusal of the case referred to will show that the real point in dispute was whether the summons having been issued in the Court of another district and the pleadings having been closed in that Court, the parties could by consent transfer the action to another Court for trial. In the course of its judgment this Court dealt with the applicability of section 35 (1) of Proclamation No. 145 of 1923 to Native Commissioner's Courts and decided that as the transfer of an action from one Court to another is merely a matter of procedure that the section did apply *where both parties agreed*. The Court, however, specially guarded itself from deciding that it would apply where one of the parties objected.

The conferring of jurisdiction is a matter of substantive law and not merely of procedure and consequently section 28 of Proclamation No. 145 of 1923 does not apply to Native Commissioners' Courts. The proviso to section 10 (3) of Act No. 38 of 1927 confers jurisdiction only in respect of residence and consequently a Native Commissioner cannot, where objection is taken, exercise jurisdiction over persons not resident in his district in the present state of the law.

The remarks of the Assistant Native Commissioner in regard to an unscrupulous defendant objecting to the jurisdiction in order to embarrass a plaintiff are beside the point.

If a defendant has the right of objection he is entitled to exercise that right and his object in doing so cannot be questioned.

The remarks of the Assistant Native Commissioner in the penultimate paragraph of his reasons for judgment also call for comment. He would appear to be of opinion that it is for the Court to decide whether or not it would allow a defendant to take advantage of the protection afforded him by the law.

In this he is clearly wrong. The Court has merely to decide what the law is and, if the law gives a certain right must concede it, not to say whether or not it will apply it in the case of any particular individual.

We are of opinion that in the case under consideration the Court of the Native Commissioner for the District of St. Marks had no jurisdiction to try the action and that the Assistant Native Commissioner erred in overruling the objection.

The appeal is allowed with costs and the judgment in the Court below altered to read: "Objection upheld. Summons dismissed with costs".

MNYIKI and MATOGU MNANAMBA vs. NDONGWANA MNANAMBA.

UMTATA: October, 1937. Before H. G. Scott, Esq., President, and Messrs. C. J. N. Lever and J. H. Steenkamp, Members of the Native Appeal Court.

Wife—living away from husband for long period—Dowry not returned and no action taken to dissolve marriage—Re-marriage—Effect—Ownership of children born of second marriage—Tembu custom.

(Appeal from Native Commissioner's Court, Tsolo: Case No. 302/1936.)

In the Court below plaintiff (now respondent) sued the defendants (now appellants) for the return of two children.

In the summons as originally drawn, plaintiff alleged:—

1. That about seven years ago he married Matogu, widow of the late Mnyiki Ntswayimbana and paid eight head of cattle as dowry.
2. That three children were born of the said marriage.
3. That Matogu deserted his kraal and has taken two of the children and is living with them at the kraal of Mnyiki, first defendant.

The plea was to the effect that Matogu was the wife of the late Mnyiki, who died about two years ago, and that plaintiff eloped with her; that the children in question were born during the subsistence of the marriage between Matogu and the late Mnyiki and that plaintiff has no claim to them.

When the case came on for hearing, plaintiff's attorney applied for the amendment of paragraph 1 of the particulars of claim by substituting the words "eleven" and "mistress" for the words "seven" and "widow" respectively. The amendment was granted.

The Native Commissioner entered judgment for plaintiff and against this judgment an appeal has been noted.

During the course of the case it was admitted by defendant's attorney that plaintiff is the father of the three children mentioned in the summons and that second defendant's brother, Goniwe Noholoza, received cattle from plaintiff as dowry for her.

In his reasons for judgment the Native Commissioner said:

"The point at issue was whether Mnyiki had married Matogu before she was given in marriage to plaintiff. According to plaintiff's and headman Mtshobi's evidence, plaintiff married Matogu in 1926. Meitwa Skwaca, under cross-examination, states that Mnyiki saw her being married to plaintiff. Asked why Mnyiki did not assert his rights, he said Mnyiki was sick. Hence from 1926 to 1934 Mnyiki took no steps to assert any rights which he may have had, with full knowledge of the position. The Court accordingly held that there was no marriage between Mnyiki and Matogu (who is described as a dikazi)."

It is difficult to see how the Native Commissioner could have arrived at the conclusion that there was no marriage between Mnyiki and Matogu in the face of the evidence. Goniwe Maholoza, who is Matogu's brother, was called as a witness for plaintiff, who is bound by his evidence unless it can be shown that he is hostile, which has not been done in this case. Goniwe says that Matogn was married to Mnyiki, who paid six head of cattle as dowry for her and she had four children by him, two of whom were born while the woman was under teleka. Matogu says she was married to Mnyiki and that that marriage has never been dissolved.

Mcitwa Skwaca corroborates these two witnesses and says that he was the messenger who drove the dowry cattle. It is true that Mcitwa says Mnyiki was well aware that plaintiff had gone away with his wife. While this might be used in argument to support a contention that Mnyiki had abandoned his wife, it is no reason for holding that there never had been a marriage.

Plaintiff, in the course of his evidence, stated that in March, 1934, he sued Goniwe for the return of his wife, Matogu, and obtained judgment against him for the return of his dowry, two head of cattle being deducted for the children born. The record in this case has not been put in and there is nothing to show what defence was put up.

It does show that Goniwe married Matogu to plaintiff, but Mnyiki was not a party to that case and cannot be bound by it.

This Court is of opinion that the evidence proves that there was a marriage between Mnyiki and Matogu prior to that between the latter and plaintiff, that such prior marriage has never been dissolved and that the children born to plaintiff were born during the subsistence of her marriage with Mnyiki.

Before this Court it was strongly urged that as Mnyiki knew that his wife had been taken by plaintiff and had taken no steps to assert his rights he must be taken to have abandoned her and the marriage must be regarded as having been dissolved. Reliance was placed on the case of Quza *vs.* Masilana (3 N.A.C. 196) in which it was held that where a man's wife was held under teleka and he did not pay cattle to release her he had abandoned her and on her subsequent remarriage to another man the children born of such union belonged to the latter.

The case relied on is one from Pondoland where the customs in a case such as this differ widely from those of the other tribes in these Territories. It was cited, however, because of a passage in the judgment indicating that the Tembu Assessors had stated that the neglect of a man to pay dowry for his wife who has been impounded is a tacit abandonment of his wife.

This is certainly one statement of the custom which is in favour of plaintiff but there are numerous other decisions of the Native Appeal Court which are opposed to the opinion of the assessors in the above-mentioned case.

In the case of Mditshwa *vs.* Nqeneka (1 N.A.C. 105), in which the facts were almost identical with those in the present case the native assessors stated that, according to Tembu Law, the first husband was entitled to the children born of the second marriage as they were born of his wife while his marriage still subsisted.

In the case of Mtangayi *vs.* Mazwane (2 N.A.C. 8), the President of the Court said: " The Court has always laid down the principle that under Native Custom a womon cannot contract a second marriage while the previous one is in existence . . . It is clear that appellant and respondent's wife have been living in an adulterous union and according to Native Custom the children begotten by an adulterer belong to the husband." This case was followed in Rwamza *vs.* Ntlanganiso (2 N.A.C. 10).

In the case of Lutoli *vs.* Sontshebe (2 N.A.C. 165), the facts were that a woman had been married to one man and lived with him for about six years. Thereafter her husband went away to work and did not return. The woman went to the kraal of her father, lived there for some time and was then given in marriage to another man.

In giving judgment, the President of the Appeal Court said: "The Appeal Court sitting both at Umtata and Butterworth has clearly laid down that with the Tembu and Transkeian tribes a Native woman during the subsistence of a previous marriage cannot validly contract a second marriage and that a man taking a woman under such conditions can only be regarded as an adulterer."

Among the Baca the custom is the same (see Mvimbi *vs.* Mabata 2 N.A.C. 69) and also among the Pondomise (see Quvile *vs.* Doldam and Tafeni 5 N.A.C. 21). In the last-mentioned case the native assessors unanimously stated that if a woman being the wife of a man "marries" another without her previous marriage having been dissolved and has children by the second man, these are the children of the husband even though she may have lived with the second man for many years without the former claiming her and this opinion was accepted by the Court as being a correct statement of Native Custom.

It was argued before this Court that it was immoral to allow a man to stand by, see his wife taken by another man without taking steps to recover her and then subsequently to claim the children of the second union. It is pointed out, however, that the woman and her father have the remedy in their own hands. They can always return the first man's dowry or sue for a cancellation of the marriage before she is married to another man.

In the present case it is clear that the children in question having been born during the subsistence of the marriage with Mnyiki belong to him. As he is now dead his rights are transferred to his heir.

The appeal is allowed with costs and the judgment in the Court below altered to one in favour of defendant with costs.

ALFRED MAQUNGO vs. SAMUEL MARWEDE.

UMTATA: October, 1938, before H. G. Scott, Esq., President, and Messrs. C. J. N. Lever and J. H. Steenkamp, Members of the Native Appeal Court.

Practice and Procedure—Default judgment after appearance entered and plea filed—Recission—"Wilful default"—Applicant's version of facts—Acceptance of—Where defendant not a free agent default is not wilful and leave to re-open should have been granted.

(Appeal from Native Commissioner's Court, Umata: Case No. 794/1936.)

On the 18th November, 1936, plaintiff (respondent) issued summons against defendant (appellant) claiming three head of cattle or their value, £15, as damages for adultery alleged to have been committed by defendant with plaintiff's wife about May, 1936. The summons was served on the 20th November, 1936, upon defendant's wife, defendant being then absent in Johannesburg. Appearance was entered by an attorney on behalf of defendant on the 1st December, 1936,

and a plea filed on the 17th December, 1936, in which the adultery was denied. On the 6th January, 1937, notice was served on defendant's attorney that the action had been set down for the 16th March, 1937. On the latter date defendant did not appear but his attorney did and applied for a postponement on the ground that his client was at the mines on contract and could not get back until June, 1937, and he tendered costs. The application was opposed by plaintiff's attorney who stated that defendant was not at the mines but was working as a monthly servant.

The Additional Native Commissioner refused the postponement and defendant's attorney withdrew from the case. Plaintiff's attorney thereupon applied to amend his summons by reducing the value of the cattle from £15 to £9 and asked for judgment, which was granted, no evidence being led.

On the 14th April, 1937, defendant's attorneys filed an application for a recission of this judgment on the following grounds: —

(*a*) That defendant was not in wilful default on the 16th day of March, 1937, and was actually represented in Court by Mr. Willie Meaker, of the firm of Meaker & Van der Spuy, attorneys, York Road, Umata, who previously thereto had filed a plea as will more fully appear from the records of the above Court.

(*b*) That the defendant was an employee of the Central News Agency, Hay Street, Turffontein, under contract, which does not expire until June, 1937, and that the only means whereby he could have been present would have been for him to have deserted from his employer and thus *inter alia* rendered himself liable to criminal prosecution.

(*c*) That the alleged adultery took place in May, 1936, and that for some months prior to defendant going to Johannesburg plaintiff had every opportunity of bringing his action but seems to have deliberately delayed the same in order to take advantage of defendant's absence.

(*d*) That defendant emphatically denies plaintiff's allegation made verbally on the 16th day of March, 1937, in open Court to the effect that the woman in question had gone with defendant to the Rand.

(*e*) That defendant reiterates that he is not guilty of the alleged adultery and desires to defend the action, having a *bona fide* and good defence, in spite of the fact that by so doing it will cost him more than the fine involved.

(*f*) That in support of his application defendant has this day paid into Court the sum of £2 and £4. 6s. to abide the Order of the Court as required by law.

The application was heard on the 16th April, 1937, when plaintiff's attorney contended that there was nothing before the Court to substantiate the statement of the applicant's attorney.

A postponement was granted to the 4th May, 1937, to enable affidavits to be obtained from applicant. On this date an affidavit by applicant was filed, the terms of which were as follows: —

1. That I am in the employ of the Central News Agency, Limited, at their branch at Hay Street, Turffontein, where I commenced work on the 1st day of August, 1936, on a 9 monthly contract.

2. That prior to my coming to work plaintiff in May, 1936, accused me of committing adultery with his wife and although I emphatically denied this from the start he took no legal action either in this Court or the Chief's Court and waited until I had left for the Rand and then

sued me before this Honourable Court. In other words I complain that he has been dilatory in bringing his action and that he has delayed his action purposely in order to get me at a disadvantage.

3. That I wrote to my attorneys immediately on receipt of the summons and requested them to explain my position to the Court and to request that I be allowed a postponement in order to enable me to defend this action at the same time telling them that I could not get leave until about June.

4. That the setting down of the trial of an action is in the hands of the plaintiff and that I have no remedy except to place the facts before the Court in an endeavour to shew that plaintiff in exercising his right has not done so in such a manner as to enable me a fair opportunity to defend, as in spite of the fact that I had about two months notice of the date of the trial still I was employed here and could not obtain leave.

5. That I have now again seen my master and shewed him all the letters and papers and that he has now agreed to give me leave during July, 1937, in order to enable me to defend this action.

The hearing was then further postponed to the 26th May, 1937, to enable applicant to produce an affidavit from his employers stating definitely what were the terms of his contract. A letter dated 18th May, 1937, from applicant's employers was then filed which stated that he could have his leave in July as applied for and that he was employed by them in August, 1936. After argument the application to rescind was refused with costs and this appeal is against that order on the ground that applicant had shewn good and sufficient grounds for his failure to attend on the day of the trial and the respondent had failed to prove " wilful default ".

There have been a number of decisions in this and the Superior Courts on the subject of " wilful default " and while no general rule applicable to all cases has been laid down the tendency has always been to lean in favour of defendant.

As was said by Gardiner, J.P., in Newman *vs.* Ayten (1931 C.P.D. 454): " Now I had occasion recently in Chedburn *vs.* Barkett (1931 C.P.D. 421) to deal with the law relating to default judgment, and it is not necessary for me to repeat what I said then, but I should like to add that in a case of doubt as to whether there has been wilful default or not the magistrate should be in favour of allowing a defendant to purge his default. It is only when it is quite clear that the default was wilful that the magistrate should refuse to re-open. It is quite true, as I said in Hendricks *vs.* Allen (1928 C.P.D. 519) and adhered to in Chedburn *vs.* Barkett, that once it has been proved that the summons has been brought to the notice of the defendant and he *has not appeared*, then a presumption of wilful default arises, but when there is doubt whether the summons has come to the notice of the defendant in time for him to enter appearance, then I think the magistrate should lean in favour of the defendant. It is a very drastic provision in our magistrates' courts which enables judgment to be taken by default, and magistrates should not refuse to open where there is a doubt as to whether the default may have been otherwise than wilful; they should lean rather towards opening than towards refusing."

In Hendricks *vs.* Allen, supra, the learned Judge-President said that " if it is once proved that the summons has been brought to the notice of the defendant and that he has not appeared, then, in the absence of any explanation on his part which would be accepted, it seems to me that a presumption arises of wilful default, and unless that presumption is rebutted by the defendant, the Court must take it that wilful default is proved but that the difficulty in these cases is to decide what explanation is sufficient to rebut the presumption.

A default is only wilful within the meaning of Order XXIX Rule 2 of Act No. 32 of 1917 (which corresponds to Rule 2 Order XXVIII of Proclamation No. 145 of 1923) so as to preclude a magistrate from rescinding a default judgment if the defendant knew what he was doing, intended what he was doing, was a free agent and was willing that the consequence of his default should follow.

(Hainard *vs.* Estate Dewes 1930 O.P.D. 119.)

In the case above referred to the defendant had failed to enter appearance. In the present case the defendant had entered appearance and filed a plea denying the alleged adultery. The summons was served at his kraal some two months after he had left for Johannesburg and at a time when he says that he had entered into a contract of service for nine months with the Central News Agency and that he was unable to obtain leave to attend the trial.

It is quite clear that he never had any intention to abandon his defence and that he was not willing that judgment should be entered against him. There is nothing on the record to show that his statement is not true and in absence of any contradiction it must be assumed for the purposes of the application that his statement is true (Chedburn *vs.* Barkett 1931 C.P.D. at p. 424).

If that is so then he was not a free agent and his default was not wilful. Now even where there is no wilful default it is in the discretion of the Court whether or not to set aside a default judgment (Johannesburg Municipality *vs.* Withers 1921 T.P.D. at p. 169), but where a judicial officer has a discretion, which he has to exercise in the interest of a party, he must exercise it judicially and according to recognised principles. An elementary rule to bear in mind is that there cannot be justice done to a person without having heard him in his defence; that the Court cannot very well give a sentence on the merits of the case without hearing both parties (Klaas *vs.* Kahn 1920 C.P.D. at p. 12).

We are of opinion that, in the case now under consideration, the defendant was not in wilful default and that he should have been allowed an opportunity of putting his defence before the Court.

The appeal is allowed with costs. The judgment of the Court below will be altered to default judgment set aside and leave given to defendant to defend, defendant to pay the costs incurred in obtaining the default judgment and the costs of the application to set aside the default judgment.

In his reasons for judgment the Additional Native Commissioner said: "Defendant himself by applying for recission instead of appealing against the judgment accepted the position that he was in default".

Now until a party has exhausted his remedies in an inferior Court it is not open to him to bring the matter before a Superior Court by way of appeal (Wainwright *vs.* Rowbone 1920 C.P.D. 320; Hurwitz & Lewus *vs.* Matshaya 1933 E.D.L. 242). Defendant was, therefore, quite correct in the procedure he adopted and cannot be regarded as having accepted the position that he was in default.

NOTYALARA MABOVU vs. SIZAKELE BUKUVA.

UMTATA: October, 1937. Before H. G. Scott, Esq., President, and Messrs. C. J. N. Lever and J. H. Steenkamp, Members of the Native Appeal Court.

Damages—Action by widow—Killing of husband to whom married by Native Custom—Proof of—Calculable pecuniary loss.

(Appeal from Native Commissioner's Court, Mqanduli: Case No. 66/1937.)

The plaintiff (appellant) sued defendant (respondent) for £50 damages for killing her husband Mabovu Magekeni to whom she was married by Native Custom.

In her summons she alleged that Mabovu Magekeni was her only means of support, that he left no estate and during his life-time supported her with what he earned and by reason of defendant's wrongful and unlawful act she was deprived of support and accordingly claimed that she had suffered £50 damages.

On conclusion of plaintiff's case the attorney for defendant applied for absolution judgment on the ground that actual damages were not proved which application was granted and judgment of absolution from the instance entered with costs. Against this judgment an appeal has been noted on the ground that appellant had adduced sufficient evidence that she suffered actual damage owing to the loss of her husband.

As was pointed out in the case of Mgolodelwa and four Others *vs.* Makayisana Blai (1934 N.A.C. 5 Cape and O.F.S.) in cases of this nature it is necessary for the widow to prove calculable pecuniary loss before she could recover damages for the killing of her husband.

The evidence for the plaintiff is as follows:—

She was married to Mabovu Magekeni by Native Custom and fourteen head of cattle were paid as dowry for her. Six months after the marriage Mabovu Magekeni was killed by defendant and that before marriage her husband had been to work at the mines and that he intended to support her from the earnings. She admits that as long as she remained at the kraal occupied by her late husband it is the duty according to Native Custom of his relatives to support her and that she actually was being supported by her late husband's brother, the head of the kraal at which he resided in his lifetime.

The dependants of a person wrongfully and unlawfully killed are entitled to claim compensation from the wrongdoer for the pecuniary loss actually sustained in consequence of the death, but in assessing the damages regard must be had to the maintenance which the deceased had been able and accustomed, by his labour, to furnish to his wife and children or other relatives (Warnecke *vs.* Union Government 1911 A.D. at page 662; see also Hulley *vs.* Cox 1923 A.D. at page 244).

In the present case there is no evidence that the deceased had in fact been accustomed to support his wife by his earnings or that she is in any way worse off as a result of his death.

The appeal is dismissed with costs.

MANTSUNDU MQANA vs. MAJINGO NDIBONGO.

UMTATA: October, 1937. Before H. G. Scott, Esq., President, and Messrs. C. J. N. Lever and J. H. Steenkamp, Members of the Native Appeal Court.

Trespass—Right of wife married by Native Custom to impound stock found trespassing in her husband's land—"Occupier"—Meaning of discussed—Proclamation No. 408 of 1896—Impounding without notifying owner—Section 77 of Pound Regulations—Damages.

(Appeal from Native Commissioner's Court, Mqanduli: Case 578/1936.)

In the Court below plaintiff sued defendant for damages for the illegal impounding of 15 head of cattle for alleged trespass in her husbands lands on the ground that she knew that the stock belonged to plaintiff and had failed to notify him of the trespass and demanded trespass fees from him.

In her plea defendant admitted having impounded the stock without notifying the plaintiff but denied that her action was wrongful or that she knew that the stock belonged to him.

From the evidence it appears that plaintiff and defendant live in the same location and their kraals are some 300 yards apart.

Defendant states that she did not know that the cattle belonged to plaintiff but she admits that she made no enquiries with a view to ascertaining who was the owner of the trespassing stock.

What the Native Commissioner was asked to decide was whether or not the defendant knew who was the owner of the stock when she impounded them. He did not, however, do that but considered the whole of Proclamation No. 408 of 1896 and came to the conclusion that the defendant was not an "occupier" of the land in question and, therefore, would have no right to impound, but that such right would rest only in one Halala, her husband's brother who had been left to look after his kraal and affairs during his absence at the mines.

It may well be that Halala would have the right to impound stock found trespassing on his brother's land, but does that necessarily preclude the latter's wife from also so impounding unless she had the authority of Halala. In passing it may be said that there is nothing on the record to show that she did not have his authority. Be that as it may, we are of the opinion that the Native Commissioner gave too restrictive an interpretation to the meaning of the word occupier in the definition of "proprietor". The definition of "proprietor" in Proclamation 408 of 1896 (which was still in force at the time the cause of action arose) is "any owner, lessee or occupier of land". In construing the words of a statute it must be assumed that the legislature used them in their popular sence unless they have acquired a different technical meaning in legal nomenclature or unless the context or the subject matter clearly shows that they were intended to be used in a different sense (Beedle & Co. *vs.* Bowley 12 S.C. 401).

According to the dictionary an "occupier" is "one who occupies". In ordinary conversation, by the occupants of any building or land are meant all persons physically present

on the premises for some continuous period and not as temporary visitors; the word would include servants as well as masters (per Mason, J. in Madrassa Anjuman Islamia *vs.* Johannesburg Municipality Council 1919 A.D. at p. 454).

Using the word "occupier" in this sense then defendant's wife was clearly an "occupier" which would entitle her to impound cattle trespassing on lands in which she had an unquestionable interest.

In the case of Pengelly *vs.* Raubach (1916 C.P.D. 365) the appellant shot certain pigs which trespassed in a garden belonging to C. The appellant with the permission of C had pitched his tent at certain acorn trees near to or adjoining the garden. It was held that as Pengelly (appellant) was not the occupier of the garden he was not justified under section 26 of Act No. 15 of 1892 (which corresponds with section 22 of Proclamation No. 408 of 1896) in destroying the pigs. A perusal of the full judgment, however, leads one to suppose that Pengelly would have been regarded as being in occupation of the portion where his tent was pitched and would, therefore, be an "occupier" within the meaning of the Act.

It may be observed also that the report is silent as to whether Pengelly's occupation was temporary or permanent. That case is, however, no authority for saying that the defendant in the present case is not an "occupier" within the meaning of Proclamation No. 408 of 1896. Her husband is in lawful occupation of the land in question and she resides with him and uses the land with his permission.

He says in his evidence: "The defendant lives with me at my kraal, and is in occupation thereof during my absence, also of my land". If defendant is not the occupier of the land during her husband's absence, who is? Halala certainly is not for he does not reside there nor, as far as the evidence goes, does he exercise any control over it. It is easy to see what difficulty might arise if a person in the position of the defendant cannot be regarded as an occupier for the purposes of the Pound Law. If the conclusion arrived at by the Native Commissioner is correct then it would have been necessary for her to have obtained permission to impound from Halala. While she was doing this the cattle most probably would have left the lands and could not then have been impounded by anyone (see Prince vs. Graetz 1921 E.D.L. 64). It cannot be said that the defendant could have detained the animals pending the obtaining of the necessary permission for if she had no authority to impound it follows that she had no authority to seize for the purpose of impounding. That a native woman has the right to impound stock found trespassing on her husband's land seems to have been accepted in the case of Mnunu *vs.* Ngqengelele (5 N.A.C. 174).

We are of opinion, therefore, that the Native Commissioner, even if he were entitled to take cognizance of matters not raised in the pleadings, erred in the interpretation he placed on the word "occupier" and that the defendant acted within her rights in impounding the cattle.

This does not, however, dispose of the case. The ground of the complaint is that defendant knowing the owner who lived in the same location, failed to notify him of the trespass or demand trespass fees from him before impounding.

The Native Commissioner has not given any decision on this aspect of the case and it is necessary, therefore, for this Court to do so. The plaintiff says that defendant knows his stock and, as a matter of fact had about a month previously brought some of the same stock that were subsequently impounded to his kraal and warned him to keep them away from her lands. He calls a witness Mzikinya, who says he was a herdboy for the defendant at that time, and that defendant called him to help her drive the cattle to the pound. He

states that he told her that the cattle belonged to plaintiff and that she said she knew this was so. Defendant denies that she knew to whom the cattle belonged but admits that she made no enquiries from anyone to ascertain the owner. She denies that Mzikinya worked for her or that he was present when the cattle were impounded. Nomasela, a small girl corroborates her and defendant's husband says Mzikinya never worked for him, but that one Noxinga is his herdboy to whom he pays £3 a year.

There are several discrepancies in the evidence of defendant and Nomasela. Defendant says the Poundmistress did not see Nomasela nor did she (defendant) ask Nomasela whether she knew to whom the cattle belonged. Nomasela says that the Poundmistress actually came out and saw her.

Defendant says that her husband's cattle were herded by Noxinga all last year (i.e. 1936) and even the present year. The cattle were impounded in November, 1936.

Nomasela says: "The defendant's cattle were being herded at the time of the impounding by girls from Majeni's kraal. They usually herd defendant's cattle. The defendant had no boy at that time. Noxinga was not herding defendant's stock then. The defendant engaged Noxinga after his return from the mines. This was after the cattle were impounded".

If this evidence is correct then neither defendant nor her husband is telling the truth.

We consider that Mzikinya's evidence must be accepted for it seems unlikely that a woman and a small girl would have gone alone with 15 head of cattle. It seems more probable that defendant would have called to her assistance someone who was accustomed to deal with cattle. If Noxinga was her herd it is significant that he was not called to help her.

It was laid down in the case of Mti Qomboti *vs.* Nyombo Hlobo (1930 N.A.C. 36) that the onus is upon the plaintiff to prove that defendant knew when he found animals trespassing that they were the plaintiff's.

In that case the defendant before driving the trespassing animals to the pound proceeded to the Headman's kraal and in the absence of the headman made enquiries of several people, but was unable to ascertain the name of the owner. It was quite clear that he was bona fide in his statement that he did not know the owner. In those circumstances the Court held that the onus was on the plaintiff to prove knowledge.

If a person seizing stock could take it to a pound without making any enquiries whatever as to their ownership, the object of regulation 77 of the Pound Regulations would be defeated, which was to prevent irritation that would naturally be caused by the removal of a man's stock for what might be a very trifling trespass to a distance from his own kraal, thereby depriving him and his family of its use for perhaps several days; also in order that he might know as early as possible that his stock had committed trespass, and thereby be afforded an opportunity of paying the amount laid down in the regulations [see Sikiti *vs.* Sinambu (1 N.A.C. 4).]

Even assuming that in order to succeed plaintiff must prove that defendant knew at the time she found the stock trespassing, who was the owner, we are satisfied that, in the present case, the plaintiff has discharged the onus upon him and that, therefore, the defendant acted illegally in impounding the stock without notifying him of the trespass and demanding trespass fees.

In view of the decision at which we have arrived it is not necessary to consider whether or not the Native Commissioner was justified in basing his decision on a ground not pleaded.

No appeal has been lodged against the amount of damages awarded.

The appeal is dismissed with costs.

BABAYI RARABE vs. NONTSIZI RARABE.

UMTATA: October, 1937, before H. G. Scott, Esq., President, and Messrs. C. J. N. Lever and J. H. Steenkamp, Members of the Native Appeal Court.

Ubulunga Custom—Widow leaving late husband's kraal either voluntarily or upon being driven away—Not entitled thereafter to claim from her late husband's heir to be put in possession of the ubulunga beast or its progeny—Tembu Custom.

(Appeal from Native Commissioner's Court, Mqanduli: Case No. 433/1936.)

In the Court below the plaintiff (respondent) widow of the late Rarabe Sirayi in his Great House, duly assisted, sued defendant (appellant), eldest son and heir of the late Rarabe Sirayi in his right-hand house and also heir of the Great House owing to the absence of male issue in the latter, assisted by his grandfather, for three head of cattle or their value, £12.

Plaintiff alleged that her father had given her as an ubuluga beast, a red heifer which had had two increase; that after the death of Rarabe Sirayi she was smelt out and driven away by Lubusa Segayari (Sirayi?) and others and her Native marriage was dissolved and, consequently, as she is living with her father she is entitled to the possession of her said "ubulunga" cattle and prays for the delivery of them to her or payment of their value. £12.

Defendant admitted all the allegations in the summons except tht plaintiff was smelt out and driven away and that she was entitled to the ubulunga cattle.

After hearing evidence, the Native Commissioner entered the following judgment: "For plaintiff for delivery of one 'ubulunga' beast and its two progeny all of which are enumerated in the summons failing which damages to the extent of £9 and costs."

The appeal against this judgment is on the following grounds:—

1. That the finding of the judicial officer on facts that the plaintiff was smelt out and driven from her late husband's kraal by one Sirayi Gqodo is against the weight of the evidence adduced, the circumstances disclosed and the inferences deducible therefrom.
2. That the said judgment is contrary to Native Law and Custom in that it gives a widow who has left her late husband's kraal unqualified possession of original and increase of an "ubulunga" beast whilst Native Law and Custom provides that the property in and right of possession of an ubulunga beast vest in the husband or his heirs and that it is only on formal dissolution of a customary union (e.g. by "Keta") that he would be responsible for its return to the person who had originally contributed such "ubulunga" beast and furthermore that the increase of "ubulunga" cattle vest absolutely in the husband or his heir.

In his reasons for judgment, after finding as a fact that plaintiff had been driven away, the Native Commissioner says:

"It its quite clear, however, that the union of plaintiff with the late Rarabe had already been dissolved by his death and that the evidence led regarding her being smelt out was merely to explain why she had been forced to take up her residence at her father's kraal.

" The claim in connection with which I had to give a decision was for the delivery of possession (which I understand to mean restoration of custody) of the 'ubulunga' beast and its progeny, I was not asked to decide the question of ownership in these cattle nor in whom these cattle vested. These are entirely extraneous matters which have been introduced by the defendant in paragraph 2 of his grounds for appeal."

Throughout the course of his reasons for judgment the Native Commissioner emphasises that plaintiff is claiming only the *custody* and not the ownership of the cattle.

It is difficult to appreciate by what method of reasoning the Native Commissioner arrives at this conclusion for the evidence recorded does not contain one word about "the ubulunga" cattle and plaintiff's claim must, therefore, be gathered entirely from the summons.

Now the summons calls upon the defendant "to answer the claim of plaintiff for (1) red heifer, (2) red bull calf, white belly, (3) red heifer, white belly, or their value, £12 and in the particulars of claim she alleges that her father gave her an ubulunga beast and that as her marriage was dissolved and she is living with her father she is entitled to the possession of *her* said ubulunga cattle" and finally she prays for "the delivery to her of the said above-mentioned three head of ubulunga cattle or payment of their value, £12".

A more unqualified claim to the ownership of these cattle could scarcely have been made. It is true that plaintiff's attorney pointed out in Court that she is suing merely for possession of the cattle, but his mere statement to that effect cannot alter the character of the action as set out in the summons, which says plainly in effect, "give me the cattle or pay me their value". This cannot be construed into a claim for the "custody" only. If custody only was claimed that should have been stated clearly and damages claimed on failure to give it.

In passing, it may be mentioned, though that is not one of the grounds of appeal, that the Native Commissioner, in awarding damages, gave judgment for something which was not asked for and in respect of which no evidence was led (see Mokoatle *vs.* Ntlabati 5 N.A.C. 45).

The Native Commissioner called to his assistance as assessors Chiefs Bazindlovu Holomisa and Sipendu Bacela. At the conclusion of the evidence they were called upon to express their opinion on the matter before the Court.

Sipendu Bacela stated:—

"I know the custom of ubulunga cattle as existing in the Tembuland districts.

"(1) If a widow leaves the kraal of her deceased husband without the consent of the Kraal Head she could not, according to the custom prevailing in Tembuland, take the ubulunga beast with her to her people's kraal. The ubulunga beast becomes part of the deceased's estate and belongs to the heir. That is, the husband's heir. If deceased's father was still alive, he would be the heir. She is entitled to the use and possession of the beast only while she is at her husband's kraal.

"(2) If the widow is driven away from her husband's kraal, she could not take the beast with her to her people's kraal. The widow would not have any claim whatever to the increase. The increase would become part of the estate. If she remained at deceased's kraal she would have the use of both the original beast and the increase."

Bazindlovu Holomisa agreed entirely with the opinion expressed by Sipendu Bacela.

The Native Commissioner appears not to have accepted this opinion but based his judgment on the decisions of the Native Appeal Court in the cases of Siduli *vs.* Nopoti (1 N.A.C. 26) and Siwangobuso *vs.* Ngindana (1 N.A.C. 142).

The question of the rights in "ubulunga" cattle has been the subject of many decisions in the Native Appeal Court, some of which are conflicting.

In Siduli's case (*supra*) it was held that under all circumstances a married woman, whether continuing in the bonds of matrimony or a widow, is entitled to the possession of the "ubulunga" beast which is presented to her at the time of her marriage and is entitled to take it with her wherever she may elect to go.

Siwangobuso's case, relied on by the Native Commissioner, is not in point. The opinion expressed by the Native Assessors was not necessary for the decision of the case which turned on the point as to whether the animal in dispute was "Nqoma" or "ubulunga". The Court found it was "Nqoma", but asked the Assessors certain questions. In reply they stated that on dissolution of the marriage the "ubulunga" beast followed the woman and if the husband had disposed of it he had to replace it. The Assessors were, of course, speaking of a case in which the marriage was dissolved during the lifetime of the husband, and not one where dissolution was brought about by his death.

In the case of Jelani *vs.* Mrauli (2 N.A.C. 54), Jelani sued Mrauli for the restoration of his wife or six head of cattle, the dowry paid for her. Defendant counterclaimed for five head of cattle being an ubulunga beast given to plaintiff's wife and its progeny. It was held that although the defendant was not entitled to recover any of the progeny of an ubulunga beast, he was entitled to the recovery of the beast itself or its equivalent in case of its death. This, again, was a case of dissolution of the marriage during the lifetime of the husband. It will be noted that even in such a case the *progeny* of an ubulunga beast are not returnable, indicating that they are not the property of the woman or her father.

In the case of Jakavula *vs.* Melane (2 N.A.C. 89)) Jakavula sued Melane for the return of a temporary "ubulunga" beast, together with its three increase, which he had given his daughter on her marriage with defendant. His daughter had died and defendant refused to restore the cattle. Defendant pleaded that the animal in question was given as permanent ubulunga. The magistrate found that the beast was given as permanent ubulunga and gave judgment for defendant, which judgment was upheld on appeal. In this case Headman Ngaba, of Elliotdale, in the course of his evidence in the Magistrate's Court said: "An ubulunga beast is a beast given to a wife by her father and remains her property" and after stating that custom requires the first heifer calf of a temporary ubulunga beast to be allocated as the permanent ubulunga, continued: "If a beast was allowed to remain long enough to have four calves without being removed it would be regarded as an ubulunga pure and simple. It could not either itself or with its progeny be afterwards claimed by the kraal of the father of the woman."

The position in regard to the ubulunga beast is very definitely put in the case of Nomanti *vs.* Zanqingqi (3 N.A.C. 283) where it was laid down that the wife has an interest in the animal and its progeny, is entitled to the milk and the husband could not divert them from her house to that of another wife without her consent, but such cattle are the property of the husband and by inheritance become the property of his heir on his death. The decision in this case was followed in that of Eliza Malinde *vs.* Isaac Mpinda (4 N.A.C. 364).

In the case of Nombuyana *vs.* Ntuntu and Mtyibili (4 N.A.C. 365) the widow had returned to her father's kraal with the ubulunga beast and its progeny and her father's heir had seized the cattle and refused to return them to her and she sued for them. It was held that the cattle were the property of plaintiff's late husband's estate and that she was entitled to their custody jointly with her minor son, the heir of her late husband. This action was, however, against the heir to the woman's father's estate and not the heir to her husband's estate.

The whole question was again considered by this Court in the case of Ndevu Mbolo *vs.* Kwaza Nomandi (15 P.H. R. 1), heard at Port St. Johns on 18th November, 1929. As this case has not been reported in the selected decisions of the Native Appeal Court, it is considered advisable to set it out *in extenso*:—

"The appellant, plaintiff in the Native Commissioner's Court, sued respondent for 35 head of cattle or their value £175. Appellant is the grandson and heir of the Qadi house of the late Mtengwana and respondent the grandson and heir of the late Nompandwana. Nompandwana, during his lifetime, married Jikicwa, a daughter of the Qadi house of Mtengwana. Appellant alleged that, during the subsistence of the marriage of Nompandwana and Jikicwa, a cow belonging to the Qadi house was given by Mtengwana to Jikicwa as an "ubulunga" beast and that this cow has increased to 35 head of cattle which respondent claims as his and which he refuses to deliver to him. Exception was taken to the summons on the ground that it disclosed no cause of action. This exception was upheld and the summons dismissed with costs.

In the opinion of this Court the exception was rightly taken. It is true that there have been numerous conflicting decisions in regard to the question of the dominium of the "ubulunga" beast and its progeny, but the majority of these seem to lay down quite definitely that, although the wife to whom the "ubulunga" beast is given has an interest in the animal and its progeny, and although the husband cannot divert them from her house to that of another wife without her consent, they are his property, are executable for his debts and on his death form part of his estate and become the property of his heir.

In earlier times amongst the primitive Bantu, cattle were set apart by each family for the purpose of the observance of the "isiko ubulunga". These animals were regarded as sacred. They could neither be alienated nor could they be lent to anyone not related by blood to such family. The woman to whom an "ubulunga" beast was given at the time or during the subsistence of her marriage or widowhood was entitled to its possession and could take it with her wherever she went. The animal and its progeny remained the property of her father's kraal and the husband did not acquire any ownership in them. Nowadays, owing to some extent to contact with European civilization, the custom has lost much of its meaning and sacredness, and the Courts, acting on the opinion of Native Chiefs and other authorities on Native Custom have decided quite definitely that although the wife to whom an ubulunga beast is given has an interest in it and its progeny and although the husband cannot divert them from her house to that of another wife without her consent, the dominium in them is vested in him and on his death they form part of his estate and become the property of his heir. The appeal is dismissed with costs."

As the matter has been raised in a somewhat different form in the present case, the following questions are put to the Native Assessors:—

1. If a widow voluntarily leaves her late husband's kraal and returns to her father's kraal is she entitled to take with her the ubulunga beast and its progeny?

2. If a widow is driven away from her late husband's kraal and returns to her father's kraal without taking with her the ubulunga cattle can she subsequently sue her late husband's heir for delivery of possession to her of the cattle while she is still at her father's kraal?

3. If she desires to have the possession and use of these cattle is it necessary that she should reside at her late husband's kraal?

The Native Assessors stated unanimously that the reply to the first two questions was " No " and to the third " Yes ".

This opinion is in agreement with the later decisions of this Court and is accepted as a correct statement of the position at the present time.

In the present case, the plaintiff being no longer at her late husband's kraal—whether she was driven away or left voluntarily is immaterial—is not entitled to the custody of the ubulunga beast and its progeny, much less to their ownership.

The appeal is allowed with costs and the judgment in the Court below is altered to one in favour of defendant with costs.

JAKO NTLIZIYOMBI vs. DOKOLWANA NTLIZIYONBI.

UMTATA: October, 1937. Before H. G. Scott, Esq., President, and Messrs. C. J. N. Lever and J. H. Steenkamp, Members of the Native Appeal Court.

Estate—Enquiry—Legitimacy of Heir—Son born in wedlock is presumed to be legitimate—Onus is on person disputing legitimacy to rebut it.

(Appeal from Native Commissioner's Court, Elliotdale: Case No. 1/1937.)

This was an enquiry before the Native Commissioner at Elliotdale to ascertain the heir of the late Ntliziyombi.

The claimants are Dokolwana Ntliziyombi and Jako Ntliziyombi. It is common cause that Ntliziyombi, the father of the claimants, had as his Great Wife one Nohalafu. As she bore no male children Ntliziyombi married Nojam, a daughter of one Makeleni, and both claimants were born of this woman. It is also common cause that Dokolwana has been in charge of Ntliziyombi's estate for some sixteen years, has brought up the whole family, paid the estate debts; that he was circumcised at Ntliziyombi's kraal and a goat was killed for him by Ntliziyombi's brother, Mandlenkomo, who was in charge of the estate at the time; when Dokolwana got married his dowry was paid out of cattle belonging to Ntliziyombi's estate with the consent of Mohalafu and knowledge of Mandlenkomo. Nojam was dead at this time. Finally that Dokolwana was born after the marriage at Ntliziyombi's kraal. The only point in dispute is as to whether Dokolwana is the issue of the marriage or whether his mother was pregnant with him by another man at the time of the marriage.

Jako's case is that Nojam was seduced and rendered pregnant by one Willie Lumkwana who paid four head of cattle to Makeleni as damages. That as Lumkwana did not pay the fifth beast demanded Makeleni brought a case against him before Chief Gwebindlala who ordered that Willie Lumkwana could not get the child until he paid the fifth beast; that

when Ntliziyombi asked for Nojam in marriage he was informed that she was pregnant but intimated that he did not mind that as he wanted a woman who would bear children. His witnesses assert that when Ntliziyombi married her she was seven months pregnant and Dokolwana was born two months after Nojam came to Ntliziyombi's kraal.

In support of his case the following witnesses have given evidence:—

1. Mhlana, an old man of 80 years of age, who says he was one of Gwebindlala's councillors and was present when Nojam's case was tried. He differs from the other witnesses in that he says that Gwebindlala gave judgment for five head of cattle and four were paid and as the fifth was not forthcoming the child was awarded to Makeleni, whereas the others all say four head were paid without demur by Willie Lumkwana and the case before the Chief was only in respect of the fifth beast. This witness seemed to be very hazy about what actually happened and it is not possible to place any great reliance on his evidence.

2. Mandlenkomo, a younger brother of Ntliziyombi, who was in charge of the latter's estate after his death. He also speaks of the pregnancy of Nojam but his evidence in regard to the case is hearsay as he was not present at the hearing. He says Nojam was seven months pregnant when she married Ntliziyombi. He goes on to say that Dokolmana was taken to Makeleni's when he was weaned as Ntliziyombi said he did not want him as he was another man's son. But his evidence is not worthy of belief. Is it likely that, if Ntliziyombi had sent Dokolwana away because he was not his son, Mandlenkomo would have allowed him (1) to take full charge of the affairs of the kraal, (2) to be circumcised at that kraal and kill a goat for the ceremony, (3) to bring up the whole family, (4) to build a kraal for Ntliziyombi's Great wife and finally, (5) to pay dowry with stock belonging to Ntliziyombi's estate without any real protest.

   Mandlenkomo also says Jako was treated as the heir. He is deliberately lying in saying so because all the evidence on record goes to show that Dokolwana was always regarded and treated as the heir. Mandlenkomo admits that he is on bad terms with Dokolwana and this probably accounts for his support of Jako's claim.

3. Mpotye, a son of Makeleni and brother of Nojam gives somewhat similar evidence to Mandlenkomo, but the value of it is discounted by the fact that he was given a blanket by Jako.

   There is evidence that Mpotye was caught in adultery with the wife of one Mangolo and a blanket taken from him as ntlonze, although he denies this.

   The admitted present of a blanket might account for his advocacy of Jako's case, and his evidence clearly is not disinterested.

4. Kokstad, a younger brother of Mpotye's, also states that Nojam was seven months pregnant when she married Ntliziyombi but he does not appear to know very much about the family affairs. While he admits that Dokolwana was circumcised at Ntliziyombi's kraal he says he knows nothing about the ceremony as Dokolwana went to Ntliziyombi's kraal when he was already old. That seems a very poor excuse for his lack of knowledge of the family affairs.

5. The last witness, Mpayipeli, speaks only of a case before Gwebindlala in regard to one of Makeleni's daughters called Tishana. He does not explain who Tishana is.

Mpotye says Nojam and Tishana are one and the same person but is the only witness who says so. Jako himself did not give evidence.

While we are not prepared to say that there was no enquiry before Chief Gwebindlala we are not satisfied that it was in connection with the woman Nojam.

In support of Dokolwana's case, the following witnesses gave evidence in addition to himself:—

1. Nohalafu, Great Wife of Ntliziyombi.
2. Nono, daughter of Nohalafu.
3. Mabovu, a relative of the parties.
4. Manamana, daughter of Nohalafu.
5. Moyiswa, a brother of Ntliziyombi.
6. Ndonga, uncle of Ntliziyombi.
7. Nqabuko, younger brother of Nojam.
8. Sweligama, brother of Nojam.

These witnesses all swear positively that Nojam was not pregnant when Ntliziyombi married her.

Mr. Starke, an attorney at Elliotdale, also gave evidence, which is of great importance, and is to the following effect:—

"Sometime last year (1936) Jako came to him and claimed his father's estate; he admitted that Dokolwana had been circumcised at his (Jako's) father's kraal and had been in charge of the estate for 16 years although he, Jako, had been a man for seven or eight years. Just prior to Jako coming to see him there had been a quarrel between him and Dokolwana over some cattle. Mr. Starke sent a demand to Dokolwana, who came to see him. He denied that he was illegitimate but otherwise admitted what Jako had said.

In passing it may be remarked that the record does not disclose what Jako had told Mr. Starke beyond the somewhat cryptic sentence: 'He alleged Dokolwana had been born at his father's kraal after his father had married his mother who was also Jako's mother'. This, of course, is not an allegation of illegitimacy for the usual and desirable sequence of events is first the marriage and then the birth of a child.

Mr. Starke went into the matter with the parties and, without deciding the question of Dokolwana's legitimacy, advised him to tender Jako seven head of cattle or their value £21, which was approximately half the estate as it existed at the beginning of 1937.

He advised Jako to accept as, even if Dokolwana were legitimate, Jako and all the members of Ntliziyombi's family had for a period of 15 or 16 years looked upon him as a son of Ntliziyombi and during that time he had never been repudiated. The parties accepted Mr. Starke's advice and on the 25th January, 1937, signed an agreement, the terms of which were:—

'I the undersigned Dokolwana Ntliziyombi of Makaula's Location, in the district of Elliotdale, hereby agree to hand over or pay to Jako Ntliziyombi of the same location, forthwith, seven head of cattle or twenty-one pounds (£21), being in full settlement of all claim which the said Jako may have against me in respect of the estate of my late father, Ntliziyombi. This payment is made in settlement of all disputes and claims made by the said Jako Ntliziyombi up to and including the 22nd January, 1937.

Dated at Elliotdale, this 25th day of January, 1937.
Witnesses:

1. ..... .
2. .....

Dokolwana Ntliziyombi (his X mark).

I, Jako Ntliziyombi, hereby agree to accept payment of the said 7 head of cattle or £21 in settlement of all disputes and claims made by me up to and including the 22nd January, 1937, which claim includes all those made through my Attorney, Mr. J. A. Starke, of Elliotdale.

Jako Ntliziyombi '."

Now, while this document is no proof that Jako accepted Dokolwana's legitimacy, it is direct proof that at that time he accepted cattle from him in settlement of all claims he then had to Ntliziyombi's estate and he is scarcely likely to have done this if he genuinely believed that he was the right heir.

It is of some significance also that it is only after a quarrel arose last year that the matter of Dokolwana's illegitimacy was raised. If he were not the rightful heir it was to be expected that Jako would have asserted his rights immediately he had grown up. Instead of doing that he allows seven or eight years to elapse, allows Dokolwana to manage the estate, pay its debts and care for the whole family including himself. This is strong proof in favour of Dokolwana's contention that he is the legitimate son of Ntliziyombi by Nojam.

As he was born in wedlock the presumption is that he is legitimate and the onus is on Jako to rebut it.

In the opinion of this Court he has failed to do so. On the contrary, we are of opinion that the evidence proves Dokolwana's legitimacy and that the Native Commissioner correctly declared him to be the heir.

The appeal is accordingly dismissed with costs.

SOLOMON PHOMODI vs. JONAS MOSITHELA.

KINGWILLIAMSTOWN: December, 1937. Before H. G. Scott, Esq., President, and Messrs. M. L. C. Liefeldt and D. G. Hartmenn, Members of the Native Appeal Court.

Appeal—Late noting—Application for condonation—Delay in furnishing written judgment—Rule 3 (1) *of G.N.* 2254 *of* 1928—*Condonation refused. Written judgment forms part of record and should not be handed over to attorney applying therefor.*

The judgment in this case was delivered on the 17th September, 1937, and the appeal was noted on the 11th October, 1937, three days after the period prescribed by Rule 6 of Government Notice No. 2254 of 1928 had expired.

Application has now been made for condonation of the late noting on the ground that the delay was caused by the fact that the Native Commissioner had delayed in compliyng with a request for written judgment in terms of Rule 3 (1) of Government Notice No. 2254 of 1928, such written judgment not being received by the appellant's attorney until the 8th October, 1937.

Affidavits in support of the application by appellant's attorney, his clerk and the Clerk of the Court at Reitz were filed.

The Clerk of the Court in his affidavit states that the written judgment was handed to him by the Native Commissioner on the 2nd October, 1937, and that he immediately communicated with the office of appellant's attorney intimating that it was available for him to take delivery whenever he chose. Both the appellant's attorney and his clerk deny that any such intimation was made to them.

Whatever may be the true position the fact remains, as will be seen from the Native Commissioner's further reasons for judgment, that the written judgment applied for was available on the 2nd October, 1937, and appellant's attorney could easily have ascertained that fact seeing that he states he visits the Native Commissioner's office daily.

Rule 3 (1) of Government Notice No. 2254 of 1928 merely provides that the Native Commissioner shall hand to the Clerk of the Court the written judgment which then becomes part of the record. It is then open to the party applying therefor to peruse it and, if he so desires, to take a copy. The rule does not contemplate that such written judgment should be handed over to the party concerned and, in fact, the Clerk of the Court should not do so for he would be parting with a document which forms part of the record.

In the present case he was in error in handing over, as he did, the original judgment to appellant's attorney.

As appellant's attorney could have ascertained the fact that a written judgment had been delivered six days before the period laid down for the noting of the appeal had expired we do not consider that just cause has been shown for granting indulgence.

The application is accordingly dismissed with costs and the appeal struck off the roll with costs.