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1952 (2)

REPORTS

OF THE

NATIVE APPEAL COURTS

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NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 4/52.

MAJOZI *v.* MAJOZI.

PIETERMARITZBURG: 15th April, 1952. Before J. H. Steenkamp, Esq., President, and Messrs. Balk and Oftebro, Members of the Court.

COMMON LAW.

Judgment debt—Tender to pay into Court after judgment—Tender not communicated to judgment creditor—Chief presiding over Court functus officio *once judgment given—Judgment debtor's duty as regards liquidation of judgment debt—Court officials not agents of either party.*

Summary: After a Chief had given judgment, the judgment debtor tendered to that Chief an amount in settlement of the judgment debt; this tender was not communicated to the judgment creditor, who subsequently caused the Chief's Messengers to attach cattle of the judgment debtor.

Held: That as the Chief became *functus officio* once he had pronounced judgment, and as he was not authorised by the judgment creditor to accept any tender made on his behalf, a tender made to such Chief would not liquidate the judgment debt where it was neither communicated to nor accepted by the judgment creditor.

Held further: That it is the duty of the judgment debtor to seek out the judgment creditor and liquidate the judgment debt.

Held further: That the presiding Chief acted in a judicial capacity when he gave judgment and is not thereafter the agent of either judgment creditor or judgment debtor.

Appeal from the Court of the Native Commissioner, Msinga.

Steenkamp (President):—

From the record it appears that the present plaintiff (hereinafter referred to as the "judgment debtor") had, in a previous case, been sued by his father, who is now defendant (hereinafter referred to as the "judgment creditor"), and who had obtained a judgment in the Chief's Court against the judgment debtor for two head of cattle.

After the judgment the judgment debtor took an ox and £3 to the Chief in settlement of the judgment debt. That ox and the £3 were never paid over to the judgment creditor who thereafter approached the Chief to send a messenger to attach the judgment debtor's property in settlement of the judgment debt. This was done about eighteen months prior to the issue of the present summons. The Chief's messenger attached two head of cattle and handed them over to the judgment creditor. The judgment debtor then sued the judgment creditor for the return of the two head of cattle which he alleges should never have been attached, seeing that he had tendered an ox and £3 in settlement of the judgment debt in the previous case.

The Assistant Native Commissioner gave judgment in favour of the present plaintiff (judgment debtor), and against that judgment an appeal has been noted to this Court on the following grounds:—

"1. On the evidence as a whole the Assistant Native Commissioner should have found that the cattle in dispute were not spoliated from plaintiff by defendant but were lawfully attached by the Tribal Messenger in pursuance of the judgment pronounced by Chief Mqati Majozi in the Native Chief's Court, Case No. 151/1949.

2. The Native Commissioner erred in holding that the present plaintiff had settled the judgment in the aforesaid Case No. 151/1949, and should have held that any offer of settlement that was made by the present plaintiff (defendant in Case No. 151/1949) was neither communicated to, nor accepted by, the present defendant (plaintiff in Case No. 151/1949).

3. The Assistant Native Commissioner should have held that Chief Mqati Majozi became *functus officio* once he had pronounced judgment in Case No. 151/1949, and that he had no power thereafter to compel the present defendant (plaintiff in that case) to accept a beast and £3 in settlement of a judgment for two beasts, and the Assistant Native Commissioner should further have held that Chief Mqati Majozi was not authorised by plaintiff to accept a tender of one beast and £3 on his behalf."

These grounds, in my opinion, are well taken, and the Assistant Native Commissioner in his reasons for judgment admits that in his verbal judgment he erred in stating that the judgment debt was extinguished by the offer of settlement made by the judgment debtor. He further states that at that time it seemed to him inequitable and not in accordance with natural justice that an attachment should have been permitted by the Chief while knowing that the judgment debtor had made a tender and that such tender had not been communicated to the judgment creditor. He goes on and states that notwithstanding this mistake on his part, he is of opinion that he gave the correct judgment because—firstly, the tender still stood at the time of attachment and still stands to-day and the Chief could not have authorised the attachment before communicating the offer to the judgment creditor, and only if the offer had been rejected then, and then only, could he have authorised the attachment; secondly that the Chief was not *functus officio* in so far as the consequences of his judgment, viz., communicating the offer of the judgment creditor, and if rejected, authorising the attachment, were concerned; thirdly, since the attachment was wrongful, the judgment debtor had the right to follow up his cattle. It is also stated by the Assistant Native Commissioner that these three reasons of his are in accordance with natural justice. He also seems to be under the impression that a most undesirable state of affairs would arise should an unscrupulous Chief be permitted to misappropriate cattle and moneys paid into Court as tenders and thereafter authorise attachments in respect of the same judgment debts without revealing the tenders to the judgment creditor.

I am afraid that this reasoning of the Assistant Native Commissioner cannot be regarded as sound, as it follows that if a person feels that the Chief's actions were such that he has suffered damage, he has the Common Law remedy to sue for any damages he might have suffered. I fail to see how the judgment creditor should be depireved of his remedy to cause an attachment to be made in respect of a competent judgment in his favour when the debt has not been paid to him personally. A judgment creditor is not concerned with what might have happened between the judgment debtor and the Court officials. After all, when a person has a judgment in his favour, he is entitled to be paid and it is the judgment debtor's duty to seek out the judgment creditor and liquidate the judgment debt. He cannot shield behind the fact that he paid the money into Court without any notification being made to the creditor. It should be emphasized that the Chief acted in a judicial capacity when he gave the judgment and is not thereafter the agent of either the judgment creditor or the judgment debtor.

As is manifest from the evidence, the tender by the judgment debtor, which was not in conformity with the Chief's judgment, was neither communicated to nor accepted by the judgment creditor; and, as is equally clear therefrom, the judgment had not been satisfied when execution was levied, and the attachment in question was a valid one.

In my opinion it follows that the appeal must succeed and that the Assistant Native Commissioner's judgment should be altered to read:—

"For defendant with costs."

Balk (Permanent Member): I concur.
Oftebro (Member): I concur.

For Appellant: Adv. W. G. M. Seymour, instructed by Messrs. Nel & Stevens.

For Respondent: Adv. J. H. Niehaus, instructed by E. Gordon, Esq.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 10/52.

MNTAKA *v.* NGCEMU.

PIETERMARITZBURG: 16th April, 1952. Before Steenkamp, Esq., President, and Messrs. Balk and Oftebro, Members of the Court.

COMMON LAW.

Jurisdiction of Native Commissioner's Court—Section ten (1) (*a*), *Act No.* 38 *of* 1927—"*Matters in which the status of a person in respect of mental capacity is sought to be affected*"—*Plea to the effect that at time contract was entered into, one party to the contract was not in possession of his mental faculties.*

Practice and Procedure: Onus of proof on Defendant.

Summary: Plaintiff sued Defendant *nomine officio* for transfer of land to which Defendant, although not admitting the alleged sale, pleaded that if the contract was entered into as alleged, the seller, who is now deceased, was at that time not in possession of his mental faculties and being *non compos mentis,* he was incapable in law of entering into such contract.

The question of jurisdiction was raised by the Court *a quo* and by the Native Apeal Court.

Held: That the Native Commissioner's Court had jurisdiction to hear the case.

Held further: That the onus to prove that the deceased's mental capacity was impaired to such an extent that the Deed of Sale is not valid was on the Defendant and that as he had failed to discharge such onus, Plaintiff was entitled to succeed.

Cases referred to:
Madhludi *v.* Rex, 26 (1905), N.L.R., 298.
Robinson *v.* Rolfes, Nebel & Co., 1903, T.S. 543.
Bertram *v.* Wood, 10, S.C. 177.
Champion *v.* Meyers, 29, N.L.R., 382.
Spence *v.* Harris, 36, N.L.R., 538.
Jackson & Co. *v.* Eggeling, 1913, T.P.D., 403.
Maduray *v.* Simpson, 1932, N.P.D., 521.
Fortes *v.* City, 1935, C.P.D., 195.
Van Zyl *v.* De Beer, 1940, O.P.D., 145.
De Villiers & Anr. *v.* De Villiers, 1949 (2) S.A., 173 (C.P.D.).
Commissioner for Inland Revenue *v.* Paarl Wine & Brandy Co., Ltd., 1946, A.D., 643.
Murison *v.* Murison (otherwise Smith), 44, N.L.R., 5.
Pather *v.* Rex, 45, N.L.R., 280.

Statutes referred to:
Section *ten* (1) (*a*), Act No. 38 of 1927.
Sections *thirty-seven* (2) and *forty-four* of Act No. 31 of 1917.

Appeal from the Court of the Native Commissioner, Ixopo.

Steenkamp (President):—

In the Native Commissioner's Court the plaintiff sued the defendant in his capacity as executor in the estate of the late J. J. Mntaka for a declaration that plaintiff is entitled to receive transfer of Sub. 1 of the Farm B of B.N. No. 7976, situate in the county of Pietermaritzburg, Province of Natal, in extent 99·9993 acres. Secondly that defendant (or any successor in office) in his capacity as the executor of the estate of the late J. J. Mntaka be and he is ordered to hand over the title deeds of the property farm B of B.N. No. 7976 to the plaintiff or his nominee and to sign all the necessary documents when tendered for signature, in order to give effect to such transfer.

Defendant's plea, although not admitting that the plaintiff had purchased the property in question from the late J. J. Mntaka, avers that if the contract was entered into and alleged in the summons, such contract is invalid by reason of the mental incapacity of the late J. J. Mntaka to enter into such contract, the said Mntaka not being at the time alleged, in possession of his mental faculties and being *non compos mentis* and incapable in law of entering into such contract.

On the day the case was set down for hearing, the Court *a quo* raised the question of jurisdiction in view of the provisions of section *ten* (1) (*a*) of the Native Administration Act. This section reads:—

> "Provided a Native Commissioner's Court shall have no jurisdiction in matters in which the status of a person in respect of mental capacity is sought to be affected."

Attorney for defendant and the attorney for plaintiff were called upon to argue on the question of jurisdiction. After argument the Assistant Native Commissioner ruled that the Native Commissioner's Court *has jurisdiction* to try the issue.

The Assistant Native Commissioner gave judgment in favour of plaintiff, and an appeal has now been noted by the defendant to this Court, the Assistant Native Commissioner's judgment being to the effect that the defendant has not proved that the late J. J. Mntaka, a the time he entered into the contract, was incapable of understanding and appreciating the contract into which he purported to have entered. This Court being doubtful as to whether a Native Commissioner's Court had jurisdiction to decide whether the status of the late J. J. Mntako was that of a person in possession of all his faculties, called upon Counsel for both parties to argue this aspect.

To enable this Court to decide whether section *ten* (1) (*a*) of the Native Administration Act is applicable to a case of this nature, it is necessary to give an interpretation to the meaning of this particular provision in the Act. First of all we have to decide what is meant by the word "status".

From the various authorities and decided cases quoted by my brother Balk in a dissenting judgment, it would seem that to define the word "status" is no easy matter. Every person from the moment he is born has a status, either one acquired by force of law, which I will call an *ipso jure* status, or one acquired by an order of Court. Primarily the status of a human being is that which he acquires by force of law during the various stages of his or her life. Let me, for example, mention that from the date a person is born to the date he reaches 21 years of age, he is, in the eyes of the law, a minor, i.e. his status is that of a minor with resultant contractual disabilities. That status may, by order of Court, be altered at any time during minority and he or she may be assigned the status of a major, which gives him or her certain rights not previously possessed. After reaching majority, the new status so obtained may again *ipso jure* be curtailed, for example, in the case of a female on marriage.

It seems clear to me when we deal with the status acquired by force of law that status continues, and only force of law

can alter it or the Supreme Court of the country has the right at any time, for good cause shown, to alter that status. If a person becomes incapable of managing his affairs, the Court may declare that his mental capacity is affected, and he then receives a status other than that which he enjoyed immediately prior to the order of Court.

If during the time a person enjoys full status (i.e. the status he acquired by force of law on reaching the age of majority which gives him full contractual capacity), he becomes disabled, either by drunkeness or mental abberation, then it cannot be accepted that his status has automatically gone through a process of alteration. Only a Court of Law with jurisdiction to deal with status, may declare a change of status. All I am prepared to say is that the person is suffering from a disability which may only be of a very temporary nature or may be the commencement of a state which will eventually lead to a change of status which only a competent Court of Law may bring about, and until that is done, an Inferior Court may not go further than declare that at the time the contract was entered into the party did not fully realise the purport of the agreement owing to his state of mind. For the same reason an Inferior Court may adjudicate on the question whether an illiterate person understood the document he was signing. It may also decide the question whether intoxication at the time was such that the person did not understand the document. These two examples go to illustrate that incapacity does not necessarily mean an alteration of a person's status and why should mental abberation automatically have such an effect. I cannot see this, and hold the view that only an order of Court with jurisdiction, can alter a person's status. To suffer from certain disabilities, either physical or mental, does not alter status unless so declared by a Court of Law.

In the present case all the plea amounts to is that at the time the contract was entered into, the deceased suffered from a disability recognised by a Court of Law as being sufficient for the impeachment of the contract. It does not suggest, because that disability existed, an automatic change of status took place.

The sub-section of Act No. 38 of 1927, already referred to, in my opinion, seeks to prevent the Native Commissioner's Court from hearing a case in which application is made for the alteration of a person's normal status to that of a person of unsound mind.

I therefore hold that the Native Commissioner's Court had jurisdiction to hear the case. My brother Balk, however, does not agree that the Native Commissioner's Court had jurisdiction.

Oftebro (Member):—

I agree that the Native Commissioner's Court had jurisdiction. My view is that the legislature, whilst conferring very wide jurisdiction upon Native Commissioner's Courts in all civil causes and *matters* between Native and Native, nevertheless, in view of the provisions of the Mental Disorders Act, and the jurisdiction of the Supreme Court thereunder, had to restrict the Native Commissioner's Courts from deciding on the status of a person in regard to mental capacity. In my opinion the object of the proviso [section *ten* (1) (*a*) of Act No. 38 of 1927], is merely to prohibit a Native Commissioner's Court from declaring that a Native is, or is not, mentally disordered or defective. I do not think that it was intended to apply to isolated instances of mental capacity where a contract, as in this instance, is concerned.

Steenkamp (President): Continues on the merits of the case:—

After evidence had been led, the Additional Native Commissioner gave judgment for plaintiff as prayed, with costs, and against this judgment an appeal has been noted to this Court on the following grounds:—

> "1. The learned Additional Native Commissioner erred in rejecting the evidence led by defendant as to the mental capacity of the late Jeremiah Mntaka and such rejection was not justifiable in law.

2. That insufficient weight was attached to the medical evidence for the defendant.

3. That there was sufficient evidence to prove that the late Jeremiah Mntaka suffered from mental incapacity in March, 1947, and at his death in 1949 and the learned Additional Native Commissioner erred in not holding that the onus shifted to respondent (plaintiff in the Native Commissioner's Court) to prove a lucid interval at the time of signature of the agreement.

4. The learned Additional Native Commissioner erred in rejecting the evidence of many of appellant's witnesses on the grounds that they were laymen and in basing his decision on the evidence of respondent's witnesses who were all laymen.

5. That the learned Additional Native Commissioner erred in his refusal to consider the circumstances of the Will in the case and his decision thereon was bad in law."

The facts of the case are that on the 7th May, 1948, a Deed of Sale, drawn up by Mr. Attorney Bulcock, was signed in his presence by the late J. J. Mntaka, whereby he sold to the plaintiff certain portion of a farm already referred to. In this Court, Counsel for defendant (now appellant) confined his argument to the question as to whether the deceased was mentally capable of entering into such an agreement. There is no other dispute, and if this Court finds that the deceased knew what he was doing at the time he signed the document, then the plaintiff (now respondent) must succeed in his claim.

The onus was on appellant to prove that the deceased's mental capacity was impaired to such an extent that the Deed of Sale is not valid.

In support of his allegation the appellant called a medical practitioner by the name of Dr. Hugh Smeath-Thomas, who was a houseman at the King Edward Hospital during the period the deceased was a patient at the Hospital and where he was being treated from the 18th February, 1947, to the 2nd March, 1947, for an illness diagnosed as senile mental changes from which he still suffered on discharge. The deceased was again admitted to the same Hospital in May, 1949, but the medical practitioner who attended him then was not called as a witness.

Here it should be mentioned that deceased died during June, 1949, after a spell in hospital, according to the evidence of appellant. The Deed of Sale was entered into on the 7th May, 1948, i.e. about a year prior to the second time deceased was admitted to hospital and approximately a year and two months after he was first admitted to that institution.

In considering the evidence of Dr. Smeath-Thomas, it must primarily be pointed out that he is not an alienist or psychiatrist, and therefore his evidence is not to be relied upon to the same extent as that of a more experienced medical practitioner. There is, however, one piece of evidence standing out and that is when he states that in his opinion cases of the nature of Jeremiah Mntaka (deceased) may permit of lucid intervals, but on the other hand, a patient may have no lucid intervals at all. He goes on in his evidence and states "a person suffering from senile dementia is still capable of lucid intervals." The doctor then gives his opinion that even during lucid intervals he doubts if a person suffering from senile mental changes would be capable of transacting business so as to appreciate all the aspects involved and the *sequelae* of such business.

This is a very doubtful expression, especially as the doctor also states that he is unable to say to what extent the deceased's business acumen was affected by the condition "senile mental changes" as observed by him.

Sight must not be lost of the fact that the doctor only had the deceased under observation for a period of about fourteen days and there is no medical evidence to indicate whether deceased's condition deteriorated or improved and what his mental state was at the time the contract was signed.

Even if we accept the evidence of the various witnesses who are able to testify as to the deceased's mental behaviour from the time he was discharged from the hospital the first time, we must be satisfied that when he appeared before Mr. Attorney Bulcock, his mind was such that he suffered from a legal disability to enter into contract.

It must be remenbered that deceased owed the Land Bank some money and he instructed Mr. Bulcock to remit £400, being the sale price of the land, to that Bank. Now, for deceased to remember his indebtedness to the Land Bank, he could not have been in such a mental state that he was unable to transact business. Mr. Bulcock had known deceased and his wife, who accompanied him, for many years, and to him deceased appeared to be perfectly normal. Mr. Bulcock is certain that deceased understood what he was doing and even mentioned that the reason for the sale was to discharge the major portion of the bond held by the Land Bank on the property. This evidence of Mr. Bulcock of what deceased said to him confirms that deceased knew what he was doing.

Reference has been made to a will signed by deceased on the 4th March, 1947, a photographic copy of which is attached to the record as Exhibit J.2. I do not think much importance can be attached to the will which *ex facie* would appear to be of no consequence seeing that we are dealing with an event which occured more than a year later. The handwriting in the Will is that of deceased and if anything, it strengthens the assumption that even after discharge from hospital the first time, the deceased was still able personally to write out such an important document as a will, notwithstanding the doctor's evidence that his mind was not sound.

There is one significant factor in the case on which no argument was offered by either Counsel. I refer to the correspondence that took place between Mr. Bulcock, Attorney for respondent, and Mr. Arenstein, Attorney for appellant, at the time the administration of the estate was being attended to. On the 30th November, 1949, Mr. Arenstein requested Mr. Bulcock to forward to him the diagram of the property in question. This was done by Mr. Bulcock, who, at the same time, advised Mr. Arenstein that a client of his had purchased 100 acres of the property and that he required the Deed of Grant and Title to enable him to pass transfer. This letter was acknowledged by Mr. Arenstein with a promise to communicate with Mr. Bulcock again. A reminder was sent on the 12th January, 1950, to which a reply was received to the effect that appellant was not in possession of the immediate Title and that he was still awaiting further instructions from the Master of the Supreme Court before he decided to make application to certify the copy of the missing transfer.

Now, if appellant had any misgivings about the sale of the property, he would, through his Attorney, have challenged the sale by his father, but he did not do so and must, at the time, have been satisfied that a valid sale had taken place.

In my opinion the appeal should be dismissed with costs. The fees under items 4 and 5 of the Tariff are increased to £4. 4s. respectively.

Oftebro (Member): I concur.

Balk (Permanent Member): Dissentiente:—

This is an appeal against the whole of the judgment of the Court of Native Commissioner at Ixopo, given in favour of the plaintiff (present respondent) in an action in which his claim against the defendant (present appellant) who was sued in his capacity as executor of the estate of the late J. J. Mntaka (hereinafter referred to as "the deceased"), was firstly for a declaration that he (plaintiff) was entitled to receive transfer of certain land which he had purchased from the deceased, and secondly for an order that the defendant take the necessary steps to effect that transfer.

The defendant, without admitting the alleged contract of sale, pleaded *inter alia* that if in fact it had been entered into, it was invalid by reason of the mental incapacity of the deceased at the time he did so.

The grounds of appeal are confined to the merits of the case.

Before proceeding with the hearing of this action on its merits, the presiding Additional Native Commissioner in the Court *a quo* raised the question of his jurisdiction *proprio motu*, to determine whether or not it was ousted by the proviso to sub-section (1) of section *ten* of the Native Administration Act, 1927, in view of the defendant's plea that the alleged contract of sale was invalid by reason of the *mental incapacity* of the deceased at the time at which he had entered into it.

After hearing argument by the Attorneys for the parties on that point, the judicial officer concerned found that he had jurisdiction and tried the case to its conclusion.

Although the Additional Native Commissioner's finding that he had jurisdiction is not one of the issues raised in the relative notice of appeal, Counsel for the parties were called upon, after due notice, to argue that matter before this Court as its determination is fundamental to the proceedings in the Court below, since the parties cannot confer on that Court a jurisdiction expressly excluded by Statute if in fact it is so excluded.

Except for the limitations imposed by the proviso to sub-section (1) of section *ten* of the Native Administration Act, 1927, a Court of Native Commissioner has, in terms of that sub-section, an unfettered jurisdiction in respect of civil causes between Native litigants.

The only of those limitations with which we are concerned in the instant case, reads as follows:—

> "Provided that a Native Commissioner's Court shall have no jurisdiction in matters in which—
>
> (*a*) the status of a person in respect of mental capacity is sought to be affected;"

This leads to a twofold enquiry, viz., the meaning of the proviso concerned and its effect on the otherwise unfettered jurisdiction of the Court *a quo* in the present action.

Counsel for appellant contended that that Court had jurisdiction, in that the word "status" implied something with a degree of permanence, so that the limitation concerned applied only when the matter in issue was the declaration of a person as a mentally disordered or defective person and not when it concerned his mental capacity to enter into an isolated transaction.

Counsel for respondent also contended that the Court below had jurisdiction. He sought to distinguish between mental capacity and mental ability, but these terms appear to be synonomous, *vide* Mahludi *v.* Rex, 26 (1905), N.L.R., 298, at page 303. He further submitted that the criterion was the declaration of a person as mentally disordered or defective and not his mental ability in an isolated transaction. But to my mind that submission is untenable in that a person who has been declared to be mentally defective can subsequently, during a lucid interval, enter into a valid contract, see Wille's "Principles of South African Law" (Third Edition) at page 140 and the authorities quoted in note 37 at the foot of that page.

The word "status" is not defined in the Native Administration Act, 1927, nor in the Interpretation Act, 1910. It therefore seems to me that the expression "status of a person" should be given that shade of its accepted meaning as is dictated by its present context and construed as—"the position which a *persona* occupies in the eye of the law", *vide* Bell's South African Legal Dictionary (Third Edition), and Madhludi *v.* Rex 26 (1905), N.L.R., 298 at pages 303 to 305, and 310. Apart from its relation to the status of a person, the expression "mental capacity" is in no way restricted in its application by its present context, so that "mental capacity to enter into a contract" appears to fall within he ambit of the proviso in question. This view gains support from the following passage in Lee's "Introduction to Roman Dutch Law" (Third Edition) at page 118:—

> "It is tempting to speak of unsoundness of mind as constituting a status, but it would not be correct to do so for mental unsoundness is not necessarily permanent or constant and a question which must be answered is not—'has the man been declared mad?', but 'was he in fact incapable of understanding the particular transaction which is brought in issue'?"

In other words, it is mental capacity to enter into a transaction that constitutes a status.

In my opinion it follows that once the mental incapacity of a person to have entered into a contract forms the basis of any claim or counterclaim in a civil action between Native litigants, it constitutes a matter affecting such person's status within the meaning of the said proviso and ousts the jurisdiction of a Native Commissioner's Court in such an action; and the fact that the person whose mental capacity is in question, is dead at the time of the action, does not appear to affect the position that the jurisdiction is ousted since the criterion is not *litis contestatio* but the time at which such person entered into the contract, see the above-quoted excerpt from Lee's publication.

But can it be said that these principles ought to be applied in a case as the present, wherein the mental incapacity of a person to have entered into a contract does not form the basis of a claim or counterclaim, but is in issue solely as a defence?

The correct common law view in cases in which it is necessary for the Court to give a finding upon a matter beyond its jurisdiction in order to decide a claim within its jurisdicton appears to be that set out in the following passage of the judgment in Robinson *v.* Rolfes, Nebel & Co., 1903, T.S. 543, at pages 549 and 550:—

> "But where the only issue before the Magistrate is the claim, and that is upon the face of it within his jurisdiction, surely his duty is to decide it. The fact that a defence is raised which goes to the merits of the claim, and involves the consideration of a matter in itself outside his jurisdiction is to my mind no sufficient reason why the Magistrate should not come to a conclusion upon the claim."

It is true that a contrary view was expressed in Bertram *v.* Wood, 10, S.C. 177, but the weight of subsequent decisions indicates that Robinson's case (supra) was correctly decided, see Champion v. Meyers, 29 N.L.R. 382, Spence v. Harris, 36 N.L.R. 538, Jackson & Co. *v.* Eggeling, 1913 T.P.D. 403, Maduray *v.* Simpson, 1932 N.P.D. 521, Fortes *v.* City 1935 C.P.D., 195, Van Zyl *v.* De Beer, 1940, O.P.D. 145, and De Villiers & Another *v.* De Villiers, 1949 (2), S.A. 173 (C.P.D.).

The Appellate Division decision in Commissioner for Inland Revenue *v.* Paarl Wine & Brandy Co., Ltd., 1946, A.D. 643 does not appear to be in point as it seems to be based entirely on the provisions of sub-section (2) of section *thirty-seven* of the Magistrates' Courts Act, 1917, and there are no corresponding provisions in the Native Administration Act, 1927.

It is of interest that in the Fortes and Van Zyl cases (supra) the view was expressed that sub-section (2) of section *thirty-seven* probably owed its introduction in the Magistrates' Courts Act, 1917, to the decision in Robinson's case (supra). It is also of interest that that sub-section, which is appended, has been re-enacted in identical terms in the present Magistrates' Courts Act (No. 32 of 1944):—

> "37. (2) Where the amount claimed or other relief sought is within the jurisdiction, such jurisdiction shall not be ousted merely becausc it is necessary for the Court, in order to arrive at a decision, to give a finding upon a matter beyond the jurisdiction."

But if I understand the judgments in Robinson's and the subsequent cases (supra) correctly, the decisions therein are based upon the fact that the relevant Magistrates' Courts enactments imposed no other restrictions upon the Magistratc's jurisdiction

than a limitation based upon the sum or value of the right or matter claimed; or where such enactments contained other limitations upon the jurisdiction, those limitations had no application, see the report of Robinson's case at pages 545, 547, 548, 551 and 552 and the reports of the other cases referred to above.

I have also referred to Murison *v.* Murison (otherwise Smith), 44, N.L.R., 5, and Pather *v.* Rex, 45, N.L.R., 280. In Murison's case, which was an application for a maintenance order, it was held that where the defence was that the applicant was not the respondent's wife, the Magistrate had jurisdiction to decide upon the validity of the marriage, regard being had to section *thirty-seven* read with section *forty-four* of the Magistrates' Courts Act, 1917. In the other case it was laid down that the Magistrate had jurisdiction to decide the paternity of an illegitimate child in adjudicating upon a charge of contravening section *three* of the Childrens' Protection Act, 1913. But here too, neither of the incidental matters, i.e. the validity of the marriage and the paternity of the child, were expressly excluded from a Magistrate's jurisdiction by the Magistrates' Court Act then in force (No. 32 of 1917) *vide* section *forty-four* of that Act.

The position appears to be entirely different in the instant action. Here the jurisdiction of a Native Commissioner's Court is expressly excluded as it seems clear in the light of what has been said above, that the proviso to sub-section (1) of section *ten* of the Native Administration Act, 1927, in so far as it relates to any matter in which the status of a person in respect of mental capacity is sought to be affected, applies, and as, to my mind, the language of that portion of the proviso is so wide that it necessarily postulates an intention by the legislature to include within its ambit all cases in which such status is brought in issue irrespective of whether by way of defence or otherwise. It must be added that where that issue is raised as a defence, this must be done, not with the intention merely to oust the jurisdiction, but *bona fide* as, from the evidence, appears to be the case in the present action; see the cases quoted in the last paragraph on page 85 and the first paragraph on page 86 of Jones and Buckle's "Civil Practice of Magistrates' Courts in South Africa" (Fifth Edition).

I therefore come to the conclusion that the jurisdiction of the Native Commissioner's Court was ousted in the instant action by the said proviso.

In the result I am of opinion that the appeal should be allowed, that the finding of the 29th June, 1951, by the Court *a quo* that it had jurisdiction to try this case, and its ultimate judgment of the 21st January, 1952, on the merits, should be set aside and that in lieu thereof an entry be made on the record that the Court *a quo* had no jurisdiction in this action.

I do not think the evidence recorded by the Court below should be set aside as it, or at least some of it, was necessary to prove that the defence was raised bona fide and not merely to oust the jurisdiction of that Court.

In my view there should be no order as to costs both in this Court and in the Court below, as the parties did not, in either of these Courts, take the point on which the appeal has succeeded.

The majority of this Court having held that the Court *a quo* had jurisdiction, I agree that the appeal on the merits must fail.

For Appellant: Mr. G. W. Clulow of Ixopo.

For Respondent: Adv. J. H. Niehaus, instructed by Mr. G. H. Bulcock of Ixopo.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 25/52.

MTIYANE *v.* MNCWANGO.

MTUBATUBA: 22nd April, 1952. Before Steenkamp, President, Balk and Fenwick, Members of the Court.

COMMON LAW.

Law of Contract—Application of doctrine of undue enrichment—witnessing of agreements between Natives.

Summary: Plaintiff claimed £5 for services rendered by him to defendant. A Chief's Court having given judgment for £2 in plaintiff's favour, defendant successfully appealed to the Native Commissioner's Court on the grounds that the services were rendered in return for shelter which defendant had given to plaintiff for a period of 12 months. Plaintiff thereupon appealed to the Native Appeal Court.

Held: That the services were rendered as a *quid pro quo* for shelter which plaintiff had received from defendant and consequently the doctrine of undue enrichment cannot be advanced in this case.

Held further: That it is usual for agreements between Natives to be made in front of witnesses.

Appeal from the Court of the Native Commissioner, Nkandhla.

Steenkamp (President):—

In the Chief's Court the plaintiff (present appellant) obtained judgment for £2 and costs on the claim of £5 which he alleged the defendant owed him for certain services rendered at the kraal of defendant while plaintiff was residing there. The defendant was not satisfied with the judgment and he appealed to the Additional Native Commissioner who upheld the appeal, and entered judgment for defendant with costs. Against that judgment an appeal has been noted on the following grounds:—

" 1. That such judgment is against the evidence and the weight of evidence.

2. That the learned Native Commissioner erred in holding that on the evidence adduced, the plaintiff had failed to prove that he was entitled to remuneration as alleged either on contract or on the doctrine of unjust enrichment or on any other grounds."

It is common cause that the plaintiff was living at the kraal of a man by the name of Majozi. He had a quarrel with Majozi and then, with the permission of the defendant, lived at the latter's kraal. He apparently went there to stay only for a few days until he could make other arrangements, but this visit of his extended to twelve months, and during the time he stayed there he performed certain services, i.e. he built or repaired a cattle kraal, a mealie-stalk shelter and stable.

The Additional Native Commissioner in well prepared reasons found the following facts proved:—

" 1. Plaintiff went to defendant's kraal after having left that of Majozi as the result of a quarrel.

2. Plaintiff resided at defendant's kraal for approximately twelve months.

3. Whilst at defendant's kraal plaintiff repaired a stable and a kraal and erected a mealie-stalk shelter there.

4. Defendant told plaintiff to leave his kraal as he had been there long enough.

5. When told to leave the kraal plaintiff did not raise any question of money owing to him, or of a quarrel."

These facts are supported by the evidence. The Additional Native Commissioner has considered all the aspects of the evidence adduced before him and it is abundantly clear that plaintiff is only claiming the amount of £5 because defendant, after plaintiff had received shelter for twelve months, informed him it was now time to leave.

As pointed out by the Additional Native Commissioner in so far as the question of unjust enrichment is concerned, it is customary between Natives to render each other assistance in regard to building operations at their kraals without there being any question of payment therefor in cash. I also agree that this is especially the case where persons are residing, either temporarily or permanently, at the kraal of another person.

If there had been an agreement between the plaintiff and the defendant that the defendant would pay for his services, the agreement would have been made in front of witnesses, which, in this case, was not done. I fail to see how the doctrine of undue enrichment can be advanced in the present case. It is a question of a *quid pro quo* for shelter which plaintiff had received from the defendant.

In my opinion the appeal should be dismissed with costs.

Balk (Permanent Member): I concur.

Fenwick (Member): I concur.

For Appellant: Mr. W. E. White of Eshowe.

Respondent in default.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 6/52.

SITOLE *v.* SITOLE.

DURBAN: 28th April, 1952. Before Steenkamp, President, and Messrs. Balk and de Vries, Members of the Court.

PROCEDURE.

Practice and procedure—Forwarding of records of cases in which appeals have been noted—Noting of appeal—Unstamped notice of appeal delivered prior to coming into force of new rules—Document stamped after such rules came into force—Security given on the 9th January, 1952, *for* £5.

Summary: The original and copies of the record of proceedings therein, which is a short one, were received by the Registrar *four months* after the relative notice of appeal had been delivered to the Clerk of the Court, and only a few days before the date fixed for the hearing of the appeal. A similar position exists in another case from the same centre. The notice of appeal, unstamped, was delivered to the Clerk of the Court on the 24th December, 1951. The stamps were sent to and affixed by the Clerk of the Court after the 1st January, 1952. Security in the amount of £5 only was given on the 9th January, 1952.

Held: That as the prolonged delay in forwarding the records to the Registrar seriously impeded the necessary preparatory work by members of this Court in the two cases from this centre, these lapses could not be allowed to pass, and the Registrar was directed to transmit a copy of these comments to the Secretary for Native Affairs.

Held further: That as the appeal was not properly noted until after the 1st January, 1952, the new rules published under Government Notice No. 2887 of 1951, apply, and that security in the amount of £7. 10s. should be deposited.

Statutes referred to:

Rules 6 and 8 of Government Notice No. 2254 of 1928.
Rules 5 (3) and 32 (2) of Government Notice No. 2887 of 1951.

Appeal from the Court of the Native Commissioner, Durban.

Balk (Permanent Member):—

Judgment in this case in the Court *a quo* was entered on the 4th December, 1951, and the relative notice of appeal was delivered to the Clerk of that Court timeously, but it is doubtful whether it was stamped within the prescribed period of twenty one days, since Counsel for appellant intimated to this Court that the stamps in question had been forwarded with other matter, which reached the said Clerk of the Court on the 9th January, 1952; moreover the security for respondent's costs of appeal in the form accepted by the said Clerk of the Court was lodged after the expiry of the said prescribed period.

Whilst the wording of the relevant Rules of this Court (Nos. 6 and 8, published under Government Notice No. 2254 of 1928) and that of the corresponding Magistrates' Courts Rule (No. 47) is admittedly not identical, the intention underlying them is, to my mind, substantially the same, viz., that the giving of security for the respondent's costs of appeal forms part and parcel of the act of noting of the appeal, i.e. the noting of the appeal is not complete without the giving of such security, since to hold otherwise postulates the respondent's being obliged to take steps to meet the appeal without security for his costs and so involves him in potential loss which could hardly have been contemplated by the legislature.

In the case of appeals from judgments of Magistrates' Courts, it has been held that security for the respondent's costs of appeal must be given within the prescribed period of *twenty-one* days and that such security must be for the full amount. [See the authorities cited on page 406 of Jones & Buckle's "Civil Practice of the Magistrates' Courts" (Fifth Edition).] In my view that position also obtains as regards appeals to this Court since, as pointed out above, the object of the relevant Rules in both Courts is substantially the same.

The security in question in the instant case, in the form accepted by the Clerk of the Court *a quo,* was not lodged until the *9th January,* 1952, and then only in the sum of £5. It follows that in terms of sub-rule 32 (2) of the new Rules of this Court published under Government Notice No. 2887 of 1951, those Rules apply in the present case, and that security should have been given in the sum of £7. 10s. as required by sub-rule 5 (3) of those Rules.

On the application of Counsel for appellant, this matter was adjourned until the next session of this Court at this centre to enable him in the interim to take the necessary remedial steps in the light of the foregoing comments.

Another matter in connection with the present case calls for comment. The original and the copies of the record of proceedings therein which is a short one, were received by this Court *four months* after the relative notice of appeal had been delivered to the Clerk of the Court *a quo,* and only a few days before the date fixed for the hearing of this appeal. This prolonged delay seriously impeded the necessary preparatory work by the members of this Court in this case. An equally lengthy delay occurred in the transmission of the record in an appeal from the judgment of the same Court in another case which had also been set down for hearing during this session at this centre. Obviously these lapses could not be allowed to pass, and the Registrar has been directed to transmit to the Secretary for Native Affairs a copy of these comments.

Steenkamp (President): I concur.

De Vries (Member): I concur.

For Appellant: Mr. A. D. G. Clark of Messrs. Clark & Robbins, Durban.

For Respondent: Mr. L. H. Catterall of Messrs. Robinson & Catterall, Durban.

NORTH EASTERN NATIVE DIVORCE COURT.

N.D.C. CASE No. 446/51.

NDIMANDE *v.* NDIMANDE.

DURBAN: 7th May, 1952. Before J. H. Steenkamp, Esq., President.

COMMON LAW.

Husband and wife—Divorce on ground of adultery—Allegation that husband sterile when his wife conceived, not proved.

Summary: Plaintiff, the husband, sued his wife for divorce on the grounds of adultery, alleging that he was sterile, being a crypsorchid, and that although he had carnal intercourse with his wife at the time she conceived, he could not be the father of the child born to her because of such alleged sterility.

Held: That as one case where spermatozoa was found in the fluid emitted by a crypsorchid is known, such one affirmative instance is sufficient for all purposes of the law to overthrow ninety-nine negative instances.

Held: Further that as a physiological fact, it is obvious that the organs which have not descended are not always defective in structure or function.

Held further: That as intercourse between husband and wife at all material times is admitted, and as there is no evidence that plaintiff was sterile when his wife conceived, no adultery has been proved, especially in view of defendant's denial on oath that she ever, during the subsistence of the marriage, had intercourse with any other man.

Steenkamp (President):—

The plaintiff (husband) sues his wife (defendant) for divorce on the grounds of adultery with some unknown person.

The defendant gave birth to a child on the 21st March, 1951, of which plaintiff alleges he is not the father.

Intercourse at all appropriate times is admitted by plaintiff, but he bases his action on the submission that he was sterile and could not be the father of the child his wife bore.

He is supported by Dr. Samuel McMahon, an Urologist of Durban.

Before dealing with the medical evidence it is necessary to give a resumé of plaintiff's evidence, which is to the effect that the defendant is his second wife—having married her on the 29th June, 1937. He divorced his first wife on the grounds of adultery, but during the subsistence of that marriage she bore him three children—the third being the adulterine child, which gave rise to the divorce. He states that he accepted the position that he was the father of the first two children, but he now has his doubts in view of what the Doctor has told him. Plaintiff also admits that during 1950, i.e. during the subsistence of the present marriage, he paid £30 damages to the parents of a girl he was accused of having rendered pregnant.

The medical evidence is to the effect that plaintiff first consulted Dr. McMahon on the 3rd May, 1948, because he suffered from undescended testicles on both sides (i.e. plaintiff was a crypsorchid. After treatment, plaintiff was operated on to bring the right testicle down to the scrotum. The operation was partially successful. Later on, towards the end of the same year, an operation was performed to deal with the left testicle. Plaintiff was discharged from hospital about the end of January, 1949. It is to be noted that prior to these operations, or even for a reasonable period thereafter, no examination of the spermatic fluid was carried out.

Plaintiff consulted Dr. McMahon again on the 5th March, 1951, for the purpose of having his spermatozoa tested. It was then found that he was sterile. It is on this evidence that plaintiff relies that he could not have been the father of the child born on the 21st March, 1951. He called a witness by the name of Octavia Ndimande, who states that she saw defendant in the company of a man by the name of James Ngcobo, but her evidence is such that no reliance can be placed thereon.

It is true the Doctor's evidence is that he is even prepared to say that it was impossible for plaintiff to be the father of the child. Later on he states: "I think we can assume that he (plaintiff) has always been sterile." He also states: "If a specimen had been examined at the time he (plaintiff) was operated on, then I think he would have been found to have no sperm." Again the Doctor states: "I could not answer the question that when I brought the testicles down that plaintiff would immediately become fertile, without the actual examination of the fluid at any time."

Reading into the evidence of the Doctor, I come to the conclusion that although, in his opinion, it was unlikely that plaintiff had ever been fertile, it is not impossible.

I come to this conclusion not without authority, as according to Taylor's "Principles and Practice of Medical Jurisprudence" Vol. II on page 287 et seq, in one case Casper found spermatozoa in the fluid emitted by a crypsorchid. The authors further state that one affirmative instance is sufficient for all the purposes of the law to overthrow ninety-nine negative instances; and, as a physiological fact, it is obvious that the organs which have not descended are not always defective in structure or function.

There is no evidence that the operation performed on this crypsorchid in any way brought about any sterility. There might have been other causes of which there is no evidence that brought about the sterility as found by the Doctor on the 5th March, 1951. This does not follow that plaintiff was sterile at the time his wife, the defendant, conceived. Intercourse is admitted at all material times.

I therefore conclude in holding that no adultery has been proved, especially in view of defendant's denial on oath that she ever, during the subsistence of the marriage, had intercourse with any other man.

Judgment is entered for defendant with costs.

For Plaintiff: Mr. Clark of Messrs. Clark & Robins, Durban.

For Defendant: Adv. R. W. Cowley, instructed by Messrs. Cowley & Cowley, Durban.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 19/52.

NOMPENXELA *v.* MANQOMNTU.

PORT ST. JOHNS: 26th May, 1952. Before Sleigh, President, Wilbraham and Thorpe, Members of the Court.

NATIVE LAW AND CUSTOM.

Native Appeal Case—Native Custom—Nqoma *cattle and increase being claimed by heir—Heir—Liable for debts and obligations of his father—Heir would be liable for shop debts if the proprietor was a Native—Heir would be liable even if he inherited nothing—Cattle—Value of not challenged.*

Summary: Respondent is the son and heir of the late M and appellant is heir of the late Mgqobozi. Many years ago M *Nqomaed* two heifers to Mgqobozi. These increased and it is common cause that when M died there were five in Mgqobozi's possession. After hearing evidence the Native Commissioner gave judgment for respondent for delivery of four cattle or payment of their value £10 each. Appellant has appealed.

Held:

(1) That the Native Commissioner was correct in accepting the evidence for respondent.

(2) That in Native Law a contractual obligation incurred must be discharged if not by the debtor, then by his heir, even if the heir derived no benefit from the estate.

(3) If contract was according to Common Law the heir would be liable only to extent to which he has benefited by the estate.

Cases referred to:

Ngqandulwana *v.* Gomba, 4, N.A.C. 132.
Letlotla *v.* Bolofo, 1947, N.A.C. (C. & O.), 16.
Umvovo *v.* Umvovo, heard at Kokstad on 11.2.52.
Magidela *v.* Siwintshi, 1943, N.A.C. (C. & O.), 52.

Appeal from the Court of Native Commissioner, Tabankulu.

Sleigh (President), delivering the judgment of the Court:—

This is an appeal against a judgment for plaintiff (now respondent) for delivery of four cattle or payment of their value at £10 each.

Respondent is the son and heir of the late Manqomntu and appellant is the heir of the late Mgqobozi. Many years ago Manqomntu *nqomaed* two heifers to Mgqobozi. These increased and it is common cause that when Manqomntu died there were five in Mgqobozi's possession.

Respondent's mother states that after her husband's death (respondent then being a minor) she went with Mandimandeni to see Mgqobozi who told them in the presence of appellant that the cattle had increased to seven, but that one had been attached and another had been paid as dowry for appellant's wife. He promised to replace these two cattle out of the dowry of his daughter. Mandimandeni confirms this evidence. Appellant denies all knowledge of this statement by Mgqobozi. He states that the *Nqoma* cattle had increased to eight when Manqomntu awarded Mgqobozi a red cow, and about three years later awarded him a white cow. Thereafter one of the original cattle died and its death was reported to Manqomntu, leaving five cattle which came into his (appellant's) possession after the death of Mgqobozi.

Respondent states that after the death of Mgqobozi he went to see appellant who told him that he had received five cattle from Mgqobozi and that two had died in the latter's possession. In this Court it is contended that Mgqobozi could not have made to the two women the report they mention because respondent would have known of it and consequently challenged appellant's statement that the cattle had died and, as he did not challenge it, the women's evidence is false and should be rejected. The evidence is, however, also capable of the inference that respondent did know that appellant's statement was false and did not challenge it because, since Mgqobozi had promised to replace the two cattle from his daughter's dowry, it made no difference whether the cattle had died or been disposed of. In our opinion, the Assistant Native Commissioner has rightly accepted the evidence of the two women in preference to that of appellant, because the latter's statement, to the effect that there was no increase after the first award was made, is so improbable that it must be false.

It is further contended that appellant would be liable as heir for the debts of Mgqobozi only to the extent to which he has benefited by the estate. If this contention is correct then the judgment in respect of these two cattle should have been one of absolution from the instance, since there is no evidence that appellant inherited anything. The contention is, however, entirely in conflict with the previous decisions of this Court. (See Ngqandulwana *v.* Gomba, 4, N.A.C., 132; Letlotla *v.* Bolofo, 1947, N.A.C. (C. & O.), 16; and Umvovo *v.* Umvovo, heard at Kokstad on 11th February, 1952, and not yet reported.] Counsel for appellant, however, contends that the law among the Pondos is different. At his request the question was referred to the native assessors whose opinion is annexed. It will be seen that the custom among the Pondos is the same as among the other tribes. The assessors go so far as to say that the heir would also be liable for shop debts if the proprietor was a native. That undoubtedly is strict Native Law; when a contractual obligation has been incurred it must be discharged, if not by the debtor himself, then by his heirs, and thus even if the heir derived no benefit out of his estate. But Native Law in this respect has been modified by statute. If one of the litigants is a non-native, the action is triable by the Magistrate's Court which is precluded from applying Native Law. If both parties are natives and they contracted according to Common Law, and one of them became liable under the contract, e.g. for payment of a debt due on a promissory note or for goods supplied by a general dealer, then the action must, in terms of section *eleven* (1) of Act No. 38 of 1927, be determined according to Roman-Dutch Law [see Magidela *v.* Sawintshi, 1943, N.A.C. (C. & O.), 52], and in that case the heir would be liable only to the extent to which he has benefited by the estate. Where, however, the deceased had incurred a contractual obligation under Native Law, as in the present case, the heir would be liable even if he inherited nothing. The contention advanced by counsel for appellant consequently fails.

We now turn to the question of the remaining two cattle. When Mgqobozi died respondent was a young man but not yet married. He states that after Mgqobozi's death he went with a man, who has since died, to see appellant about the cattle, and that the latter told him that there had been two increase but that two of the cattle had died. On being questioned appellant could not explain why he had not reported these deaths. Respondent goes on to say that he then demanded that appellant replace the cattle alleged to have died, and that the latter promised to do so. Thereafter on his mother's instructions he removed the five cattle and on this occasion as well as on two subsequent occasions he demanded these as well as the other two cattle, but was put off on the pretext that a permit could not be obtained for the removal of the cattle from the kraal where they were. On one of these occasions respondent was accompanied by Nonqandana

who supports his evidence. Appellant denies that he informed respondent that there had been two increase and two deaths. He also denies that respondent demanded four cattle from him although he admits that respondent complained to the headman. He maintains that there were no increase or deaths and that he accounted for all the cattle which came into his possession.

Unfortunately the record is silent as to the ages of the five cattle which were removed. Respondent knew that there were five cattle when his father died. If these were the cattle he received from appellant they must have been old and respondent would naturally have wanted to know where the increase were. (There were three female cattle among the five.) On the other hand if some of the cattle, judging from their apparent ages, were born after Manqomntu's death, respondent would require appellant to account for the missing cattle. In either case respondent would not have been satisfied that the five cattle produced were all that he was entitled to. The Native Commissioner was therefore correct in accepting the evidence that appellant did say that there had been two increase and two deaths, and since the deaths were not reported appellant is liable, in Native Law, to replace them, as well as the two cattle used by Mgqobozi whose daughter has since married.

One of the grounds of appeal is that there is insufficient proof that the value of the four undescribed and unknown cattle is £10 each. The only evidence on this point is respondent's statement that he values the cattle at £10 each. This valuation was not challenged either in the plea or during the hearing and, in any case, since the judgment is in the alternative it is open to appellant to pay cattle if he considers that the value is too high.

The appeal is dismissed with costs.

OPINION OF NATIVE ASSESSORS.

Names of Assessors: Mdabuka Mqikela (Lusikisiki), Nobulongwe Masipula (Flagstaff), Lanyanzima Mvinjelwa (Port St. Johns), Tolikana Mangala (Libode), Nombekile Libode (Ngqeleni).

Question: A man lends another cattle under *Nqoma* custom. When he goes to inspect them he finds that two are missing and is told that one was attached by the Messenger of the Court and the other impounded for dowry by his daughter-in-law's people where it had been sent to be trained. He is promised by the borrower that he will replace these cattle from the dowry of his daughter but he dies before his daughter is married. Is his heir liable to replace these two cattle?

Answer (per Tolikana): He is liable to replace those cattle. Even if his father had not promised to replace them he must still meet his father's obligations.

(Per Mdakana): I support. The heir is liable to pay all his father's debts. Others agree.

Question: Assuming that a beast, lent to make up a span of oxen. died and the borrower failed to report its death, must the heir of the borrower replace it?

Answer (per Nombekile Libode): The heir must replace because that is his father's debt, especially as the death was not reported.

Others agree.

Question: If a native buys some sugar and a suit of clothes from a native trader, pays for the sugar, but is still owing the money for the clothes when he dies, is his heir liable for this debt?

Answer (per Lanyanzima): Yes.

Question: Even if the heir inherited nothing?

Answer (per Lanyanzima): He must pay.

(Per Nobulongwe): I agree. It is right that he must pay the native trader.

Others agree.

Question: In the circumstances of the first question, if both the missing cattle had died and the heir had inherited nothing?

Answer (per Tolikana): The heir is obliged to pay because he is bound by his father's obligations even if he inherited nothing.

Others agree.

For Appellant: Mr. Birkett, Port St. Johns.

Respondent: In default.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 20/52.

NONGQUNGQU *v.* **MTUTI.**

PORT ST. JOHNS: 26th May, 1952. Before Sleigh, President, Wilbraham and Thorpe, Members of the Court.

NATIVE LAW AND CUSTOM.

Native Appeal Case—Dowry—Claimed by heir—Practice and Procedure—Court not prepared to take point mero moto.

Summary: It is common cause that the late N was related by her father to M, the father of plaintiff; that N had a number of children including a girl G; that G had a number of children; that some of her girls have been given in marriage and what remains of their dowries is in the possession of G. It is alleged that neither N nor G ever married and that plaintiff, as heir of M is entitled to the dowries of G's daughters. The defence is that N married Mabulula and G married L, according to Native Custom and consequently plaintiff had no right to the dowries of the girls; that both Mabulula and L are dead and their heirs are Mbana and Mpandla respectively. The Native Commissioner entered judgment for plaintiff and appellant has appealed.

Held:

(1) That the Native Commissioner's finding was correct.

(2) That neither N nor G ever married.

(3) That respondent is entitled to the dowry of G's daughters.

(4) That both heirs were present at the trial and gave evidence for G and could have intervened had they so desired.

Appeal from the Court of Native Commissioner, Ngqeleni.

Sleigh (President), delivering the judgment of the Court:—

It is common cause that the late Nozinjeyi was allotted by her father to Mtuti, the father of plaintiff (now respondent); that Nozinjeyi had a number of children including a girl, Gcude (now appellant); that Gcude also had a number of children including the girls Nontwanazana, Nomakenqe, Nondobayina, Nomadangatya and Sigunza; and that some of the girls have been given in marriage and what remains of their dowries is in the possession of appellant.

It is alleged in the particulars of claim that neither Nozinjeyi nor appellant ever married and that respondent, as the heir of Mtuti, is therefore entitled to the dowries of appellant's daughters. He claims a declaration of rights in respect of these daughters and delivery of the dowry cattle in appellant's possession or payment of their value.

The defence briefly is that Nozinjeyi married Mabulula, and appellant married Luwaka Kupiso, according to Native Custom,

and consequently respondent has no right to the dowries of the girls, that both Mabulula and Luwaka are dead and their heirs are Mbana and Mpandle Ngonjana respectively.

The Assistant Native Commissioner entered judgment for plaintiff (respondent) and appellant has appealed on the ground that the judgment is against the weight of evidence and the probabilities.

At the hearing of the appeal Mr. Birkett, who appeared for appellant, stated that he was unable to attack the judgment on its merits. We agree that the evidence supports the Native Commissioner's finding that neither Nozinjeyi nor Gcude ever married and consequently respondent is entitled to the dowry of Gcude's daughters.

Mr. Birkett, however, raised the point that Gcude was in the eyes of the law a minor and could not be sued unassisted especially by her guardian. This point was not canvassed in the Court below. It is a legal objection which should have been taken in the Court below within the time prescribed by Rule 1 (1) of Order XII of Proclamation No. 145 of 1923 and as the objection was not so taken it could not thereafter be raised without leave of the Court [see Rule 1 (2)]. Mr. Birkett, however, asked the Court to take this point *mero moto*.

Native Appeal Court Rule 22 provides that the appellant shall be limited to the grounds stated in his notice of appeal. There may be cases in which this Court, which is virtually the highest Court open to native litigants, may, in order to avoid an injustice, take of its own motion a point not raised in the notice of appeal but this is not such a case.

It is alleged in the particulars of claim that appellant was denying respondent's legal rights to the dowries of the girls and he had to sue her in order to obtain redress. He would have been well advised as a preliminary step to apply to the Court for the appointment of a *curator ad litem* but no injustice has resulted from his failure to do so as both the heirs (according to her version), were present at the hearing of the case and gave evidence for her and could have intervened had they so desired.

Mr. Crowther for respondent applied for the increase of the fee for conducting the appeal on the ground that he was involved in considerable work in preparing notes to meet the appellant's arguments on the merits of the case. The record is not unduly long and no difficult legal issues are involved; moreover Mr. Crowther was the attorney of record and should therefore be familiar with all the facts of the case. The application is therefore refused.

The appeal is dismissed with costs.

For Appellant: Mr. Birkett, Port St. Johns.

For Respondent: Mr. Crowther, Ngqeleni.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 34/52.

DUBE *v.* DUBE.

PRETORIA: 9th June, 1952. Before Steenkamp, President; Balk and Smithers, Members of the Court.

COMMON LAW.

Practice and Procedure—Application for "Mandament van Spolie"—Disposing of issue of fact on affidavits.

Summary: Plaintiff claimed to have been unlawfully and forcibly ejected from premises by defendant, and defendant filed affidavits alleging that plaintiff had in fact consented to leave, whereupon the Court *a quo* disposed of the matter on the affidavits, dismissing the application.

Held: That in a case of this nature the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence.

Held further: That as the weight of evidence on the dispute of fact in this case is in favour of the respondent, the Native Commissioner was correct in disposing of the matter as he did.

Cases referred to:

Peterson *v.* Cuthbert & Co., Ltd., 1945, A.D., 219.

Hilleke *v.* Levy, 1946, A.D., 214.

Nienaber *v.* Stuckey, 1946, A.D., 1049.

Appeal from the Court of the Native Commissioner, Volksrust.

Balk (Permanent Member): Dissentiente:—

Just cause having been shown, the late noting of the appeal is condoned.

Application was made in the Court of the Native Commissioner at Volksrust for a "mandament van spolie" in respect of certain property situate in the Volksrust Municipal Location (hereinafter referred to as "the property"), the applicant (present appellant) averring in his supporting affidavit that he had been in peaceful and undisturbed possession of the property on the 5th February, 1952, when the respondent had wrongfully, unlawfully and forcibly ejected him therefrom.

An interim order for the restoration of possession of the property to the applicant and a rule *nisi* calling upon the respondent to show cause on the 28th March, 1952, why that order should not be made final were granted by that Court on the 13th idem.

The respondent filed a replying affidavit in which he denied that the applicant had been in peaceful and undisturbed possession of the property. He also denied therein that he had wrongfully, unlawfuly or forcibly ejected the applicant from the property and averred that the applicant had consented to vacate it. The respondent filed other affidavits in support of his contention.

On the return day which was anticipated by the respondent after due notice, the matter came before the Court *a quo* on the affidavits and that Court, after hearing argument by the respondent's attorney and the applicant's reply to its enquiry whether he wished to address it, discharged the interim order on the 24th March, 1952.

It seems to me on examination of the alleged dispute of fact in this case that there is in truth a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence, viz., the issue whether or not the applicant finally consented to vacate the property; that being so, the Court *a quo* should have intimated that it could not reach a decision on the affidavits and that evidence was to be led for the proper determination of the matter, see Hilleke *v.* Levy, 1946, A.D., 214.

I am therefore of opinion that the appeal should succeed and regret that I am unable to concur in the learned President's judgment.

Steenkamp (President):—

I have read my brother Balk's judgment and agree that the late noting of the appeal should be condoned. There are two aspects of the case which militate against the appellant, viz., firstly the fact that applicant (now appellant) has waited about five weeks after the alleged eviction before applying for a "mandament of spolie" and secondly that applicant has not filed any replying affidavits.

On the first question I have consulted the case of Nienaber *v.* Stuckey, 1946, A.D., 1049, in which the question of delay in applying for relief was discussed. In that case the applicant did not act promptly. There was a delay from the 17th September to the 11th January, i.e., nearly four months. The learned Judge of Appeal remarked as follows:—

> "But whatever the cause of the delay, there is no warrant for holding that the appellant (applicant) thereby lost his remedy. On the contrary, the last passage cited from Wassenaer (Ch. 13, Art. 1) makes the remedy available for a year [see also *Voet* (43.16.6 and 7)]. It is true that Savigny on "Possession" (pp. 406 *et seq.*) describes this remedy as *possessorium summariissimum*, but I think the adjectival qualification refers not to the period within which the remedy must be claimed, but to the procedure of the Court in dealing with the application. I express no opinion on the question whether the Court has a discretion to refuse an application where, on account of the delay in bringing it, no relief of any value can be granted."

This passage, quoted from the judgment of Greenberg (J.A.), does not peremptorily lay down that delay does not prejudice applicant's application for a spoliatory order, and I think the surrounding circumstances of the matter must be considered in the light of any apparent probability that the applicant might have acquiesced in the action taken by respondent, and I think this is where the time factor plays a prominent part. One would expect a person who has been evicted from a house to take immediate steps to have himself re-instated and not to wait from the 5th February, 1952, to the 13th March, 1952. His failure to take immediate steps in such an important matter certainly prejudices his claim in a spoliatory application. By this I do not mean that an action must be instituted immediately and as stated by the Native Commissioner in his reasons for judgment when he discharged the interim order, applicant is not without the remedy of an action.

It is observed that certain allegations are made in the affidavit by respondent and in the affidavits made on his behalf by other persons, and if the contents of these affidavits are the truth, then the applicant cannot succeed in his application. He has not denied these allegations. There is only one affidavit by the applicant and that is the one in support of his application for an interim order. That affidavit is in general terms. The affidavits made on behalf of respondent give specific details and one would expect applicant to deny these categorically.

The applicant was not represented, however, and I realise that the failure to file a replying affidavit should not be held to be fatal to his case. As already stated, there is evidence that he recognised by implication the right of the respondent to the premises, and in these circumstances it is only necessary to decide if the issue could be decided without *viva voce* evidence. It is clear from the judgment in the case of Hilleke *v.* Levy, 1946, A.D., at page 219, quoting Peterson *v.* Cuthbert & Company, Limited (1945, A.D., 420), that "in every case the Court must examine the alleged dispute of fact and see whether in truth there is a real issue of fact which cannot be satisfactorily determined without the aid of oral evidence"; I am satisfied that the weight of evidence on the dispute of fact in this case is in favour of the respondent, and the Native Commissioner was correct in disposing of the matter as he did.

The appeal is therefore dismissed with costs.

Smithers (Member): I concur in the judgment of the learned President.

For Appellant: Mr. Michel of Messrs. Helman & Michel, Johannesburg.

For Respondent: Adv. C. J. Mouton, instructed by Messrs. Kuit & Mortimer, Volksrust.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE. No. 21/52.

NYANDA *v.* KOHLISO.

KOKSTAD: 9th June, 1952. Before Sleigh, President, Wilkins and van Aswegen, Members of the Court.

NATIVE LAW AND CUSTOM.

Native Appeal Case—Heir—Presumptive heir according to Native Custom—Native Custom—"Custodian" or "keeper" has no authority to sue on behalf or in name of absconding owner of kraal—Presumptive heir's duty to take action for preservation of absconder's property.

Summary: V, the alleged brother and heir of plaintiff sued defendant for delivery of 6 cattle or their value £60 being the value of 6 cattle sold by defendant. It is clear the plaintiff is an absconder and that V is his presumptive heir according to Native Custom; that when plaintiff left for Johannesburg 19 years ago he left 11 cattle with one Mkwayi for safe keeping. Shortly thereafter, defendant falsely represented to Mkwayi that he received a letter from plaintiff instructing him to obtain possession of the cattle. The cattle were handed over and the defendant has since sold 6 and has appropriated the proceeds for his own use.

Held:

(1) That a "custodian" or "keeper" has no authority to sue on behalf or in the name of an absconding owner of a kraal.

(2) That the presumptive heir's duty is to take action for the preservation of absconder's property.

(3) That if the owner is an absconder his heir has a right in Native law to represent him in any dispute concerning property.

(4) That judgment of absolution cannot be granted at this stage.

Cases referred to:

Mdontsa *v.* Fumbalele, 1946, N.A.C. (C. & O.), 68.

Ketabahle *v.* Mpamba, 1937, N.A.C. (C. & O.), 193.

Qolo *v.* Ntshini, 1 N.A.C. (S), 234.

Bower *v.* Divisional Council of Albany, 7 E.D.C. 211.

Geldenhuys *v.* Keller, 1912, C.P.D., 623.

Appeal from the Court of Native Commissioner, Maclear.

Sleigh (President) delivering the judgment of the Court:—

Valiko Nyanda, the alleged brother and heir of the plaintiff, sued defendant for delivery of 6 cattle or payment of the sum of £60 being the value of 6 cattle sold by defendant. In the particulars of claim it is alleged that the plaintiff left for work on the mines in Johannesburg about 19 years ago and has not been heard of since; that when he departed for Johannesburg he left certain cattle, his property, with one Mkwayi, to look after for him; that shortly thereafter defendant falsely represented to Mkwayi that he had received a letter from the plaintiff instructing him to obtain possession of the cattle from Mkwayi and thus induced the latter to hand over to him 11 head of mixed cattle: that defendant has since sold 6 of the cattle and has appropriated the proceeds to his own use; that there are still 6 cattle belonging to the plaintiff in defendant's possession; that the average value of cattle in the district where the parties reside is £10 per head; and that in view of defendant's dishonest

dealings with plaintiff's property he is not a fit and proper person to have or continue to have possession of the plaintiff's property.

Apart from admitting that the plaintiff went to work in Johannesburg and that the average value of cattle is £10, the plea amounts to a bare denial of the allegations in the summons.

It is clear from the evidence that the plaintiff is an absconder and that Valiko is his presumptive heir according to Native Custom; and the uncontraverted evidence is that when the plaintiff left for Johannesburg he left 11 cattle with Mkwayi, being 6 cattle paid by Noveldt as dowry for plaintiff's sister and 5 other cattle he inherited, that defendant obtained possession of these cattle and sold 6 and that there are still 6 cattle in his possession.

During the course of his evidence Valiko stated that plaintiff stayed with defendant before he left for the mines and that he appointed defendant as his representative to look after his interests while he was away. In view of this evidence, defendant's attorney applied, at the close of plaintiff's case, for absolution judgment. This was granted, the Native Commissioner holding that Valiko had failed to establish his right to represent the plaintiff, especially in view of his admission that plaintiff had appointed defendant as his representative. The Native Commissioner referred to Madontsa *v.* Fumbalele, 1946 [N.A.C. (C. & O.), 68], and held in effect that the principles enunciated in that case do not apply in the present case.

Valiko now appeals. The ground of appeal briefly is that the Native Commissioner erred in ruling that the conditions laid down in *Mdontsa's* case do not apply when the absconder has himself appointed a representative.

In support of his judgment that Native Commissioner quoted the following passage from the judgment in Madontsa's case, viz:—

> "Secondly the right to sue will be confined to the person who in Native Law has the right to the control of the property, that is, the absentee's representative according to Native Law and, if the representative is himself an absconder, then the next person in line of succession and so on . . . It is inadvisable to concede the right to other members of the family, if the legal representative is available."

In that case one of the native assessors stated: "If the elder brother does not take action, a younger brother can claim the property in opposition to the elder brother." This Court considered that if the elder brother (the heir) was available, it would be inadvisable to concede a right of action to the younger brother. The Court was there referring not to the appointed representative, i.e. the eye, custodian or keeper of the kraal, but to the legal representative according to native custom.

The "custodian" or "keeper" of a kraal has certain rights and obligations [see Ketabahle *v.* Mpamba, 1937, N.A.C. (C. & O.), 193, and Qolo *v.* Ntshini, 1 N.A.C. (S) 234], but nowhere, as far as I am aware, has this Court ruled that he has authority to sue on behalf of or in the name of the absconding owner of the kraal. Unless he is the heir, his authority is limited to the supervision of the affairs of the owner and it is his duty to resist outside illegal interferance with the owner's property. If there is such interferance native custom probably expects him to report to the owner, or the senior member of the owner's family, for such action as the occasion may require. In Ketabahle's case (*supra* at p. 196) the native assessors expressed the opinion that a "keeper" would not be liable to replace any stock disposed of for the benefit of the kraal. But defendant is not the "keeper" of the kraal of plaintiff, since the latter had no kraal of his own. If it is correct that defendant was authorised to obtain possession of the cattle for safekeeping he is in the position of a bailee and can resist by legal action outside interference (see Bower *v.* Divisional Council of Albany, 7 E.D.C. 211 and Geldenhuys *v.* Keller, 1912, C.P.D. 623). But what is the position if he himself has abused his trust and the owner is an absconder? In that case it is not only the right of the

presumptive heir of the absconder but his duty to take action for the preservation of the absconder's property. The dispute is then not between the bailee and a third person but between the bailee and the owner. If the latter is an absconder his heir has the right in native law to represent him in this dispute. The Native Commissioner consequently erred in holding that Valiko has failed to establish his right to represent the plaintiff.

But in this Court it is contended that in any event there is no evidence that defendant's dealings with the cattle was fraudulent and that in the absence of such evidence this Court should confirm the judgment of absolution. There is uncontradicted evidence that defendant disposed of six head of cattle without consulting Valiko as the presumptive heir, as he should have done in accordance with Native Custom. Further, there is the evidence that the eleven cattle which came into defendant's possession about 19 years ago have increased to only twelve. There may be an explanation for this, but it can come from the defendant only, and in the absence of such explanation the probability is that he has appropriated the normal increase which could have been expected. Valiko has thus made out a *prima facie* case and consequently judgment of absolution on this point cannot be granted at this stage of the action.

The appeal is allowed with costs, the judgment of the Court below is set aside and the record is returned to that Court for further hearing.

For Appellant: Mr. W. Zietsman, Kokstad.

For Respondent: Mr. Elliott, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 22/52.

UMVOVO *v.* UMVOVO.

KOKSTAD: 9th June, 1952. Before Sleigh, President, Cockcroft and Wilkins, Members of the Court.

LAW OF PROCEDURE.

Native Appeal Case—Appeal—Leave to appeal to Appellate Division granted—Practice and Procedure—Native Commissioner's decision on the exception cannot be challenged successfully—Whether the Native Commissioner exercised a proper discretion in deciding the case according to Native Law—Native Custom—Heir liable for obligations of his father—Costs to abide the final determination of the case—Consent for leave to appeal to the Appellate Division of the Supreme Court. Held:

(1) That Native Commissioner's decision as well as this Court's decision on the exception cannot be challenged successfully.

(2) That an heir in Native Law is liable for his father's obligations.

(3) That point to be taken on appeal is whether the Native Commissioner exercised a proper discretion in deciding the case according to Native Law.

Application succeeds.

Cases referred to:

Umvovo *v.* Umvovo, 1, N.A.C. (S), 97 and 190.

Ngqandulwana *v.* Gomba, 4, N.A.C., 132.

Dlumti *v.* Sikade, 1947, N.A.C. (C. & O.), 47.

Nompenxela *v.* Manqomntu, heard at Port St. Johns on 26th May, 1952.

Application for consent to apply for leave to appeal to Appellate Division on a judgment of the Southern Native Appeal Court dismissing an appeal from the Court of Native Commissioner, Umzimkulu.

Sleigh (President), delivering the judgment of the Court:—

On 11th February, 1952, this Court dismissed an appeal brought by present applicant against a judgment in favour of present respondent for the sum of £40 and costs. The consent of this Court is now sought, in terms of section *eighteen* (1) of Act No. 38 of 1927, to an application being made to the Appellate Division of the Supreme Court for leave to appeal.

The points which applicant desires to take on appeal are as follows:—

1. That the judgment of the Native Commissioner's Court at Umzimkulu, as confirmed by this Honourable Court on appeal, in dismissing the defendant's exception to the summons as disclosing no cause of action, was wrong in Law for the reasons:—

   (*a*) That prior to the annexation of the Transkei and East Griqualand in terms of Act No. 38 of 1877 (Cape) and Proclamation No. 110 of 1879, private individual ownership of land was unknown to Native Custom and it was neither alleged in plaintiff's claim nor proved by any evidence that any Native Custom in any way affecting such ownership has now become grafted on to Native Law or Custom;

   (*b*) That the registered rights of ownership of the defendant and his father before him in the farm Roodeval in the Umzimkulu district (which district falls within the Annexed Territories above referred to) were acquired by defendant and his father respectively, entirely by operation of Common Law wherefore any agreements affecting such ownership fall to be interpreted entirely by Common Law principles;

   (*c*) That under Common Law the Exception was sound and should have been upheld.

2. That after dismissing the aforesaid Exception the decision of the said Native Commissioner's Court to apply Native Law and Custom to the trial of the action was wrong in Law and wrongly confirmed on appeal by this Honourable Court.

3. That under Common Law or even under any alleged Native Custom the defendant's action in ejecting plaintiff from the farm Roodeval by process of Law issued in pursuance of a judgment of a competent Court cannot and did not give rise to any claim for *damages* and the decision of the aforesaid Native Commissioner's Court and this Honourable Court in awarding any damages and costs to plaintiff is wrong in Law.

4. That defendant's sixth ground of appeal as from the Native Commissioner's Court to this Honourable Court raising the plea of *res judicata* under Common Law in so far as any claim for *damages* is concerned, should have been upheld.

At the hearing of the application Mr. Zietsman, who appeared for applicant, requested the Court to add a fifth point, namely, that the finding in regard to the payment of rent is against the weight of the evidence. This point is not arguable since the evidence as to the payment of rent is largely hearsay.

By consent it is recorded that the parties in this case are the same as those in the cases Umvovo *v.* Umvovo reported in 1 N.A.C. (S.) at pages 97 and 190.

The original exception to the summons as disclosing no cause of action attacks the summons on the ground that applicant is

not liable for any loss which respondent may have suffered as the result of the exercise by applicant of his lawful rights. This is a good defence under Roman Dutch Law for, generally speaking, the exercise of a lawful act resulting in loss to another does not give rise to a claim for damages. The same principle applies in Native Law, but when the action is based on contract and one party has fulfilled his part of the contract and the other party has died before fulfilling his part, then his heir is obliged under Native Law to honour the agreement. If it is not possible for the heir to do so or if he repudiates the contract, he is bound to make restitution, if not of the original thing given then in kind [*vide* Ngqandulwana *v.* Gomba, 4, N.A.C., 132; Dlumti *v.* Sikade, 1947, N.A.C. (C. & O.), 47; assessors' opinions in the present case; and Nompenxela *v.* Manqomntu, heard at Port St. Johns on 26th May, 1952, not yet reported].

The Native Commissioner in deciding the question whether the summons disclosed a cause of action had to confine himself to the allegations in the particulars of claim. Pleadings in Native Commissioner's Courts are not generally drawn with that precision that one expects to find in a Supreme Court, but the summons does, in effect, allege that in consideration of certain assistance given by respondent to applicant's father, Maqayekana, the latter promised that respondent could reside on the farm until his death; that applicant as heir of Maqayekana is liable, in Native Law, for the latter's debts and obligations (see paragraph 12); that instead of honouring the agreement entered into with Maqayekana, as applicant was bound to do under Native Law, he ejected respondent from the farm (see paragraph 10 read with paragraph 12); and that as a result of this ejectment respondent has suffered loss (paragraph 14). Here then is a complete cause of action.

It is, however, alleged in paragraph 1 (*b*) of the present application that since applicant's rights of ownership in the farm were acquired by operation of Common Law, any agreement affecting such ownership falls to be interpreted entirely by Common Law principles. This is a point which was not relied upon in the exception. The submission overlooks the possibility of agreements among residents of communally occupied land in regard to the reservation, cutting and division of thatch grass, the location, digging and use of mealie pits, and agreements in regard to *buqisa* (i.e. the right of a resident of communally occupied land to graze his stock on the reaped lands of other residents). These agreements are governed by principles recognised by Native Custom. The submission also violates the elementary rule relating to the interpretation of contracts, namely, to ascertain and give effect to the intention of the parties. Since the agreement between Maqayekana and respondent was verbal, it was necessary to hear evidence of the surrounding circumstances in order to obtain a true picture of the nature of the contract and of what the parties contemplated. If, therefore, the submission is correct, the Native Commissioner would have to rely on evidence to ascertain whether the summons disclosed a cause of action. This he is not permitted to do.

Paragraph 1 (*a*) of the application was also not relied on in the exception. Here too evidence would be necessary and, in any event, it was not respondent's case that the principles of private individual ownership have become grafted on to Native Law. His case is that the farm was communally occupied from the start, and that the principles governing communal occupation apply.

In our opinion the Native Commissioner's and this Court's decision on the exception cannot be challenged successfully. We consequently refuse our consent to the exception being argued on appeal, especially as the points relied on can be taken under paragraph 2 of the present application.

Paragraph 2 goes to the root of this case. The action was brought under Native Law and applicant's case was based on Roman-Dutch Law. In terms of section *eleven* (1) of Act No. 38 of 1927, the Native Commissioner had a judicial discretion to decide the case according to the principles of Roman-Dutch Law

or Native Law. He applied the latter system. The sole question is whether he exercised a proper discretion. If not, then the plea of *res judicata* must prevail and the judgment should have been one for defendant (the present applicant). We, therefore, consent to the following point being taken on appeal:—

> "Whether, having regard to all the circumstances of the case, the Assistant Native Commissioner exercised a proper discretion, in terms of section *eleven* (1) of Act No. 38 of 1927, in deciding the case according to Native Law."

By consent the costs of this application are to abide the final determination of the case.

NORTH EASTERN NATIVE APPEAL COURT.

N.A.C. CASE No. 115/51.

BALOOI *v.* **BALOOI.**

PRETORIA: 10th June, 1952. Before Steenkamp, President, Balk and Smithers, Members of the Court.

NATIVE CUSTOM.

Practice and Procedure—Appeal struck off the roll—Application for re-instatement—Penalising client for Attorney's negligence.

Vindicatory action—Summons containing claim for alternative value of cattle—Action accordingly no: spoliatory but vindicatory—Action to be taken by owner.

Summary: Plaintiff, a widow, sued defendant for the return of cattle, or their value, which she alleged defendant removed from her possession. She was assisted in the action by her late husband's brother and heir.

Held: That this was not a case where the client should suffer for his Attorney's negligence to the extent of being denied access to his Court of Appeal and that the application for re-instatement on the roll should be granted.

Held further: That as an alternative value was claimed in the summons the action was vindicatory and not spoliatory and accordingly vindicatory action for the recovery of the cattle could only be maintained by the actual owner, not by the plaintiff, who merely held the cattle temporarily on behalf of such owner.

Cases referred to:

Rose & Ano. *v.* Alpha Secretaries, Ltd., 1947 (4), S.A., 511 (A.D.).

Groenewald *v.* van der Merwe, 1917, A.D., 233.

Xulu *v.* Xulu, 1936, N.A.C. (T. & N.), 38.

Mbata *v.* Ntuli, 1938, NA.C. (T. & N.), 187.

Martheze *v.* Rescue Works Committee of the D.R.C., 1927, C.P.D., 23.

Johnson *v.* McDonald & Ors., 1941, C.P.D., 235.

Appeal from the Court of the Native Commissioner, Pietersburg.

Balk (Permanent Member):—

This is an application for the re-instatement on the roll of an appeal which was struck off therefrom for want of prosecution.

The appeal was noted timeously and it is clear from the affidavit filed in support of the application that the applicant intended

that the appeal should be prosecuted and was in no way to blame for this not having been done; he left this matter in the hands of his Attorney who, in the affidavit referred to above, explains that the prosecution of the appeal escaped his notice owing to the moving of his practice, involving the transfer of an accumulation of files to another office.

It seems to me therefore that this is no more a case in which the client should suffer for his Attorney's negligence to the extent of being denied access to his Court of Appeal than was Rose and Another *v.* Alpha Secretaries, Ltd., 1947 (4) 511 (A.D.), see in particular the antepenultimate paragraph on page 519 of the report of the judgment in that case.

The application was accordingly granted.

The plaintiff (present appellant), duly assisted by Matseka Balooi who, according to the evidence, is her late husband's eldest brother and as such her guardian, brought an action in the Native Commissioner's Court at Pietersburg against the defendant (present respondent) for the recovery of certain six head of cattle or alternatively their value £75, averring in her particulars of claim that—

"(1) plaintiff is Shalati Balooi, the widow of the late Jack Balooi and is herein assisted as far as need be by Matseka Balooi, a brother of her late husband;

(2) defendant is Stephen Balooi also a brother of the late Jack Balooi;

(3) early in March, 1951, there were six (6) head of cattle in the lawful possession of the plaintiff, which cattle were then taken away from plaintiff's possession by the defendant without plaintiff's permission or consent;

(4) notwithstanding legal demand defendant refuses or neglects to return the said six head of cattle to the plaintiff."

The defendant in his plea admitted that he had removed the six head of cattle concerned from the plaintiff's place of residence but denied all the other allegations contained in paragraph 3 of the particulars of claim; alternatively he pleaded that he was the owner of those cattle and therefore entitled to remove them. He also preferred the following counterclaim:—

"Defendant (now plaintiff in reconvention) claims against plaintiff (now defendant in reconvention) as follows:—

1. During the lifetime of plaintiff's husband Jack Balooi, defendant lent to the said deceased four head of cattle and the sum of £5, at the said Jack Balooi's special instance and request.
2. The said four head of cattle and £5 were required by the said Jack Balooi to pay lobola for his son's wife, Raisebe.
3. The said Raisebe subsequently deserted Jack Balooi's son and the said Jack Balooi thereupon reclaimed the cattle.
4. Notwithstanding numerous requests for the return of the said four head of cattle, the £5 and one progeny, the said late Jack Balooi refused or neglected to comply with defendant's request.
5. Before the action could be taken for the return of the loan, the said Jack Balooi died.
6. Defendant then demanded the return of the loan from the plaintiff. Plaintiff refused to hand the cattle back.
7. Whereupon defendant drove six head of cattle to his own kraal. The six head of cattle comprises four head of cattle originally loaned to plaintiff's husband, 1 beast in lieu of payment of £5, one progeny;

wherefore defendant claims that he is the owner of the said six head of cattle."

After the plaintiff had closed her case, the presiding Assistant Native Commissioner in the Court *a quo*, on the application of the defendant's Attorney, dismissed the summons with costs and thereupon also dismissed the counterclaim with no order as to costs.

The appeal against this judgment is brought on the following grounds:—

"(1) That the judgment is bad in law in that the Court should have found that the action is one of spoliation and not a vindicatory action.

(2) That the finding of the Court was bad under Native Law and Custom in that the Court should have found that the plaintiff (assisted by her guardian) has the necessary *locus standi* in the absence of a male heir to the lapa to prosecute the action whether one of spoliation or vindicatory.

(3) That the decision of the Court in stating that the counterclaim falls away is bad in law in that the defendant in his counterclaim avers that he lent cattle to plaintiff's late husband to enable the latter to pay dowry for a wife and thus even if defendant's contention is established it could not have been contemplated that the same cattle would be returned to him as they would have been handed over to the father of the second wife. As defendant (plaintiff in reconvention) would have lost ownership in them he cannot now ask for a declaration of rights in them and the Court should have given judgment for the plaintiff (defendant in reconvention) on the counterclaim."

The claim in the instant case was not confined to the recovery of the cattle in question inasmuch as the summons also contained a claim in the alternative for their value so that the action is a vindicatory and not a spoliatory one, see "The Civil Practice of the Magistrates' Courts in South Africa" by Jones & Buckle (Fifth Edition) at page 55 and the authorities there cited.

It emerges from the evidence that the cattle concerned were the property of the plaintiff's late husband (hereinafter referred to as "the deceased") and that the latter's eldest brother, Matseka Balooi, who assisted her in this action, is the deceased's heir; further that the plaintiff held those cattle temporarily on Matseka's behalf so that the question of juristic possession does not arise, see Groenewald *v.* van der Merwe, 1917, A.D., 233.

It is not altogether clear from the evidence whether or not the cattle in question accrued to the plaintiff's house and thus constituted house property; but this aspect is immaterial in the present instance since, according to the evidence, the deceased died leaving no male descendants and those cattle thereupon, in either event, formed kraal property and, as is also manifest from the evidence, devolved under the relevant system of Native Law on the deceased's eldest brother, Matseka. That being so, Matseka was the owner of those cattle when the defendant removed them and therefore only he could maintain a vindicatory action for their recovery, the plaintiff having no *locus standi* to do so, see Xulu *v.* Xulu, 1936, N.A.C. (T. & N.), 38, Mbata *v.* Ntuli, 1938, N.A.C. (T. & N.) 187, Marthezc *v.* Rescue Works Committee of Dutch Reformed Church, 1927, C.P.D. 23, and Johnson *v.* Macdonald & Others, 1941, C.P.D., 235.

It is also obvious that in the circumstances of this case the counterclaim preferred by the defendant did not disclose a cause of action as against the plaintiff, see Xulu's and Mbata's cases (supra), and Counsel for appellant did not, in fact, press the third ground of appeal.

I am therefore of opinion that no good grounds have been advanced for disturbing the well-reasoned judgment of the

Assistant Native Commissioner concerned and that the appeal should accordingly be dismissed with costs.

Steenkamp (President), I concur.

Smithers (Member): I concur.

For Appellant: Mr. A. Jones of Messrs. Lunnon & Tindall, Pretoria.

Respondent in default.

SOUTHERN NATIVE DIVORCE COURT.

N.D.C. CASE No. 23/52.

SIHIYA v. SIHIYA.

KOKSTAD: 11th June, 1952. Before Sleigh, President.

COMMON LAW.

Native Divorce Case—Marriage by Christian Rites—Bigamous marriage—Marriage declared null and void ab initio*—Child—Illegitimate child is not legitimated by a putative marriage of parents—Claim for Maintenance refused.*

Summary: Plaintiff sued defendant for restitution of conjugal rights. Defendant counterclaimed for (1) an order declaring the marriage null and void; (2) an order declaring her child, Titus to be legitimate; (3) custody of the child; (4) maintenance for the child; and (5) costs of suit.

At the hearing the claim in convention was abandoned.

Held:

(1) That the marriage is declared null and void *ab initio*.

(2) That an illegitimate child is not legitimated by a putative marriage of the parents.

(3) That the claim for maintenance is refused at present.

(4) That the custody of the child is awarded to plaintiff in reconvention.

(5) That defendant in reconvention pay the costs of this action.

Cases referred to:

Bam *v.* Bhaba, 1947, (4) S.A. (A.D.), 804.

Potgieter *v.* Bellingan, 1940, E.D.L., 264.

Exparte Soobiah & Ors. in re Estate Pillay, 1948, (1) S.A. (N), 882.

H *v.* C, 1929, T.P.D., 992.
Lionel *v.* Hepworth, 1933, C.P.D., 481.
Exparte J., 1951, (1) S.A. (O), 665.

Native Divorce Court Case.

Sleigh (President):—

Plaintiff, alleging malicious desertion, sued defendant for restitution of conjugal rights failing which a decree of divorce. Defendant alleged that when plaintiff married her he was the lawful husband of Elizabeth Sihiya (born Lindi). She counterclaimed for (1) an order declaring the bigamous marriage between plaintiff and herself null and void; (2) an order declaring her child, Titus Dalewonga, to be legitimate; (3) the custody of the child; (4) maintenance for the child at the rate of 10s. per month; and (5) costs of suit.

At the hearing of the case the claim in convention was abandoned and the trial was thus confined to the claim in reconvention.

The facts of the case are not in dispute. On 28th April, 1941, defendant in reconvention (herein referred to as plaintiff) married Elizabeth Lindi according to Christian Rites, community of property being excluded. During the same year he seduced plaintiff in reconvention (herein referred to as defendant), and rendered her pregnant. As a result she gave birth to the child Titus in June, 1942. On 7th December, 1943, he married her in the Magistrate's Court, Kokstad, Elizabeth then being still alive. Although defendant knew that Elizabeth had been living with plaintiff, she was not aware that he was married to her. Elizabeth worked at Franklin and disappeared in 1943 or 1944. It is not known whether she is still alive. Some time after the marriage defendant left the plaintiff and he then married another woman according to Native Custom. This woman bore him four children.

On this evidence defendant is clearly entitled to judgment in terms of prayers (1), (3) and (5).

In regard to the claim for maintenance, it appears that plaintiff has no property except a horse. He is employed as a shop assistant at £2. 10s. per month. Defendant is employed at an hotel at £1. 10s. per month. As plaintiff has to support his children by his customary wife, he is hardly in a position to contribute towards the support of the child Titus. On the other hand defendant is not without means. The claim for maintenance must, therefore, be refused for the present.

In regard to the claim for an order declaring the boy Titus to be legitimate reliance is placed on Maasdorp's Institutes (Vol. I. 7th Ed., p. 8) where it is stated as follows:—

> "In the case of a bigamous marriage, where both parties contracted in good faith, the children are legitimate. If only one of the parties acted bona fide the children are illegitimate."

This statement of the law is not supported by the authorities which I have been able to consult.

In Bam *v.* Bhabha [1947, (4) S.A. (A.D.) at page 804] Centlivres, J. A. (as he then was) says:—

> "The Roman-Dutch authorities, which state that the children of a putative marriage are legitimate, refer to those cases where a marriage is solemnised in proper form but the marriage itself is null and void because, e.g. one of the parties was at the time already married to someone else. If in such a case one or both of the parties entered into the marriage ceremony in bona fide ignorance of the already existing marriage, the children of the bigamous marriage were regarded as legitimate."

In Potgieter *v.* Bellingan (1940, E.D.L., 264), Gane, J. quotes Pothier as follows:—

> "When only one of the parties has in good faith been ignorant of the invalidating impediment rendering null the marriage which she contracted with another party, her good faith suffices to give this marriage, though null, the usual civil effects in respect of the children born therefrom, and to bestow upon them the rights of legitimate children."

Further, the learned Judge quotes van der Keessel as saying:—

> "Even if the second spouse alone has acted bona fide, having been deceived by the bigamist, a son born of such a union shall also be legitimate."

In Ex parte Soobiah & Others: in re Estate Pillay (1948) (1) S.A. (N) at page 882, it was stated that the genuine belief of one party that the marriage entered into is valid and binding is sufficient to entitle the Court to regard the union as a putative marriage, and the children as legitimate.

In H. v. C. (1929, T.P.D. 922—the full report is not available), it was held that the issue of a putative marriage is legitimate and that our Courts will, in a proper case, so declare such an issue, provided one of the putative spouses bona fide believed

the marriage to be lawful and provided further that the rights of other persons, not parties to the proceedings, are not prejudiced by such declaration. [See also Lionel *v.* Hepworth, 1933, C.P.D., 481; Ex parte L (also known as A) 1947 (3) S.A. (C), 50; and Potgieter's case *supra.*]

It is clear that the union contracted by the parties on 7th December, 1942, is a putative marriage and, on the authority of the cases cited, Titus would be legitimate if he had been born during the subsistence of that marriage. How does that fact that he was born before the marriage affect his position? It is clear that an illegitimate child becomes legitimated by the marriage of the parents, subsequent to its birth, and, on the authority of Ex parte J. [1951 (1), S.A. (O), 665], this is so even if it were an adulterine child. The birth of such child can be registered in the birth register as the issue of its parents but only if the subsequent marriage between them was lawful. (See Section 10 of Act No. 17 of 1923, as amended by Section 4 of Act No. 7 of 1934.) This seems to indicate that an illegitimate child is not legitimated by a putative marriage of its parents. However, I prefer to leave this question open, firstly, because the Roman-Dutch Law authorities dealing with this matter are not available, and secondly, because I do not intend to make an order in terms of prayer (2) as such order would affect the heritable rights of the children of the customary union (if it is valid) and they are not parties in this action. It is stated that the first wife had no children.

It is ordered that the marriage between Rosey Sihiya (born Dlamini) and Christopher Sihiya celebrated on the 7th December, 1943, at Kokstad, in the district of Mount Currie, is declared null and void, *ab initio,* that the Registrar of Births, Marriages and Deaths, Pretoria, is authorised to make a note of this order against the entry in his Register and that defendant in reconvention pay the costs of this action. The custody of the child Titus Dalewonga is awarded to plaintiff in reconvention.

Plaintiff: In default.

For Defendant: Mr. F. Zietsman, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 24/52.

NATAL *v.* BODLIYASE AND ANOTHER.

KOKSTAD: 12th June, 1952. Before Sleigh, President, Wilkens and Van Aswegen, Members of the Court.

COMMON LAW.

Native Appeal Case—Damages for assault—Practice and Procedure—Maxim pari delicto—*Maxim* volente non fit injuria—*Assault has been established by the evidence.*

Summary: Appellant sued respondents for the sum of £203. 16s. 6d. as damages for assault. The respondents deny the assault and plead that on the day in question an affray took place in which appellant and respondents voluntarily participated. The Native Commissioner held that appellant was *in pari delicto* and was not entitled to damages.

Held:

(1) That the assault has been proved.

(2) That the maxim *in pari delicto* is applicable to contracts and has no place in the realm of delicts.

(3) That it is assumed that the respondent intended the maxim *volente non fit injuria* to apply in their pleas.

Appeal from the Court of Native Commissioner, Umzimkulu.

Sleigh (President), delivering the judgment of the Court:—

Appellant sued respondents the one paying the others to be absolved for the sum of £203. 16s. 6d. as damages for assault and alleged that on 6th August, 1950, the respondents acting in concert and with a common purpose wrongfully assaulted appellant and inflicted various wounds which are described. He claims that he suffered permanent injury. Appearance was entered by Mr. Attorney B. van Niekerk on behalf of six of the respondents and by Mr. Attorney D. A. Jennings on behalf of the remainder. They filed virtually identical pleas in which the assault is denied and it is alleged that on the day in question an affray took place in which appellant and respondents voluntarily participated. Appellant was, therefore, in *pari delicto* with respondents and other participants in the said affray and consequently he is debarred from claiming damages for any injuries which he may have sustained in the course of the affray.

At the outset of the trial it was agreed that the liability of respondents be decided first and that if liability is established, evidence of damages suffered be led later. The Assistant Native Commissioner, after hearing evidence from both sides, held that as appellant received his injuries as the result of participating in a fight, he was in *pari delicto* and was not entitled to damages and entered judgment for defendants. If appellant and his witnesses are to be believed he and his party where assaulted without provocation while they were peacefully walking in the location, but the evidence goes to show that they started the trouble and were originally the aggressors. They were chased by the respondents and when they got near the dipping tank they faced the respondents and a fight took place during which appellant received numerous injuries including a stab wound in the knee.

The maxim *in pari delicto patior est condictio defendentis* is a principle of law which curtails the right of persons, who have entered into an illegal or immoral contract, to avoid the consequences of the performance or part performance of such contract (see Jajbhay *v.* Cassim, 1939, A.D., 537). The doctrine is applicable in the law of contracts and has no place in the realm of delicts. It is significant that none of the works on torts to which I have been able to refer even mentions this principle. However, it is also a principle of law that no man can complain of an act which he has expressly or impliedly assented to. This principle is commonly expressed by the maxim *volenti non fit injuria* and we assume that this is what the respondents intended to convey in the pleas. In order to establish the defence that the plaintiff consented to run the risk of harm, it is necessary to show not merely that the plaintiff had knowledge of the danger, but also that with a full appreciation of its nature and extent he voluntarily elected to encounter it. The essential elements are knowledge, appreciation and consent (see *McKerron's Law of Delict*, 3rd Ed., pp. 22-3).

In the present case respondents do not dispute that the injuries suffered by appellant were inflicted by one or more of them, but they contend that they are not liable because appellant and his party voluntarily took part in the fight.

The onus was on them to prove their plea of *volenti non fit injuria*. Appellant and his witnesses state that they were armed with sticks, whereas respondents were armed with assegais, battle axes and swords. This respondent No. 13 denies. He asserts that they were armed with sticks only and that an assegai was taken from one of appellant's party. Appellant states that he was stabbed with an assegai by respondent No. 4 and was struck with a battle axe by respondent No. 6. This is not denied by these respondents. Appellant's witness, Zephania, states that he was struck with a sword on the head and suffered a fracture on the forearm and a fracture on the leg below the knee. This indicates

that heavy or sharp instruments must have been used. His other witness, Mtshato, says "that the respondents' party were armed with swords, assegais and battle axes, and it is not disputed that seven out of the eleven in appellant's party were in hospital for considerable periods; whereas according to the evidence the injuries received by respondents' party were of a superficial nature. We consequently reject the evidence for respondents that they were armed with sticks only.

The onus was on respondents to prove that appellant's party knew that respondents were armed with dangerous weapons, and with this knowledge consented to run the risk of injuries by these weapons. It is improbable that appellant's party was aware that respondents' party was so armed, otherwise they would have escaped while they had the opportunity to do so, and, in any event, this Court cannot assume—there being no evidence on the point—that they consented to take the risk of being struck with such weapons. Respondents have therefore failed to establish their defence and consequently the Native Commissioner should have found that they committed an assault upon appellant and his party.

The appeal is consequently allowed with costs, the judgment of the Court below is set aside and the record is returned to that Court for further hearing.

For Appellant: Mr. F. Zietsman, Kokstad.

For Respondent: Mr. Walker, Kokstad.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 25/52.

TYALITI *v.* **SHENXANE.**

UMTATA: 19th June, 1952. Before Sleigh, President, Mundell and Nel, Members of the Court.

COMMON LAW.

Native Appeal case—Damages for adultery and pregnancy—Marriage by civil rites—Rights of action flows from the marriage—No Native Law involved—Damages should be awarded according to Common law.

Summary: Plaintiff sued defendant for 5 head of cattle or their value, £40, for damages for adultery and pregnancy of his wife. Plaintiff married his wife according to civil rites. The Native Commissioner realised this too late but refers to it in his reasons and states that the action should have been brought under common law.

Held:

(1) That no question of Native Law is involved and consequently the Native Commissioner had no discretion to apply Native Law.

(2) That damages should have been awarded on the basis allowed under Common Law.

(3) That plaintiff will only be entitled to damages for *contumelia* inflicted upon him.

Cases referred to:

Notenjwa *v.* Mafeke, 1940, N.A.C. (C. & O.), 146.

Nazo *v.* Lubisi, 1946, N.A.C. (C. & O.), 18.

Bukulu *v.* Cebisa, 1946, N.A.C. (C. & O.), 45.

Appeal from the Court of Native Commissioner, Cala.

Sleigh (President), delivering the judgment of the Court:—

This is an appeal against a judgment for plaintiff for five head of cattle or their value, £40, and costs as damages for adultery with, and the pregnancy of, plaintiff's wife.

The adultery has been established and on this score the appeal fails. It appears, however, that plaintiff married his wife according to civil rites. The Native Commissioner unfortunately realised this too late, but he refers to it in his reasons and states that the action should have been brought under Common Law, quoting Nontenjwa *v.* Mafeke [1940, N.A.C. (C. & O.), 146], as his authority. Apparently, as a result of his remarks, application is now made to argue the following additional grounds of appeal:—

"1. That the plaintiff having been married by Christian Rites it was incompetent for him to sue for damages for adultery according to Native Custom. That it is clear from the evidence and from the fact that he claimed five head of cattle or their value that he was claiming according to Native Custom and the Court accordingly erred in granting judgment in his favour.

2. That in any event, as the plaintiff was not entitled to damages in the amount fixed by Native Custom, he was bound to prove his damages in order to succeed and he failed to do this the Court erred in giving judgment in his favour."

Mr. Tsotsi who appears for plaintiff (respondent) does not oppose the application which is granted.

In this Court it is contended that the Native Commissioner had a discretion to decide the case either according to Roman-Dutch Law or according to Native Law, that plaintiff had in fact a dual remedy. We cannot agree with this contention. Plaintiff is entitled to obtain redress for the injury suffered. His right of action flows from the marriage. If he had been living with his wife in concubinage he would have had no right of action. The action is entirely based on the unlawful violation of his marriage rights. Take the marriage away and he would have no right of action. Since it was a civil marriage we must look to the Common Law to ascertain what redress, if any, plaintiff is entitled to. No question of Native Law was involved and consequently the Native Commissioner had no discretion to apply Native Law to the case (see *Nontenjwa's* case *supra* and the cases there quoted.)

Under Common Law the injured husband is entitled to damages on the ground of loss of *consortium* and for *contumelia* inflicted upon him [see Nazo *v.* Lubisi, 1946, N.A.C. (C. & O, 18]. The Native Commissioner should not therefore have awarded the plaintiff the customary fine for adultery coupled with pregnancy, but should have awarded damages on the basis allowed under Common Law, having regard to all the circumstances of the case [see Bukulu *v.* Cebisa, 1946, N.A.C. (C. & O.), 45].

In the present case there has been no loss of *consortium,* since plaintiff's wife has not left him and he has no intention of divorcing her. Plaintiff will therefore be entitled to damages only in respect of the *contumelia* inflicted upon him, and this, the Native Commissioner admits, has not been seriously explored.

It thus becomes necessary to return the case to the Native Commissioner so that this aspect of the case could be investigated.

The appeal is allowed with costs, the judgment of the Court below is set aside and the record is returned to that Court for evidence of the amount of damages suffered by plaintiff under Common Law, and for a fresh judgment.

For Appellant: Mr. Muggleston, Umtata.

For Respondent: Mr. Tsotsi, Lady Frere.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 26/52.

DLWENGU *v.* DLWENGU.

UMTATA: 23rd June, 1952. Before Sleigh, President, Mundell and Nel, Members of the Court.

NATIVE LAW AND CUSTOM.

Native Appeal Case—Native Custom—Ubulunga cattle claimed from heir in qadi *house—Herbalist acquire stock in his own name and it belongs to his great house.*

Summary: Plaintiff is the heir in the *qadi* house of the late D and defendant is the heir in the great house. When D died there were 22 cattle, 87 sheep, 14 goats and two horses at his kraal. These are claimed by M, the *qadi* wife, on behalf of her minor son, the appellant who, duly assisted sued defendant for (1) payment of the sum of £45, being proceeds of sale of wool, and (2) a declaration of rights in regard to the cattle, sheep, goats and horses.

The defence is that the stock belonged to D's great house and they are therefore defendant's property.

The Native Commissioner dismissed claim (1) and in regard to claim (2) he declared plaintiff to be the owner of 12 cattle and granted absolution from the instance in respect of sheep, goats and horses. Defendant has appealed.

Held:

(1) That the cattle acquired by herbalist belong to his great house.

(2) That plaintiff has failed to satisfy the Court which particular cattle belonged to his mother's house.

(3) That the Native Commissioner was correct in giving an absolution judgment in regard to the sheep, goats and horses.

Cases referred to:

Oliver's Transport *v.* Divisional Council, Worcester, 1950 (4), S.A. (C.), 537.

Appeal from the Court of Native Commissioner, Mqanduli.

Sleigh (President), delivering judgment of the Court:—

Plaintiff is the heir in the *qadi* to the great house of the late Dlwengu and defendant is the heir in the great house. When Dlwengu died there were 22 cattle, 87 sheep, 14 goats and 2 horses at his kraal. These are claimed by Mamqwambi, the *qadi* wife, on behalf of her minor son, the appellant who, duly assisted, sued defendant for (1) payment of the sum of £45 being proceeds of the sale of wool of the sheep, and (2) a declaration of rights in respect of the cattle, sheep, goats and horses.

The defence is that the stock of which there are at present 24 cattle, 78 sheep, 14 goats and 2 horses, belonged to the late Dlwengu's great house and that they are therefore defendant's property.

The Assistant Native Commissioner dismissed claim (1). In regard to claim (2) he declared plaintiff to be the owner of 12 head of cattle and granted absolution from the instance in respect

of the sheep, goats and horses. Defendant was ordered to pay costs and he has appealed.

During the course of her evidence Mamqwambi stated that four of the cattle, which she described, are her ubulunga cattle. The appeal is against the judgment in respect of 8 of the 12 cattle, against the judgment of absolution and against the order as to costs.

The Native Commissioner has given no judgment in regard to the balance of the cattle claimed. As there is no cross-appeal the judgment in this respect will be left as it is.

It appears from the evidence that Dlwengu was a herbalist and lived at his father's kraal where Mamqwambi was his pupil. He quarrelled with his father and then established his own kraal. Mamqwambi as well as the other novices accompanied him. She completed her training and later he married her as his third and *qadi* wife. Thereafter they both practised at the same kraal. She states that besides the four *ubulunga* cattle, she trained eight persons whom she names and received a beast from each as her fee. She did not identify these cattle or their increase. In fact she states that she is unable to do so, nor is there any other evidence to identify them.

Now it is obvious that the evidence does not justify a judgment for plaintiff in respect of 8 of the 12 cattle. Before defendant can be expected to challenge Mamqwambi's evidence he must know what cattle she claims.

There was an onus on plaintiff to satisfy the Court as to which particular cattle belong to his mother's house. This he has failed to do in so far as the 8 cattle are concerned. To this extent the appeal succeeds.

In regard to the absolution judgment there is no evidence as to how the goats and horses were acquired. The only evidence in favour of plaintiff is that they run at the kraal where his mother resides. But Dlwengu also resided at that kraal and it is not disputed that he acquired stock during the course of his profession as a herbalist. Any stock so acquired would belong to his great house. In so far as the sheep are concerned, it is common cause that they are earmarked stump and skey left ear. Mamqwambi says that this is the mark of her house, but she admits that no sheep were allotted to her by her husband, and there is no evidence that she ever earned any. If all the sheep at the kraal bear the same mark, as Mamqwambi says, how were the sheep earned by her husband marked? The evidence is too vague altogether. The Native Commissioner was therefore correct in giving a judgment of absolution in respect of the sheep, goats and horses.

It is contended on behalf of defendant that on the evidence, he was entitled to a full judgment. This would be so if the Native Commissioner believed the evidence for the defence and rejected that for plaintiff [see Oliver's Transport *v.* Divisional Council, Worcester, 1950 (4), S.A. (C.), 537]. Defendant did not prove that the sheep, goats and horses belonged to his mother's house. In fact the Native Commissioner says that the claim for the sheep, goats and horses was entirely overlooked by both parties, and no evidence was adduced in respect thereof. Defendant is therefore not entitled to a full judgment.

In regard to the appeal against the order as to costs. The trial lasted two days and judgment was then reserved. Counsel are agreed that in view of the plea, plaintiff had to come to Court to establish his claim to the *ubulunga* cattle and that he was therefore entitled to costs on the basis that the trial would have lasted one day and that defendant is entitled to appearance costs for one day and for taking reserved judgment which fee we are informed, amounts to 10s. As appearance costs are equally divided plaintiff will be awarded costs up to and including 15th October, 1951, the date the case was set down for trial, less the sum of 10s. being the fee for taking reserved judgment.

The appeal is allowed with costs and the judgment of the Court below in respect of claim (2) is altered to read:—

"Plaintiff is declared to be the owner of the four *ubulunga* cattle. Absolution from the instance in respect of the 8 cattle and the sheep, horses and goats. Defendant is ordered to pay costs up to and including the 15th October, 1951, less 10s."

For Appellant: Mr. Hughes, Umtata.

For Respondent: Mr. Muggleston, Umtata.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 27/52.

XALISILE *v.* MHLOHLENI.

UMTATA: 23rd June, 1952. Before Sleigh, President, Mundell and Nel, Members of the Court.

NATIVE LAW AND CUSTOM.

Native Appeal case—Interpleader action—Ownership of cattle did not vest in appellant at time dowry was paid, nor when judgment was given against the debtor—No specific cattle claimed—Marriage by Native Custom—Marriage dissolved by restoration of dowry.

Summary: H (the claimant) married M by Native Custom and paid dowry to K (the debtor). V (appellant) claimed that he was the person entitled to M's dowry. He sued K for delivery of the dowry and obtained judgment. When M. became aware that the dowry would go to V she deserted her husband and K then returned the dowry to H in whose possession the cattle were attached. The Native Commissioner declared the cattle not executable and appellant has appealed.

Held:

(1) That the ownership of cattle did not vest in appellant at time dowry was paid.

(2) That ownership did not vest in appellant when judgment was given against the debtor.

(3) That union was dissolved by restoration of dowry.

(4) That no specific cattle were claimed.

Cases referred to:

Mayekiso *v.* Mapitsha, 1945, N.A.C. (C. & O.), 55.
Dlumti *v.* Sikade, 1947, N.A.C. (C. & O.), 47.

Appeal from the Court of Native Commissioner, Mqanduli.

Sleigh (President), delivering the judgment of the Court:—

No evidence was led in this interpleader action but the parties are agreed on the following facts:—

Heshe Mhlohleni (herein referred to as claimant) married Mbuku according to Native Custom and paid dowry for her to Kutu Xalisile (herein referred to as the debtor). Vatile Xalisile (now appellant) claimed that he was the person entitled to Mbuku's dowry. He sued the debtor for delivery of the dowry and obtained judgment for 7 cattle or their value. When Mbuku became aware that the dowry would go to appellant she deserted her husband and the debtor then returned the dowry to claimant in whose possession the cattle were attached.

On these facts the Assistant Native Commissioner declared the cattle not executable and appellant has appealed on the following grounds:—

1. That as respondent had a judgment for the specific cattle claimed, Kutu (the judgment debtor), could not give claimant title to the cattle.

2. That as respondent had been declared the dowry eater and entitled to the dowry, any claim by the husband for their return must be directed to him more particularly as desertion of wife from husband was admitted to have been for a maximum period of three weeks.

3. Respondent by the judgment of the Court has been deprived of his elementary rights to ascertain—

   (*a*) whether in fact desertion did take place;

   (*b*) whether the wife had just cause to desert;

   (*c*) whether a putuma was effected by the husband; and

   (*d*) what cattle were returnable, if any, on desertion.

The record does not say so but it appears to be common cause that Mbuku was living at the debtor's kraal at the time of her marriage and that she returned to that kraal.

In regard to the first ground of appeal it is sufficient to say that appellant did not obtain judgment for specific cattle.

As to the third ground, it is clear from the admitted facts that Mbuku deserted without cause and failed to return. At any rate the return of the dowry to claimant dissolved the union. While Mbuku and the debtor may have conspired to defraud appellant of his rights, it cannot be assumed that claimant was a party to the conspiracy.

The summons follows substantially the usual wording of an interpleader summons. In the present summons the Court is asked to determine whether the cattle attached by the Messenger and claimed by claimant be or be not liable to execution. Now the cattle will be executable, firstly, if they are the property of the debtor, but this appellant presumably denied in the case against the debtor. In any event, the debtor had parted with ownership at the time of the attachment. The cattle are also liable to attachment if they are the property of appellant. The correct approach to the case is therefore whether the ownership in the cattle had vested in appellant before they were delivered to claimant

It is customary to pay dowry to the head of the kraal at which the girl is found. If the head of this kraal is not the guardian of the girl, he should, if it is at all possible, report the proposed marriage to the guardian and obtain instructions. If he then gives the girl in marriage he acts as agent for the guardian, and the ownership in the cattle will vest in the latter as soon as all the requisites of a customary union are fulfilled. In the present case the debtor did not act as agent for appellant, since he denied appellant's right to the girl's dowry. The ownership therefore did not vest in appellant at the time the dowry was paid, nor did it vest in him when judgment was given against the debtor, because the judgment was not for delivery of specific cattle [see Mayekiso *v.* Mapitsha, 1945, N.A.C. (C. & O.), 55].

In regard to the second ground of appeal, it is well established Native Law that when a wife has deserted her husband the latter is entitled to sue the person to whom dowry was paid for the return of his wife or, failing her return, for the restoration of the dowry paid for her [see Dlumti *v.* Sikade, 1947, N.A.C. (C. & O.), 47, and the cases there quoted]. However, before he can sue he must *putuma* his wife and it is then open to the dowry holder to *keta* the dowry or the latter may dissolve the union by returning the dowry before the woman is *putumaed*. This is what happened in the present case.

It is, however, contended that claimant should have demanded the return of his wife or restoration of the dowry from appellant as the Court had held that the latter was entitled to the dowry.

Claimant was not a party to that action, and, since at the time of Mbuku's desertion, the dowry was still in the possession of the debtor he was the only person legally liable to restore it. If claimant had demanded it from appellant he might have been met with defence that appellant had never received the dowry.

The appeal consequently fails and is dismissed with costs.

For Appellant: Mr. Hughes, Umtata.

For Respondent: Mr. Knopf, Umtata.

SOUTHERN NATIVE APPEAL COURT.

N.A.C. CASE No. 28/52.

ZIBI *v.* ZIBI.

UMTATA: 24th June, 1952. Before Sleigh, President, Mundell and Nel, Members of the Court.

NATIVE LAW AND CUSTOM.

Native Appeal Case—Native Custom—Institution of heir, farmalities have been proved—Child—Adoption of according to Native Law—Evidence—Letter clearly inadmissible—Practice and Procedure—In an enquiry Native Commissioner's duty to call witnesses—Marriage by Christian Rites—The second proviso to Section 2 of Proclamation 142 of 1910 discussed—Proviso preserves not only rights of parties to the marriage but also the consequences flowing therefrom.

Summary: In an enquiry two claimants, namely, appellant and respondent claim two lots registered in the name of the late P., Engcobo District. The Native Commissioner found for respondent and appellant has appealed.

Held:

(1) That the formalities concerning the institution of an heir have been complied with.

(2) That there can be an adoption of a child in Native Law.

(3) That in an enquiry it is the duty of the Native Commissioner to call witnesses.

(4) That the second proviso to Section 2 of Proclamation 142 of 1910 preserves not only the rights of parties to the marriage but also the consequences flowing therefrom.

Cases referred to:

Mkanzela *v.* Rona, 1, N.A.C. (S), 219.
Sobozo *v.* Notshokovu, 1, N.A.C., 198.
Kwaza *v.* Nofesi, 2, N.A.C., 17.
Zondani *v.* Dayman, 2, N.A.C., 132.
Mbeki *v.* Mbeki, 1934, N.A.C. (C. & O.), 49.
Estate Tontsi *v.* Executor of Estate Nchela, 21, S.C., 650.
Majwambe *v.* Majwambe, 4, N.A.C., 123.
Dingiswayo *v.* Dingiswayo, 4, N.A.C., 124.
Tetani *v.* Tetani, 1939, N.A.C. (C. & O.), 61.
Njobe *v.* Njobe & Dube, N.O. 1950 (4), S.A. (C), 545.

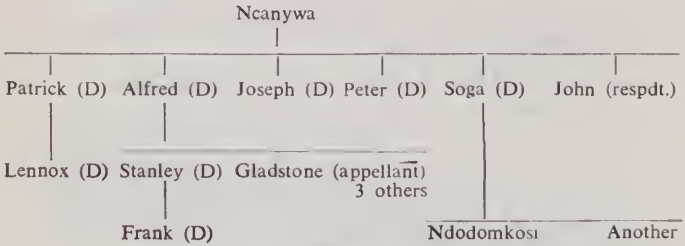
Appeal from the Court of Native Commissioner, Engcobo.

Sleigh (President) delivering the judgment of the Court:—

The late Patrick Zibi is the registered owner of Garden Lot No. 51 and Building Lot No. 34, Tora Location, Engcobo District. His only son, Lennox, predeceased him and his widow, Dorcas, who occupied the lots after his death, died in 1944. There are now two claimants to the lots, namely, Gladstone

Zibi (herein referred to as appellant) and John Zibi (respondent) on behalf of the minor, Ndodomkosi.

It is common cause that the late Ncanywa Zibi married twice according to Christian Rites and had four sons by his first wife and two by his second wife. The sons are, in order of birth, (1) Patrick, (2) Alfred, (3) Joseph, (4) Peter, (5) Soga and (6) John (respondent). Patrick had only one wife, not two nor is Soga his son, as the Native Commissioner says in his reasons. He married this wife according to civil rites, and, as I have already stated, his only son predeceased him. Alfred was an interpreter in Umtata and died in 1944. He had five sons, namely, Stanley, Gladstone (appellant) and three others. Stanley and his only son are both dead. Joseph, Peter and Soga are also dead. Soga died in 1942 and his eldest son is the boy Ndodomkosi. The following genealogical tree illustrates the relationship:—



As Patrick left no male descendants his heir, under the Table of Succession, would be appellant; but the Native Commissioner, in an estate inquiry, found that at a properly convened and conducted meeting Patrick instituted Soga as his heir and that consequently the two lots devolve upon Soga's heir, Ndodomkosi. From this finding appellant appeals on several grounds and, at the hearing of the appeal, leave was granted to argue additional grounds.

Before dealing with the grounds of appeal I must refer to the manner in which this appeal was noted. The finding was delivered on 19th December, 1951. The notice of appeal is dated 8th January, 1952, and was received by the Clerk of the Court on the 9th January, but security for respondent's costs was not lodged until the 18th January. The Rules of the Court were therefore not complied with. The attention of appellant's attorney is drawn to Rule 5 (3) of Government Notice No. 2887 of 1951.

The first question for decision is whether Soga was instituted as heir and, if so, whether the institution was lawful.

It is common cause that Patrick was a minor chief of the Hlubi tribe and headman of Tora location, and that about 1926 and after the death of Lennox he called a meeting of relatives and residents of the location which meeting was attended by Magamdeli Mkatshane of Nqamakwe, Lunda Ndondo of Tsomo and Silwanyana Ntliziyo of St. Marks District. They are also chiefs of the Hlubi tribe. The parties, however, disagree as to the purpose of the meeting. Respondent and his witnesses say that the object of the meeting was to appoint an heir for Patrick who was sickly and whose son had died. Respondent states that Patrick complained at the meeting that he had written to Alfred and Joseph, who were employed at Umtata and Mqanduli respectively, asking them to give him a son but they had refused, and that Patrick then announced that he was adopting Soga as his heir. Respondent as well as other witnesses say that Alfred's letter in reply was read out at the meeting. It appears, however, that although respondent was at the time an adult he did not actually attend the meeting as he was still uncircumcised.

Bonga Dlwati and Charles Twayise support respondent's evidence in regard to the announcement made by Patrick. It appears from their evidence that Peter and Soga were present at the meeting but not Alfred and Joseph.

Appellant admits that he has no personal knowledge of what transpired at the meeting. Henry Stokwe, who was a herd boy at Patrick's kraal, says that he heard that Patrick had said that Soga was to act for him as head, but that he never heard that Soga was also to be the heir. Ebenezer Sobantu, who attended the meeting, says that Patrick stated that he wanted one of his younger brother's sons as a son but that he was told that they were still being educated. He says that Patrick then said, "Hlubis, here is a child of my father (meaning Soga) and therefore he must be my deputy". He goes on to say that Patrick mentioned that Soga was to succeed him as headman.

Alice Zibi, a daughter of Patrick, states that she was in Johannesburg in 1926 and that although she heard it said in the location that Soga had been adopted as heir, neither her father nor her mother informed her of the adoption.

The evidence of Ebenezer and Alice goes a long way to support respondent's version. It is clear from Ebenezer's evidence that Patrick wanted an heir and with this object in view approached his brothers Alfred and Joseph. Their excuse that their children were still being educated is unacceptable since one of their sons could have been instituted as heir even if he were still at school. There is evidence that they suspected that Lennox had been killed by witchcraft and they feared that a son given to Patrick might suffer a similar fate. This is a more reasonable explanation for their refusal to part with a son.

The evidence that the object of the meeting was merely to appoint a deputy headman for Patrick is also unconvincing. If this were the object of the meeting, there was no necessity to call the meeting at all. The same result could have been obtained by notifying the Native Commissioner that on account of Patrick's illness Soga would represent him as headman. If, on the other hand, the object was to institute Soga as heir, the presence of the chiefs from other districts is explained, because the institution not only affected the succession to Patrick's estate but also altered the line of sucession to the chieftainship—a matter which affects the tribe. The evidence therefore supports respondent's contention. Moreover, the fact that Soga lived at Patrick's kraal and presumably administered Patrick's estate without objection by the rest of the family is further proof that he was instituted as heir. We consequently agree with the Native Commissioner that the institution of Soga as heir of Patrick has been proved.

Appellant, however, contended that it was not competent for Patrick to institute Soga, the son of Ncanywa's second wife, as heir to Ncanywa's first wife. This contention is not correct. In Mkanzela *v.* Rona [1 N.A.C. (S), 219], it was stated that the institution of an illegitimate child as heir must not have the effect of disinheriting the legitimate male issue. That case dealt with the institution as heir of an illegitimate child by an unmarried woman, but the principle is the same where a father seeks to institute a junior son as heir in a house in which there is already an heir. Thus, if there is no heir in the right hand house it is competent to take a son from the great house and institute him as heir in the heirless house (see Sobozo *v.* Notshokovu, 1 N.A.C. 198); but if there is an heir in the great house and none in the *qadi* to that house, it would be contrary to custom to institute another son as heir to the *qadi* house. (See Kwaza *v.* Nofesi, 2 N.A.C., 17.) In the present case Ncanywa could not have appointed Soga as his heir, because this would have had the effect of disinheriting Patrick and his brothers; but there was nothing to prevent Patrick, who had no surviving male issue, from instituting as his heir one of his brothers or one of their sons as he originally intended to do.

It is contended further that the institution was invalid because Alfred and Joseph were not present at the meeting. This is not Patrick's fault. He is required by custom to call to the meeting all his relatives. The evidence goes to show that he wrote to Alfred and Joseph and that he received replies from them. He had no means of compelling attendance at the meeting.

Further, it is contended that since Patrick was married to his wife according to civil right the adoption of Soga according to Native Law and Custom was unlawful and therefore null and void. There are two observations I wish to make in regard to this contention. Firstly, the marriage has nothing to do with the adoption since it is competent for an unmarried person to adopt a child. Secondly, this was not an ordinary adoption as is understood by the word.

A native is sometimes given an unwanted or destitute child which he will bring up and regard as his own, but such child acquires no heritable rights under native law unless it is instituted as heir with all the formalities required by custom. But it is hardly likely that a native would institute an unrelated child as his heir. Among natives it is a very serious matter for a man to die without a son, since such son, as heir, has religious functions to perform. In order to avoid this catastrophe a native would marry other wives in order to produce a son and, if this failed, he would appeal to his relatives for a boy who would then be instituted as heir with the customary formalities. (Zondani *v.* Dayman, 2, N.A.C., 132.) The person so instituted is regarded as heir and succeeds to the house in which he has been placed to the exclusion of all others. He loses his right of succession to the house or family from which he was taken [see Mbeki *v.* Mbeki, 1934, N.A.C. (C. & O.), 49]. The person instituted as heir need not be a child as the present case shows. The institution of an heir in an heirless house or family is a custom peculiar to natives, and it is not necessary to comply with the statutory provisions of the Adoption of Children Act in order to confer heritable rights on the person instituted. The contention that the institution of Soga as heir is invalid therefore fails.

It appears from the evidence that the Native Commissioner refused to admit as evidence, a letter written by Peter to appellant's brother, Livingstone, in 1945, in which the latter was informed that Peter had made a statement to the Land Clerk in the absence of respondent. One of the grounds of appeal is that the Native Commissioner erred in rejecting this evidence. The letter is clearly inadmissible. The statement, if it related to what transpired at the meeting, may be admissible if made *ante litem motam*. Apparently, the statement could not be found.

Two further grounds of appeal were abandoned at the hearing of the appeal, but I must refer briefly to one of these. In it this Court is requested to order the reopening of the inquiry for the evidence of additional witnesses. There is no indication who these witnesses are, what evidence they can give, and why their names were not given to the Native Commissioner whose duty it was to call the witnesses. When reopening is requested for further evidence it is desirable that affidavits be obtained from the witnesses to be called so that this Court will be in a position to decide whether their evidence, if accepted, will affect the finding.

Finally, it is contended that as the allotments in question fall within the purview of sub-section (2) of Section 23 of Act No. 38 of 1927, appellant is the only person entitled to succeed to the said allotments in terms of the Table of Succession framed under Proclamation No. 142 of 1910, as amended. The contention is that the words "male descendant" in the Table of Succession do not include an instituted heir and according to this Table appellant takes precedence over Soga. We do not agree with this contention. In native law an instituted heir is regarded as the actual child of the person by whom he was

instituted. If Soga's adoption had been in compliance with the requirements of the Children's Act, he would be in Law the child of Patrick, and there is no reason why the same result could not be affected by an adoption under Native Custom, which is clearly recognised. The result is that appellant is not entitled to succeed to the lots in question. His appeal consequently fails and he must pay the costs of appeal.

There is a further point which requires consideration. Although it is stated that Patrick married Dorcas according to civil rites, it is not indicated when he married her. But having regard to the fact that Alice, who is the youngest daughter of Patrick, was undergoing training in Johannesburg in 1926, it is almost certain that Patrick and Dorcas were married before 1910, unless they were first married according to native custom and later according to civil rites. If they were married before 1910, then the principles of community of property would apply to the marriage, unless they entered into an antenuptial contract which is most unlikely, and in any case the presumption is against this (see Estate Tantsi *v.* Executor of Estate Nchela, 21 S.C., at p. 650). Nor is there any evidence whether Patrick's estate was reported to the Master. If not, then the provisions of Act No. 38 of 1927 apply to the estate [see 23 (11) of the Act] and Section 22 (8) thereof provides that nothing in that Section nor in Section 23 shall affect any legal right which has accrued or may accrue as a result of a marriage in community of property contracted before the commencement of the Act.

Provisions identical to the above and contained in the second proviso of Section 2 of Proclamation No. 142 of 1910 as amended by Proclamation No. 127 of 1918, were considered in Majwambe *v.* Majwambe (4, N.A.C., 123), where it was held that the community of property protected the spouses only and if one of the spouses had died, one half of the joint estate devolves according to Native Custom. Majwambe's case came from the Idutywa District which is a surveyed district. Although the judgment does not say so, the Court held in effect that the rights of the issue of the marriage were not protected by the community of property because the marriage conferred no special rights upon the issue in view of the provisions of Section 19 read with Section 22 of Proclamation No. 227 of 1898, which provided that the estates of all natives residing in a surveyed district shall devolve according to native custom, and quitrent lands according to the Table of Succession. This was in fact held in Dingiswayo *v.* Dingiswayo (4 N.A.C., 124. See also Mhambi *v.* Mhambi (4 N.A.C., 126). But these cases are not in point since Section 19 of Proclamation No. 227 of 1898 was never extended to Tembuland [see Tetani *v.* Tetani, 1939 N.A.C. (C. & O.), 61].

The present case appears to be different. Sections 19 to 23 of Proclamation No. 227 of 1898 were repealed and re-enacted in a modified form by Proclamation No. 142 of 1910. What remained of the former Proclamation was extended to the Engcobo District by Proclamation No. 320 of 1911. Actually the survey of the Engcobo District took place many years later. If I am not mistaken, it was completed about 1924. However, the right of succession to Patrick's allotments—which fall within the purview of Section 23 (2) of Act No. 38 of 1927—is presumably governed by Proclamation No. 142 of 1910, Section 8 (2) whereof provides that quitrent lots shall devolve according to the Table of Succession. The question is whether these special provisions are affected by the second proviso of section 2 of the Proclamation. In Njobe *v.* Njobe & Dube N.O. [1950 (4), S.A. (C), 545]— a case from Cala (Xalanga) District—it was held that the proviso preserves not only the rights of the parties to the marriage but also preserves the consequences flowing therefrom in regard to the issue of such marriage. In that case, however, the land in question was not quitrent land in a native location and, in any case, Proclamation No. 227 of 1898 never applied to Xalanga District.

The question whether the protection afforded by the second proviso of Section 2 of the proclamation or by Section 22 (8) of the Act, extended to quitrent land in a native location has not been adequately argued before us and, in any event, as Patrick's daughters who may be affected by any ruling which we may give, are not parties to this case, it becomes necessary to send the proceedings back to the Native Commissioner for evidence as to whether the consequences of community of property apply to the marriage of Patrick and Dorcas. Their daughters should be given an opportunity to state their claims.

The appeal is dismissed with costs, but the finding of the Native Commissioner is set aside and the proceedings are returned to him for further evidence and a fresh finding.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: Mr. Hughes, Umtata.

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CENTRAL NATIVE APPEAL COURT.

MUTOLO *v.* NGEMA.

JOHANNESBURG: 20th July, 1952. Before Marsburg, President; Stafford and Austin, Members of the Court.

Inferences—Reasoning from—£5,000 damages or other alternative relief and costs of suit for alleged boycotting of and interfering with Plaintiff's business.

Held: Where several cases of similar purport are consolidated for purposes of trial the evidence in the test case should be confined strictly to the issues in that particular case.

Held further: The doctrine of common purpose applies only when persons conspire together for an unlawful purpose.

Cases referred to:—
Rex *v.* Dhlumayo 1948 (2) S.A. 677 (A.D.). Absolom Mtombeni *v.* Motsanyane, 1948, N.A.C. (C.D.), 18. Rex *v.* Blom, A.D. 1939.

Appeal from the Court of the Native Commissioner, Johannesburg.

Marsberg (President), delivering the judgment of the Court:—
In the Native Commissioner's Court at Johannesburg Plaintiff, Frederick Ngema, by cession of action from the Bantu Bus Service Limited, a company duly registered with limited liability according to the laws of the Union of South Africa, sued Defendant Isaiah Mutolo, described as a Native of No. 1740, Block 4, Jabavu, Johannesburg, for damages in the sum of £5,000 for interference with plaintiff's business.
Plaintiff's allegations are as follows:—

> During the period 5th December, 1948, to 6th January, 1949, the Defendant interfered with the Company's lawful conduct of its bus service and prevented it from operating the said service by the following means:—
> (*a*) He induced and incited persons to throw stones at the Company's buses plying between Jabavu and Nancefield Station, with the result that they did throw stones at the said buses.
> (*b*) he threatened to assault and/or to procure the assault of persons about to board the Company's buses and by this means intimidated them and induced them not to board or use the Company's buses.
> (*c*) he threatened to assault and/or to procure the assault of anyone who used the Company's buses, and by this means induced persons not to use the Company's buses.

In answer to a request, Plaintiff gave further particulars as follows:—

(*a*) (i) At a meeting held at Jabavu Township on the 5th December, 1948, the Defendant acting in concert with Johnson Nagatso and Nelson Putswa and others, incited and induced the persons present thereat to do the acts alleged in the summons, and also that such persons should inform, incite and persuade all other users of the buses of the Company who were not present at the meeting, to do the same acts.

(ii) on the 6th December, 1948, and at Jabavu Bus Terminus Defendant induced and incited persons to carry out the said acts, which they did.

(iii) subsequent thereto the Defendant and the others mentioned in (i) above held further meetings when large numbers of persons were present, during December, 1948, and January, 1949, when they incited and induced such persons to continue with the said acts.

(*b*) and (*c*) Defendant induced and incited the Native inhabitants of Jabavu and Moroka townships, as aforesaid. The names of the persons so induced and incited are to the plaintiff unknown.

Defendant denied each and every allegation and specially denied that he did or committed any of the acts alleged against him.

After a very lengthy trial the Native Commissioner found in favour of Plaintiff and entered judgment for payment of £3,900 damages and costs.

Defendant has appealed against the whole judgment on the following grounds:—

(i) That the judgment is bad in law and contrary to law in that—

(*a*) the Native Commissioner erred in holding that the cession of action granted by the Bantu Bus Service Limited to the Plaintiff, was a good and bona fide cession;

(*b*) the Native Commissioner erred in holding that the boycott of the Bus Service of the Bantu Bus Service Limited, which it is alleged was initiated by the defendant constituted an actionable wrong on the part of the Defendant; or, alternatively, he erred in his finding that Defendant had committed an actionable wrong;

(*c*) the Native Commissioner erred in admitting and accepting hearsay, inadmissible and irrelevant evidence from witnesses which wrongly influenced him in his judgment against the Defendant, and did further err in holding that such hearsay inadmissible and irrelevant evidence was part of the "res gestae" of the case;

(*d*) the Native Commissioner erred in rejecting the evidence and relevant exhibit regarding the Annual General Meeting of the shareholders of the Bantu Bus Service Limited, held on the 26th February, 1950;

(*e*) the Native Commissioner erred in his finding that the Plaintiff had established the case against Defendant, as set forth in the Plaintiff's summons and Further Particulars;

(*f*) the Native Commissioner erred in his conclusions of law in regard to the subject of the boycott.

(2) That the judgment is against the evidence and the weight of evidence; and that the Native Commissioner erred in his findings of facts found to be proved.

Throughout the lengthy trial Defendant was represented by Mr. B.A.S. Smits, who also noted the appeal on his behalf, but when the appeal was called on before us Defendant appeared in person, unrepresented. Mr. Franklin appeared for Plaintiff, Respondent. It was obvious that Defendant would be in no position to argue upon the points of law involved in the case and the notice of appeal, nor would he be able comprehensively to review the evidence or to criticize or challenge the Native Commissioner's conclusions and judgment. However, he confirmed the notice of appeal and proceeded with the aid of this Court's Interpreter shortly to state his case. Thereafter in discharge of our obligation to render all reasonable assistance to an unrepresented litigant and to ensure that the ends of justice were served, it became our task to seek information and

elucidation on a number of points gathered from our reading of the record as a whole. After Mr. Franklin had been heard on the law relating to boycott and other points, much of the subsequent hearing involved questions from the members of the Court and answers from Mr. Franklin.

The onus to substantiate his grounds of appeal rested on Defendant. At the end of his address there was little arising out of these remarks, as Mr. Franklin pointed out, which called for a reply. Nevertheless there was a great deal *ex facie* the record which called for comment, matters which any legally trained mind would note, and it was in this direction that the court pursued its inquires.

Handicapped as he was by a lack of knowledge of the law and the rules of evidence, by an inability to employ the arts of debate of the skilled lawyer, Defendant would have been placed in a most disadvantageous position had he been held to the formal rules of procedure at the appeal stage and we, as a Court of Appeal, would have failed in our duty to ensure that justice be done. Our duty required that we render reasonable assistance to Defendant, a task which we endeavoured to perform by our interrogation of Plaintiff's counsel, as indicated above.

As we have pointed out, Defendant was not in a position to and did not argue upon the points of law involved in this case but fortunately, in view of the main line which we are taking in our judgment, it is unnecessary for us to investigate or determine what may be the law in relation to the subject of boycott. So far as this case is concerned the matter is not crucial. We have not heard full argument and to pursue the inquiry would be of academic interest only. For the purposes of this case we shall assume and accept that the acts alleged in the summons and Further Particulars would constitute an actionable wrong on the part of Defendant and, if proved, would have entitled Plaintiff to a judgment for damages.

On considering the facts of this case we have not been unmindful of the decision of Rex *v.* Dhlumayo of the Appellate Division (1948 S.A.L.R. II.). In this Court we have followed this judgment as a guiding principle in dealing with appeals on questions of fact. An appellant must persuade us that the judicial officer was manifestly wrong or could not reasonably have arrived at the decision he gave.

On opening the case for the Plaintiff before the Native Commissioner, Mr. Oshry who then appeared, informed the Court that Plaintiff was suing three different defendants in cases Nos. 202, 203 and 204 (of 1949) each for £5,000 damages, that it was proposed to take case No. 202 first (i.e. present Defendant Mutolo) and that this would be a test case for all three cases. There is no other reference anywhere in the record that the three defendants were made co-defendants or joined jointly and severally, but there is a great deal of evidence in the record relating to the two other persons named Magatso and Putswa which can have no relevance to the present defendant, Mutolo. The summons is directed to Mutolo alone. There is an allegation in paragraph (*a*) (i) of the Further Particulars that he acted in concert with Johnson Magatso and Nelson Putswa and others but nowhere is there any claim that they be held jointly and severally liable. We have pointed out previously in the case of Absolom Mtombeni versus Motsanayane [1948 N.A.C. (Central) 16] that where several cases of similar purport are consolidated for purpose of trial the evidence in the test case should be confined strictly to the issues in that particular case. Evidence relating to other parties can have no relevance. It cannot be taken into consideration in arriving at a decision in the test case. If it was desired to use evidence against Magatso and Putswa as evidence against Mutolo on the grounds of conspiracy or common purpose they should have been joined together in one action and there should have been a definite allegation against them that they were guilty of conspiracy.

Only on that basis could they have been liable for the acts of each in furtherance of the common purpose. As the case stands formally before us Mutolo cannot be held liable for the acts of others. We take the consolidation of those three actions to mean that one will be tested and the others will stand or fall by the decision in the test case, but the test case must be decided strictly on the facts and circumstances applicable to it. It is possible that strong argument could have been advanced to us on this score under ground 1 (*c*) of the notice of appeal, but in the circumstances of the representation before us the matter was not raised. We shall not comment further here because it is our purpose to review the issues on the basis whether there was or was not in fact a conspiracy as alleged by plaintiff.

Was there a Grand Conspiracy?

In reading the record of this case in cold print the members of the court have been unable to appreciate for what reasons the Native Commissioner entered judgment in favour of plaintiff. The allegations in the summons are specific, yet it has been very difficult to find any real evidence to support those allegations. A great deal of evidence in the case relates to what is alleged to have taken place at a number of meetings which were held covering a period of over a month. Mr. Franklin has submitted that taking all those events together the conclusion can be drawn that defendant and others have been consistently hostile to plaintiff and that all the events point to some plan or conspiracy to injure plaintiff in his business. The only specific allegations in the summons are that on 5th December, 1948, defendant, acting in concert with Mogatso and Putswa and others incited the persons present at a meeting to do the acts complained of and also that they held further subsequent meetings when they incited the persons present to continue with the said acts. But Mr. Franklin has gone further. Before us he has suggested that these occurrences were merely part of a more comprehensive conspiracy involving the Municipality of Johannesburg, Mr. Carr, the Deputy Manager of Non-European Affairs, the Public Utility Corporation—a bus service—and the members of the Native Advisory Board, of which defendant is one. He submitted that all those bodies were in league for the purpose of getting rid of the plaintiff and his Bantu bus service, that they were like vultures waiting for the prey on behalf of the Public Utility Corporation. He suggested that Mr. Carr, the Deputy Manager went out of his way to get the Public Utility Corporation to take over the Bantu bus service of plaintiff, and that Mr. Cadle, the Location Superintendent was favouring the Public Utility Corporation by permitting the distribution of pamphlets for the Corporation through his Native constables. Asked on what he based those suspicions Mr. Franklin stated that they were *inter alia* relying on a statement of one Moremi that £6,000 had been offered to members of the Native Advisory Board. Mr. Franklin went so far as to say before us that if defendant would now inform him who was at the back of the whole matter he would withdraw his judgment against defendant. It is obvious from a perusal of the record that a great deal of the cross-examination of the defendant and the witnesses has been directed in an endeavour to elicit information to support those suspicions. The Native Commissioner has himself commented that "Counsel on both sides in their cross-examination resorted to questions which would have the effect of confusing the witnesses even more". We see then that a more comprehensive factor has been introduced into these proceedings than is to be deduced from the pleadings. Practically the whole of plaintiff's evidence relates to the theories and suspicions in his mind as to the machinations of his real or imagined enemies plotting for his downfall. At page 194 he said "When this accident happened they thought they had a full grip and could now cause my downfall." The impression

we have gained of plaintiff is that he is a hyper-sensitive, suspicious and arrogant person, all too prone to jump to conclusions and ascribe to his fellow beings the worst of motives in their dealings with him. Apparently his success in business has made him intolerant and self-opinionated. Many of his expressions are indicative of his state of mind. For example: Referring to the members of the Advisory Board—"They are municipal dogs paid by the Council." At a meeting at the City Hall: "I told him that when my mother gave birth to me I had nothing and that I will go back to the earth in nothing. I did'nt take up a pencil and paper to sell my African birthright to a European, not me! They can beat me to death, the next man who is going to get this company can sell it but not me, I, as founder of that service. If the people are prepared themselves to kill the service they must kill it, they would only turn round afterwards and say 'Ngema has sold us.'" All through his evidence we see this unfortunate suspicion upon which, as we shall endeavour to show, his whole case seems to be founded. Suspicion is always an unsound foundation on which to build. Unfortunately it seems to have played too important a part in the determination of the case before the Native Commissioner. As has been said by some writer: "To be sure suspicion must feed upon itself and swell by what it feeds on."

Relevant to this suggestion of a grand conspiracy a series of related incidents took place during the period 4th to 13th December, 1948, concerning which adverse conclusions have been drawn against Defendant. The bus accident occurred at 6 p.m. on Friday, 3rd December, 1948. Several Advisory Board members, including Defendant, visited the Location Superintendent, Mr. Cadle, at his office on Saturday morning, 4th December, to discuss the accident. These Board members, or some of them, arranged to hold meetings in their respective wards on Sunday morning, 5th December. Such meetings were held. From one of them a letter dated 5th December, 1948, was sent to Mr. Cadle. On Monday, December 6th Mr. Cadle arranged with Mr. Carr for a meeting to be held at the City Hall in Johannesburg at 2 p.m. on that day, at which Board members were to be present. The meeting was held and it was further arranged that Mr. Carr and a Police Officer should address a meeting in the location at 6 p.m. that same night, 6th December. After seeing the Board members at 2 p.m. Mr. Carr had an interview with plaintiff Ngema, who had arrived. Subsequently, that night at 6 p.m. Mr. Carr held his meeting in the location. Thereafter the Non-European Affairs Committee of the Municipality took certain action and eventually plaintiff Ngema was asked to attend a meeting at the City Hall on 13th December, 1948, at which representatives of the Public Utility Corporation were present. Plaintiff was present at this meeting. Now, in regard to this series of events we are asked by plaintiff and Mr. Franklin to believe that all the parties who took part were in league and were motivated by a desire to cause plaintiff's downfall, in other words, that their motives were *mala fide*. What evidence is there to support this contention? Mr. Franklin contends that it is to be gathered from the evidence of the witnesses for plaintiff viz. Obed Kanile, John Tjekele, Alexander Moremi, Hosias Mkhulusi, Oriel Monogoaka and Jackson Ntenjane. Taken at its highest value those witnesses allege that at meetings held by some of the Board members, the members asked the public "What is the intention in connection with what had happened relating to the buses?" The witness Obed alleges that Defendant said "I want you to hit those buses because they killed us and further because we are not properly treated." Mr. Franklin has been fair enough to admit before us that this witness was probably exaggerating. But none of plaintiff's witnesses were present at the meeting with the officials of the Municipality. There is no direct evidence of any acts from which a conspiracy could be inferred. The suggestion of conspiracy is based purely

on supposition and inferences sought to be read into the series of events detailed above. Plaintiff's own interpretation is clearly clouded by the suspicions which he entertained. According to him, he says that after the stoning of the buses on the morning of the 6th December, Moremi came to him and made a report. He thereupon went to Mr. Cadle to lay a complaint. He complained that he had heard that the Board was responsible for the strike and Mr. Cadle asked him who had told him that. "I told him that was a secret that I could not release. Mr. Cadle kept quiet. I went to Mr. Fox to ask him for advice." "Mr. Fox advised me that at 2 o'clock that day some members of the Advisory Board would be in Mr. Carr's office in town and other European members of the Council. He said there would be a meeting there." Plaintiff goes on to say he went to town and then "I asked to see Mr. Carr and another European asked me if I had an appointment with Mr. Carr and I said yes. I told him I was Mr. Ngema the owner of the Bantu bus service. He went inside to tell Mr. Carr and Mr. Carr said 'Allright, bring him in.' While I was still making a report to Mr. Carr about what I had told Mr. Cadle the Board members came in and sat on the chairs. I was speaking to Mr. Carr saying one of the Board members had come to me and told me that the strike was caused by the Board members. Mr. Nowana asked me who had told me and I said it was a matter far from him. Mr. Carr asked me when I would start with my bus service again and I said tomorrow. He said I must wait, he was going to ring up Marshall Square first and the Chief of the Police. He rang up and the reply was that I should not put the buses on the road. I said I would put them on the road. I then went away leaving the Board members there and I returned to my garage." Then he says he recieved a letter from Mr Carr telling him that if he put the buses on the road he did so at his own risk. Then he received a letter asking for the number of passengers carried on the day before the strike. Then he was asked to attend the meeting at the City Hall on the 13th December. This is his version: "I found Mr. Carr there, another European who was from the Council and two Europeans who came from the Public Utility. I found Jimmy Morudae of the Benefit Bus Service . . . . Mr. Carr said we were opening the meeting now. Mr. Carr then said 'Do you see, Mr. Ngema, how you have suffered through those people, that they keep on destroying your buses and that is why I have now called this Company, this Company wants to assist you in your suffering.' After Mr. Carr had spoken to me one man who came from the City Hall spoke to me and told me the same things Mr. Carr had told me. He told me I will become ruined and become bankrupt; he said that this Company was there to help me in my suffering: Then one man from the Public Utility stood up and said to me 'you have heard, Ngema, what we have to say, it is for you now to tell us what you want from the bus service, we can give you what you want for the bus service.' He then sat down and waited for a reply from me. I told him that when my mother gave birth to me I had nothing and that I will go back to the earth in nothing. I didn't take up a pencil and paper to sell my African birthright to a European, not me! They can beat me to death, the next man who is going to get this company can sell it but not me, I, as founder of that service. If the people are prepared themselves to kill the service they must kill it, they would only turn round afterwards and say 'Ngema has sold us.' I further said the members of the Advisory Board will not go to the members of the public and say to them 'We met Ngema to sell his buses:' but they will be able to go to the members of the public and tell them that Ngema owned the whole of this bus service and that he sold our rights to Europeans: and I said I will not do that to Mr. Carr. Then I sat down and Jimmy also got up and said 'Anybody who has committed an offence he should be brought before the Magistrate for a conviction, not just be told to sell

the buses, I don't agree to that, I support Mr. Ngema, he cannot sell an African right: ' After that the two men who came from the Public Utility took their bags and went off." Now, this is plaintiff's own account of those occurrences. Those are the vultures swooping on the prey. Can any reasonable man support that contention? We fail entirely to perceive how any conclusions adverse to Defendant could have been drawn. Mr. Franklin has allied himself with plaintiff's insinuations and, as we shall point out, the Native Commissioner has also passed unfavourable remarks against the City Council officials. It is clear that his mind has been influenced in favour of plaintiff, in our opinion without justification. The aspersions cast against the Council officials were serious and the Native Commissioner should have been on his guard to look for the clearest and strongest proof in their support. Clear and strong proof is absent. The bogey which plaintiff appears to have conjured up seems to rest entirely on suspicion. Deductions and inferences have been drawn from sources we are unable to discover. The plaintiff and the Native Commissioner do not appear to be cognisant of a very important principle referred to in the case of *Rex* v. *Blom*, A.D. 1939. Therein Watermeyer, J. A. said:

> "In reasoning by inference there are two cardinal rules of logic which cannot be ignored:—
>
> (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
>
> (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

We have not been able to discover any points in the evidence given for the plaintiff from which it can reasonably be inferred that there was a conspiracy on the part of the persons and bodies named to undo plaintiff. The version given by Mr. Carr who was called for defendant does not appear to have been acccepted but has been subjected to adverse criticism by Mr. Franklin and the Native Commissioner. Yet, to us, this version appears to be a correct and reasonable account and it shows that the persons concerned were endeavouring to assist plaintiff in what they considered to be dilemma in which he was placed. According to Mr. Carr the people were hostile to plaintiff and his bus service as evidenced by the stoning and their utterances at the meetings he held on 6th December, they were clamouring for municipal buses, the Non-European affairs Committee of the City Council considered the matter, an approach was made to the Public Utility Corporation, and the parties were brought together at the meeting on December 13th when their proposals were put to plaintiff. To us that appears to have been a natural and reasonable line of action to adopt. We can see nothing sinister in those activities. There can be no warrant whatever to impute improper motives to the Committee of the City Council or Mr. Carr. Yet we are asked to hold otherwise.

Under the heading ' Certain significant features " in his reasons for judgment the Native Commissioner has these comments:—

> 7. "The Public Utility Corporation became a very interested party in this affffair *but only after the rioting* had started. There is no evidence that they negotiated with Ngema before the accidents or riots."

We do not appreciate what is significant about this. The Native Commissioner has no further comment and leaves us in doubt as to what he inferred. Mr. Carr explains the presence of the Public Utility Corporation in the affair. Was it reasonable to reject that explanation?

8. "The Defendant, Putswa, Mahase and Nowana who were probably the most active in the whole of this affair, all four changed their employment after the rioting commenced or soon thereafter, in each case being to set themselves up in their own employment and not for other persons or parties."

Presumably we are asked and expected to infer that they did so by virtue of their share of the £6,000 alleged by Moreni to have been offered or paid by the Public Utility Corporation. At the time of the trial Moremi had become a shareholder in plaintiff's company. The actual date was 16th May, 1949. Surely the Native Commissioner should have been on his guard in attaching any importance to this vague statement or drawing adverse conclusions.

19. "The position of Mr. Carr, the Dupty Manager of Non-European affairs, in this matter is not quite clear." (The Native Commissioner then refers to the keeping of minutes of the Advisary Board). "Further, on the evidence before me there is nothing to show that at any time at the meeting of the 6th December, 1948, which Mr. Carr held at Moroka, did he tell the people to stop the boycott. He was only concerned with the rioting, which he referred to as hooliganism. The plaintiff has made serious allegations against Mr. Carr, that Mr. Carr in fact told the plaintiff he would be ruined and that he should sell out his fleet of buses to the Public Utility Corporation. Mr. Carr says he might have advised the plaintiff to do so. The Plaintiff also says, and he is supported by the defence witness Nowana, that when he saw Mr. Carr on Monday, the 6th December, he accused Advisory Board members of being behind the whole opposition to his buses. Mr. Carr says he has no recollection thereof, but admits that if such allegation had been made he would most certainly have investigated it. The other matter was that a public request was made to Mr. Carr at a public meeting and the only reply he gave to that public request, even though he had undertaken to give the public an answer within six days, was a telephonic conversation which he states he had with Mrs. Hoernle, the chairman of the Moroka Native Advisory Board. Only after several requests from the Native Commissioner did Mr. Carr formally write to the Moroka Native Advisory Board. He never gave the reply of the Johannesburg City Council to the public at a public meeting similar to the one at which he received the request. Another disquieting feature is that Mr. Carr, in his official capacity. called for figures of passengers carried, from Ngema, to which Mr. Carr is not entitled. Such information is confidential and is submitted to the Transportation Board only."

Again, the Native Commissioner does not state what inference he drew from his estimation of Mr. Carr's activities, but obviously his mind was adversely influenced. We think the Native Commissioner is suggesting that Mr. Carr deliberately delayed in informing the public that Municipal buses would not be available to make matters more difficult for plaintiff. But that assumption hardly fits in with the proved facts of the case. We see nothing disquieting or irregular in calling for figures of passengers carried. If the Municipality were to consider the introduction of municipal transport such information would be essential for their deliberations.

We have, then, two points of view to consider, as did the Native Commissioner. On the one hand plaintiff asks us to believe there was this grand conspiracy against him, based, as far as we have been able to ascertain, on his own suspicions. On the other hand public officials have testified on behalf of Defendant, giving an account of a course of events which, to us, seems fair and unbiassed and which could reasonably reflect the actual state of affairs between the parties. We are

entirely at a loss to appreciate why the Native Commissioner rejected the latter and accepted the plaintiff's submissions with all their inherent weaknesses. Firstly, a judicial officer should not lightly accept the imputation of improper motives in public officials, without the strongest and clearest proof. Secondly, suspicions cannot afford proof of allegations. Thirdly, in drawing inferences the cardinal rules of logic should not be ignored in reasoning.

We definitely hold, therefore, that there was no grand conspiracy against plaintiff on the part of the persons and bodies mentioned.

Now, to revert to the issues pertinent to this case as disclosed in the pleadings. To prove his claim against defendant, plaintiff was obliged to establish several things, viz.—

(1) that defendant, *acting in concert* with Magatso, Putswa and others—

(2) did, at a meeting held in Jabavu Township on the 5th December, 1948, *incite and induce* persons present thereat to do certain acts alleged, and also urged such persons to inform, incite and persuade all other users of plaintiff's buses to do the same acts;

(3) that on 6th December, 1948, at Jabavu bus terminus defendant induced and incited persons to carry out these acts, which they did;

(4) subsequently defendant held further meetings in December, 1948, and January, 1949 when he incited and induced people to continue with such acts.

The acts complained of were those as detailed in the opening part of our judgment, as repeated from the summons.

ACTING IN CONCERT.

Dealing with this point the Native Commissioner in his reasons for judgment says:—

> "12. There is no doubt whatsoever that the plan of action for the meetings was drawn up at the caucus meeting on the 4th December, 1948, and Mutolo (Defendant) Mahase and Putswa were in agreement even through Mahase (Magatso) did not attend the caucus meeting—he saw Mutolo soon thereafter and everything was explained to him and he says he was in full agreement."

The only evidence on which the Native Commissioner could base this finding is that of defendant and his witnesses because there is not a title of evidence in any of the statements of plaintiff's witnesses referring to any acts of defendant from which it might be inferred that he and others had agreed to act in concert. Here, again, the Native Commissioner has drawn conclusions entirely from inferences, which were not justified. Defendant's evidence is to this effect. After the bus accident at 6 p.m. on Friday, 3rd December, members of the public approached some members of the Advisory Board and asked them what they intended to do about the matter. On Saturday morning the 4th several Board members went independently to the office of the Location Superintendent, Mr. Cadle, to discuss the bus accident with him. That is confirmed by Mr. Cadle. In discussions between themselves those Board members arranged or suggested that they should call meetings of the people in their respective wards to test the feelings of the people. Defendant himself says: "There was a caucus meeting, we called it. I did not call it. We wrote a letter to Mr Cadle in which we informed him that there was a loud noise by the public and that we think there is danger, help us by speaking to some authority in town to come and address the meeting. It was advised (at that caucus meeting) that we should try and stop people from doing anything until the Manager comes from town to speak to them." Meetings were held by Board members in their wards next day, Sunday 5th December.

From this evidenc the only 'plan of action' which could be inferred was the decision to try to stop the people from doing anything until the Manager came from town to address them. Was that decision *unlawful* or for an unlawful purpose? In a paragraph of his judgment, headed "Defendant's motives", the Native Commissioner states: "It must be remembered too that the calling of the caucus meetings and public meetings by the defendants was not an unlawful act on his part. He called such meetings within the scope of his employment." Mr. Franklin has suggested that defendant was a hypocrite and was playing a double game, that he merely pretended to act outwardly as a man of peace whereas all the time behind the scenes or secretly he was inciting and urging the people to acts of violence. We have searched in vain to discover any evidence or facts from which inferences could be drawn which could support that submission. There is ample evidence to show that by that time the people themselves were already incensed and hurt by the bus accident. That would have been a natural reaction. Would it not have been the plain duty of all persons in authority to try to calm the public feeling? Why then regard the 'plan of action' of some Advisory Board members to meet the public as malicious? The Native Commissioner remarks: "When the defendant knew of the very strong public feeling running through the whole township, and particularly in those areas where people lived who had lost relatives in the accident, two days earlier, he should have foreseen the danger of calling together those angry people to discuss the very matter which caused the anger. He was culpably negligent in this regard, because he owed a duty of care towards plaintiff and all others by virtue of his official position, namely to maintain law and order." We most definitely cross swords with the Native Commissioner. We agree that the defendant was in duty bound to maintain law and order. He says that was the very object in view by arranging to meet the people. Had he failed to carry out this obvious duty by failing to act, he might have been culpably negligent. But to say that he was culpably negligent because he did meet them seems to us to be unsound reasoning. We do not know what special duty of care he owed to plaintiff. Be it remembered that at that stage plaintiff's buses were running normally. The whole case against defendant appears to have been built up by inverse reasoning—from effect to cause, not from cause to effect. Mr. Franklin has admitted that his witnesses have probably formed their opinions in the light of subsequent events and have put forward their proposition thus: Because there was stoning of the buses, therefore, someone must have told them to do so; therefore, who told them? So, it must have been defendant because he held a meeting. The Native Commissioner, too, appears to have reasoned along those lines. He says: "Whether by design or accident the meetings held on Sunday, 5th, had the effect of further inflaming the incensed populace and further to organise their individual feelings of hurt and shock into one body of dangerous opposition to the buses. The accident happend on the Friday. On Friday, Saturday and Sunday people boarded the buses normally and on Monday morning, i.e. the first morning after the meetings on Sunday, trouble started. What, therefore, caused the organised action on Monday morning? *The irresistible inference is, the meetings on the Sunday did so,* and those meetings were called by members of the Moroka Native Advisory Board." The Native Commissioner talks of "*further* inflaming the incensed populace" and "further to *organise* their individual feelings." But the only evidence on the record states that the avowed object of the meetings to be held on Sunday, December 5th, was to calm the people. Why brush this evidence aside? We are concerned at this stage with discovering the motives of the Board members on the allegation that they acted in concert on the Saturday to further a 'plan of action'. Their evidence is not accepted—it is the only evidence—and the worst of motives is ascribed to

them. On what grounds? Because we are asked to believe that defendant was playing a double game. We cannot assume that. Plaintiff must prove it. And there was no evidence before the Court on which the Native Commissioner could impute improper motives to the defendant and the other Board members in arranging on the Saturday to hold meetings next day. The Native Commissioner has found that it was lawful for them to hold meetings, the purpose of the meetings as disclosed by evidence was not unlawful and the doctrine of common purpose does therefore not apply because *that doctrine applies only when persons conspire together for an unlawful purpose.*

The onus rested on plaintiff to prove that defendant and others acted in concert for an unlawful purpose. In our opinion plaintiff has failed entirely to do so. We consider that the Native Commissioner erred in drawing an inference adverse to defendant from the proved facts. We hold that defendant and others did not act in concert for an unlawful purpose. It follows from this that defendant cannot be held responsible for the acts of other persons in subsequent events.

INCITEMENT.

We pass on now to the allegation that defendant incited people present at his meeting on Sunday, 5th December to do the acts alleged in the summons. In this regard the question of the credibility of witnesses will be an important factor. The Native Commissioner has commented: "In regard to all the evidence in general one finds that all the witnesses show a distinct degree of partiality for the one or the other side, and one has to be careful in accepting either version as the only correct one of what it is portended to be. On the plaintiff's side we have the plaintiff and a great number of his employees and also members of the Vigilance Committee. On the defence side we have only the version of the various members of the Moroka Advisory Board plus the women Lizzie whose evidence should be ignored completely for obvious reasons, and the two witnesses who gave evidence in regard to Magatso's and Putswa's alibis. Apart from these we also have the defence witnesses who are all officials and cannot deal with the caucus meeting on Saturday, the 4th, and the incitement at the public meetings of Sunday, the 5th." As the Native Commissioner appears to have accepted the version of plaintiff it will be necessary to examine the evidence of his witnesses. As the Native Commissioner has pointed out they have shown a distinct partiality to their side. The reason is obvious. They are all employees of plaintiff or members of the Vigilance Committee who, the evidence shows, are not favourably disposed towards members of the Advisory Board. There appears to be a good deal of jealousy and friction between the latter. The witness Moremi who spread the rumour about the £6,000 offered to the members of the Advisory Board by the Public Utility Corporation became a shareholder in plaintiff's company between the time of the accident and the time of the trial. This witness in evidence has stated that he endeavoured by means of money and brandy or liquor to buy over members of the Advisory Board to their side to discover the mysterious "Mr. X" behind the scenes. Plaintiff himself tried to contact Board members for the same purpose. As late as the hearing before us he through Mr. Franklin, was prepared to abandon his judgment of £3,900 against defendant if the latter would inform him who this mysterious person was. We see, therefore, that there have been very questionable forces at work throughout these proceedings to procure, by reward or the subtleties of liquor or the bludgeon of a judgment, information to sustain their cause, from the very persons they eventually sued. If a man's cause be just there should be no need to resort to such practices. It may be significant, therefore, that the chief witnesses plaintiff has called are his servants, dependant on him for their livelihood. As the Native Commissioner has remarked, one has to be careful in accepting their

testimony. Yet the issues, as detailed in the summons, are based on the word of those employees. If those allegations be true, it is remarkable that out of a population of 68,000 persons plaintiff has hardly brought a single independent unbiassed person to testify on his behalf. The evidence against defendant Mutolo, and he is the only person with whom we are now concerned, is that of the witnesses Obed Kanile and John Tjekele, a dispatcher of buses and a queue policeman respectively, both employees of plaintiff. Obed states he attended the meeting held by defendant and Magatso on Sunday 5th December. He arrived late and was there about 15 minutes. He arrived between 2 and 3 p.m. He goes on: "When I arrived Mogatso was addressing the meeting. I heard him ask the public what the intention was in connection with what had happened relating to the buses. He referred the question to all the public." "The reply was that they expected action from their leaders. Magatso was one of the leaders. When that was said Magatso stood up and said there was nothing further they could do—that damage be wrought on the buses and do away with them. At this a Mr. Mutolo stood up and seconded Magatso's statement. When Mutolo seconded Magatso's motion he said his reason was that they were badly treated and it seems that they are slaughter houses. I did nothing further than that and the meeting was closed and the people clapped their hands. In regard to the people getting to work without buses, this question was discussed. They said they would provide other conveyances. Mutolo said that they would provide other conveyances to take the people from Jabavu to Nancefield station." Later in evidence, Obed says: "Mutoli stood up and said 'I want you to hit those buses because those buses killed us and further because we are not properly treated.'" "Mutolo said 'I agree with Magatso in his statement that these buses should be damaged.' At this the people clapped their hands. Then the meeting ended." "I did not say 'I want you to hit those buses because we have not been properly treated' and 'in my opinion those buses should be hit.'" When his previous statements were read out to him (Obed) he continued: "The correct statement is the one which reads 'I agree with Magatso that the buses be hit.' Those are the correct words that he used—I am sure of that. He said nothing after that. I did not hear Magatso say that the buses must be hit—I only heard him express agreement with what Mutolo said. The exact words that Magatso used at the meeting were 'What do you say about the matter, about those buses and about the accident which occurred.' This person stood up and said 'We shall hear from *you*.' In reply Magatso said 'I want those buses to be hit.' 'Do not board them.' At this Mutolo stood up and said 'I agree with what Magatso has said' and the people clapped their hands and dispersed. Mutolo's statement ended there. *I am not sure of Mutolo's statement.*" "At this meeting that I attended it appeared that the people were angered at the words used at the meeting. Before those words were uttered they did not seem excited and were quite calm. No particular people were told to stone the buses. No dates were arranged for further meetings. The question of the burial of the dead was not discussed. Magatso and Mutolo were telling the inhabitants to hit the buses and to boycott them. Quite distinctly they told the people to hit the buses and not to board them. There were no threats made to the people that they would be assaulted if they boarded the buses."

The evidence of the other witness John Tjekele, a queue policeman, is as follows: He went to the meeting on 5th December, Sunday, with Obed. He says: "When we arrived the speakers were already addressing the meeting. Magatso was addressing the meeting. I heard him say 'Did you notice the accident made by Ngema's buses?' Magatso further stated that Ngema's buses were bad and that is the reason why the people don't like them. He said 'I really do not want Ngema's buses.' The people clapped their hands and cheered. He

further stated that the people be told on Monday that no one board the buses. When he sat down Mutolo stood up. When Mutolo stood up he said 'I second the statement that has just been made by Magatso.' At that the people clapped. He sat down as soon as he was finished saying that. Members of the Advisory Board at the meeting were inciting the people to fight. On this Sunday, (5th December) it was Mutolo and Magatso who incited the people to violence. Magatso said unless the buses were stoned no one would refrain from boarding them. He insited that the people should not use the buses. *Mutolo's only word was his seconding Magatso in that the buses should not be* boarded." Under cross-examination he said "When I got there the words I heard spoken by Magatso were 'The people do not like the buses of Mr. Ngema'. The people clapped their hands. He also said he did not want the buses. He said 'I do not want the buses.' He also said that the people did not want the buses as they complained that the buses are not bringing them to the station in time and make them late for their trains and that buses had killed people. He then sat down and Mutolo stood up. He never spoke again—not while I was there. Mutulo said 'I second what Mr. Magatso has said.' While I was at the meeting I did not hear anything else. I did not hear any of the audience speak. When Mutolo said those words Magatso stood up and spoke saying that he wanted European (meaning municipal) buses. That was all he said. I then stood up and went away. Obed and I left together and the meeting appeared to break up."

Now, this is the sum total of plaintiff's evidence to support his allegation of defendant's incitement of the people at his meeting on Sunday, 5th December. Not only is there a grave contradiction between the two witnesses as to what was said by Mutolo and Magatso, but in the cross-examination of John Tjekele there is not a suggestion of any incitement to violence, or stoning or even an organised boycott. Tjekele does not confirm the fiery utterances alleged to have been made by Mutolo by the witness Obed. Mr. Franklin has admitted that Obed was probably exaggerating, with which we entirely agree. His evidence can be rejected. Tjekele's version substantially agrees with that given by defendant. It must be remembered that Obed and Tjekele arrived towards the end of the meeting. This is defendant's version. "They (the people) were altogether bad, they were in a fighting attitude. Once they all said 'You members of the Board, we can easily see that now you have been bribed by Ngema because it is long since we have been complaining about the buses killing us, they don't come to a stop.' At that time people could not easily speak about the buses in the township there and if one did speak about it the people looked at you. Towards the closing of the meeting one stood up and he said he would like to know what the leaders say we must do: before we could reply to that someone else stood up and said 'What shall we do with the people going to the buses because we told you we no longer want these buses, we want to strike them, to take them out of the road together with the owner of the buses,' and I then asked Magatso to speak. He supported what I said. I said since you have made up your mind to strike the buses and that we, as leaders should show you what to do, I am going to tell you: It is better for you to walk from here to the station rather than striking the buses and attacking the buses: it will cause a very big trouble if you strike the buses and assault the passengers: they did not like what I said that the buses should not be attacked, they did not want to listen to that meeting: I ended by saying when you leave off from here you will have to go along the road to the station and you must not strike them: those were my words." Magatso said 'I agree with what Mutolo has said. The station is not far. You must not touch the buses at all, it is better for you to walk and I will also walk.' He did not make a long speech, the people were creating a noise. They did not want to listen at that stage

because they had heard that we did not want them to strike the buses and assault the passengers. I closed the meeting with a last word. 'You have asked us to say that we should tell you what to do, we give you this advice as your advisers: We are giving advice: in our section we don't want to hear that any of you have struck the buses or assaulted any passengers.' Then I suggested that we should go home in order to be able to go to work the next day and I asked them to stand up: I then closed the meeting. Their national anthem was sung and the meeting closed at 12.30 p.m."

This was the kind of advice given to the people at all subsequent stages of events by other persons in authority and is the sort of advice which we would expect to be given by any responsible person in such circumstances. Yet the Native Commissioner has found that the defendant was culpably negligent in this regard in holding his meeting. As we have said, we cannot agree with the Native Commissioner in his view. It was the duty of the defendant to maintain law and order and he endeavoured to do so. We are satisfied that there is no evidence to support the allegation that defendant at his meeting on Sunday, 5th December, incited the people to acts of violence against plaintiff's buses or incited or encouraged them to boycott the service. From the proved facts there is no warrant for the inference drawn by the Native Commissioner that "whether by accident or design the meetings held on Sunday, the 5th, had the effect of *further* inflaming the incensed populace and *further to organise* their individual feelings of hurt and shock into *one body* of dangerous opposition to the buses." It seems highly improbable to us that Mutolo could have disseminated his alleged malicious views throughout the other 24 areas comprising a population of 68,000 persons within the short period of time available on that Sunday afternoon. There is not a shred of evidence that such efforts were made.

The most that can be reasonable deduced from the meetings on Sunday, 5th December, is that the people were told: "If you don't want the buses, then walk, as we shall walk." We can see nothing irregular or unlawful in that advice. It certainly does not amount to incitement. Throughout the reasoning in this case little thought appears to have been given to the effect of the bus accident itself on the feelings of the people. Defendant has been regarded as the author of all the trouble and plaintiff has been held forth as the innocent victim of his evil designs. In the nature of things the accident in itself would have stirred up the people. They would naturally though irrationally want to vent their feelings against the object of their anger, viz. the buses themselves. There have been many demonstrations of this kind in this country. It would be folly to assume that those who endeavour to dissuade them against such acts are guilty of incitement. Yet, such is the view taken by the Native Commissioner. In our opinion in the light of all the proved facts he has erred and we hold that defendant did not incite the people to violence or boycott of plaintiff's bus service.

Alleged Acts of Hostility as Detailed in Summons.

We need not examine this aspect of the case very exhaustively. There is no evidence whatever that defendant incited the public to stone the buses, nor did he incite them to assault people who used the buses nor did he assault or himself threaten to assault anyone so doing. Plaintiff's own witnesses admit that he was not present at the time of the stoning. The Native Commissioner appears to have arrived at some similar conclusion for he states in his reasons for judgment: "The Court inclines to the view that when defendant called for a boycott he did not contemplate the rioting which ensued. Further that defendant tried by intimidation or persuasion to prevent ordinary passengers from boarding the buses, and not to stone the buses. This is borne out by the fact that defendant says he realised that the accident on Monday was greater than the accident on Friday. By this he means that the people went further than he

meant them to go. It is clear that the incitement to boycott started the boycott on the buses. Whether there is a casual connestion between the incitement to boycot and the resultant public violence is a question difficult to decide and the Court feels that it is not necessary to go into that aspect as it is satisfied that incitement to boycott is an unlawful act and that such act can found a claim for damages such as the present claim" It is perhaps unfortunate that the Native Commissioner did not pursue his speculation on this casual connection further, not on the basis of his assumption that there was in fact an incitement to boycott, but on the actual evidence relating to the alleged acts. We are sure that he would have found that there was no casual connection, He has adopted the view put forward by Mr. Franklin that the stoning was a natural and probable consequence of the Sunday meeting. But the only proved facts are that defendant warned his people not to commit acts of violence. Where, therefore, can it be held that the stoning was the natural consequence of his advice? Mr. Franklin has submitted that defendant knew what was going to happen on the Monday (6th December) and purposely got up late and prepared an alibi. He submitted further that defendant was dissatisfied that there was no boycott on the Saturday and deliberately went out of his way to set the ball rolling by calling his meeting on Sunday when the people were suffering from a sense of loss. They were peaceful but ripe for something. Defendant set them alight. He says defendant had no good ground on which the Board members should hold their meetings on Sunday. We must confess that we cannot follow Mr. Franklin's argument because, as we have pointed out, there is no evidence to support, or from which we can infer, any malicous intentions or guilty mind on the part of defendant. The evidence is not there to support his contentions. It might be added that there is not a shred of evidence as to the identity of any person who took part in the stoning on Monday morning. There is uncontradicted evidence that no person from defendant's ward was killed or injured in the bus accident on Friday. It can reasonably be inferred that no person from his ward would have any personal grounds for attacking the buses. His Sunday meeting comprised a mere handful of people compared with the total population of 68,000 in the area. There is no evidence whatever that he or any of his people took part in the stoning or assaults.

We are satisfied, therefore, that none of the alleged acts of aggression detailed in the summons can be laid at the door of the defendant and the plaintiff has completely failed to prove that portion of his allegations.

Was there any Incitement to Boycott.

Faced with the difficulty we have mentioned in the preceding section, Mr. Franklin submitted that his claim against defendant was that contained in paragraph 4 of the summons, viz: During the period 5th December, 1948, to 6th January, 1949, defendant interfered with the company's lawful conduct of the bus service and prevented it from operating the service. He suggested that the whole trial had been fought on the greater issue of a boycott which could be read into the words quoted, that all the detailed allegations relating to violence were superflous and could be disregarded for purposes of arriving at a judgment. In other words, having failed to establish the alleged acts to violence or incitement thereto he was prepared to rely on a claim arising from boycott. On the subject of boycott the Native Commissioner has expressed himself thus: "The right to boycott a business enterprise is the right of each individual in a democratic country such as South Africa. Each person by personal selection or preference can decide by what mode of transport he would travel." So far we shall assume he is correct. He goes on: "If buses are dangerous and he boards them he does so at his own risk. If a person decides not to use a particular bus he does not harm anyone, but the moment he attempts to induce others to act as he does then the harm creeps in. If he holds a position of

some standing among his fellowmen and is likely to be followed by them then he must be careful. If he holds an official position or is one in authority then he must be even more careful because his very appointment puts him above the ordinary person and his lead is likely to be followed by others."

We have not been able to find any evidence that the Board members incited the public to boycott the buses. The public feeling was already there. That is admitted by all witnesses. If the individuals comprising the public wished to walk then, according to the Native Commissioner, they did no one any harm. What further effect, therefore, could the calling of public meetings have had? At the most it can be said that the board members agreed with the public and expressed their agreement at the meetings on Sunday. If people were asked to let other persons know the result of the meeting it could be interpreted that it was said that buses should not be boarded. There is evidence that defendant warned his people not to stone the buses. This bears out defendants's statement that he told his people not to stone and that he had his people under conrol. But keeping to the evidence on record we cannot find anything to suggest that he incited them to boycott. We cannot agree with the Native Commissioner that his more official position in itself would have acted as an impetus to the public feeling. On the Monday night after the stoning Mr. Carr, the Duputy Manager of Non-European Affairs and a police officer gave the same advice to the public. And so, we verily believe, would all responsible officers.

Again, we are at a loss to understand why it is sought to hold defendant responsible for the boycott. We can find no satisfactory evidence to support the assumption that he incited the public to boycott.

What was the Proximate Cause of Suspension of Bus Service?

The Native Commissioner has stated that the public had a perfect right not to use the buses if they did not wish to do so. The figures supplied by plaintiff show that there was no appreciable falling off in the number of passengers carried from the time of the accident on Friday up to about 6.30 a.m. on Monday morning. If there was a boycott there was no sign of its effect. Queues were forming and passengers were being dispatched normally. Then suddenly stoning took place and the service came to a standstill. Obviously then it was the actual stoning which caused the suspension. The buses were put away and plaintiff himself went to the Transportation Board and sought permission to suspend the service, which was granted. In evidence Plaintiff was asked what was his object in applying not to run his busses. His reply is somewhat startling: "They were stoning the buses and I made this application for the service to be suspended to make those people walk all the way." At that stage, at any rate, plaintiff was concerned not merely with protection of his buses from further damage but he was determined to make the public suffer for their acts of violence. Anger is apparent there. Plaintiff does not stand out as the meek victim of designing malefactors. He counter-attacked himself. He did not try to carry on with his service but himself withdrew it. He was a contributing factor in the suspension of the service. This point may have been of further interest had the question of the quantum of damages been a point in issue. But it is of interest here only in determining the proximate cause of the suspension of the service. As we have seen there was no obvious sign of the boycott on Monday morning and it is clear that the actual stoning was the direct and proximate cause of the suspension. Was the stoning spontaneous or was it pre-arranged? Was it the natural and probable consequence of the meetings held on the Sunday morning? We venture to say that he would be a bold man to hazard an answer to those questions. The Native Commissioner has endeavoured to do so by reference to other similar incidents. He has argued that there were previous bus accidents. They were not followed

by caucus meetings and no violence ensued. But now, in the case of this accident caucus meetings are held and violence follows. Therefore, the caucus meetings must have caused the violence. We shall not pretend to follow the Native Commissioner because we think the argument is not logical nor does it account for the vagaries in human behaviour. There is the old saying that it is the last straw which breaks the camel's back. There is much evidence on this record about public complaints against the bus services before this accident. It is probable that their long suffering had reached breaking point. One argument has been put forward to negative the spontaneity of the riots on the score of delay. It is suggested that the delay from 6 p.m. on Friday to 6.30 a.m. on Monday does not indicate that the outbreak was sudden. We must remember, however, that most of the people living in that Native township are workers at places elsewhere and that their only and usual time for gathering together is on Sundays. They would have been concerned with their work on Saturday. There must have been a great deal of talk on Sunday among the large population, apart from the poorly attended meetings held by the Board members. It is said that the latter had little influence at that time. We have no direct evidence as to the general nature of public talk over the week-end and, as we have pointed out, there were no outward signs of a general boycott. We have shown, too, that there was no conspiracy or incitement of the public to boycott or acts of violence. Who, then, threw the first stone? No one knows. Certainly there is no connection between defendant and the stoning, according to the evidence. Was the Native Commissioner justified in drawing the "irresistible inference" that the Sunday meetings were the direct cause of the boycott? Can he justifiably single out defendant from that large population of 68,000 and say: "There is the man who caused the first stone to be thrown." Did he lose sight of the ever present hooligans? We could suggest other factors, from which inferences other than the one he has drawn could be drawn.

On the evidence we are satisfied that it was the stoning of the buses which caused the suspension. We can find no evidence to suggest that Defendant was the person who caused the stoning either by incitement or direct intervention. We cannot hold that the stoning was the natural and probable consequence of the meetings held on Sunday, 5th December. It is even doubtful whether there was a boycott, as such, as alleged in the summons.

The evidence of subsequent events and meetings takes the matter no further. Other public officials and bodies intervened in an effort to settle the trouble and defendant, if he played any part at all, became a very minor factor. There is nothing to support the suggestion of common purpose or a course of conduct. The evidence shows that after the first outbreak public hostility was directed at all forms of transport, including taxis and motor vehicles of private and official persons. Obviously a section of the public was out for mischief and they did not discriminate. It has been suggested that defendant was guilty because he took no steps to "put out the fire." But what could he have done when the matter had passed into the control of other authorities.

We have endeavoured to view the events in this case in their proper order of sequence and to consider the evidence relating to those events. The Native Commissioner says: "Leaving out all contradictions and inconsistencies one finds an overall weight of evidence that the plaintiff's version of the facts fits into the sequence of events more readily than that of the defendant. The Court, therefore, accepts the fact that incitement did take place and that defendant Mutolo was probably the chief instigator thereof." The plaintiff's "version" was that there was a grand conspiracy against him on the part of the Municipality and their high officers, the members of the Advisory Board and the Public Utility Corporation. As the Native Commissioner has stated, that is a most serious submission. In the first place it would be highly improbable and secondly one would demand and

expect the clearest of evidence to support it. One would not lightly accept the opinions of interested parties but such unfortunately appears to have been the case. Inferences have been drawn to a large extent to fit in with the theory propounded by plaintiff. This reasoning by inference has played a dominant part in the determination of the claim and the arguments put before us. In our opinion it has caused the Native Commissioner to err in his judgment. He has assigned to the proved facts implications which they could not reasonably bear and taking them altogether he has arrived at a conclusion which is manifestly wrong. The conduct of the defendant throughout these proceedings as disclosed in the evidence has been such as we would expect to find in the normal course of human activity. On the whole we have no hesitation in stating that the Native Commissioner should not have accepted the highly improbable version of events as propounded by plaintiff and, had he assessed the evidence at its true value, he could not reasonably have given judgment in favour of plaintiff.

We have the impression that Mr. Franklin has realised the weakness of his case as circumscribed by the particulars of his claim. There is no evidence whatever to support those allegations of violence. He argued that those detailed allegations could be regarded as superfluous. He has now under date 21st November, 1951, after the hearing of the appeal before us has been closed and during the course of our deliberations, made formal application for amendment of the summons to read, at the end of paragraph 4:—

> "Alternatively by inducing and inciting persons to boycott and not to use the said bus service and to inform others to partake in such boycott and interfere with the Company's trade."

No application to this effect was made to the trial Court and we see no good purpose to admit it now. Even were we to allow the amendant it would not, because of the view which we have taken of this case, help his cause in any way. We have found that defendant did not induce or incite people to boycott the bus service.

The appeal is allowed with costs and the judgment of the Native Commissioner is altered to read:

For defendant with costs.

Stafford (Member): I Concur.

Austin (Member): I Concur.

For appellant: In person.

For respondent: Mr. E. Franklin of Messers. Emanuel Cluckmann, Franklin and Widman, Attorneys, P.O. Box 1744, Johannesburg.

SOUTHERN NATIVE APPEAL COURT.

LENGESI AND OTHERS *v.* KWINANA AND ANOTHER.

N.A.C. CASE No. 29/52.

KINGWILLAMSTOWN: 21st July 1952. Before Steenkamp, Acting President; Blakeway and Fenix, Members.

LAW OF PROCEDURE.

Practice and Procedure—Appeals—Appeal to Appellate Division.

Summary: On appeal from a Native Commissioner's Court, the Native Appeal Court reversed the judgment of the lower Court, granting plaintiffs an amount of £80 damages for defamation against six defendants.

Held: That the amount in dispute is trivial as compared to the costs that might be incurred in bringing the matter before the Appellate Division.

Held further: That the matter is not one which can affect the status or reputation of the applicants.

Cases referred to:—

Haine *v.* Podlashuc and Nicholson, 1933, A.D. 104.

Application for consent to apply for leave to appeal to the Appellate Division against the reversal on appeal by the Native Appeal Court of a judgment of the Native Commissioner's Court, East London.

Steenkamp (Acting President), delivering the judgment of the Court:—

This is an application for leave to appeal to the Appellate Division of the Supreme Court.

In his argument before this Court Counsel for applicants based his application on the following grounds:—

1. That the Native Appeal Court erred in finding that the words complained of are defamatory either in their primary signification or in the special circumstances of their publication.
2. That the applicants' plea of fair comment should have been upheld.
3. That the question of damages is grossly excessive and
4. That the evidence of witnesses as to how they understood the words complained of should not have been admitted.

In the case of Haine *v.* Podlashuc and Nicholson (1933 A.D. 104) one of the essentials influencing a Court in granting leave, was laid down as being the importance of the matter to one or other or both of the parties concerned. There are other essentials, one being whether the amount in dispute is trivial as compared to the costs that might be incurred in bringing the matter before the Appellate Division.

The Native Appeal Court awarded to the two plaintiffs a gross amount of £80 damages. This amount is payable by the six defendants and if we take into consideration that each defendant (i.e. each applicant) will only have to pay just over £13, then there can be no doubt that in relation to the costs the amount concerned is trivial.

Although the Court is of the opinion that the amount is trivial, it still has to decide whether notwithstanding this the status, reputation or real importance of the matter to the parties are such that leave should be granted.

While the matter is of real importance to and can affect the status or reputation of the respondents those considerations do not apply to the applicants whose status and reputation cannot be affected by the reversal of the judgment.

The application is therefore refused with costs.

For Applicants: Mr. W. M. Tsotsi, Lady Frere.

Respondents: In default.

SOUTHERN NATIVE APPEAL COURT.

MPENDU *v.* **MFAXA.**

N.A.C. CASE No. 30/52.

KINGWILLIAMSTOWN: 21st July, 1952. Before Steenkamp, Acting President, Blakeway and Fenix, Members of the Court.

LAW OF THINGS.

Ejectment—Stand in Municipal Location—Lessor acquired full rights to stand and buildings thereon—Ejectment cannot be resisted—Right of Municipality.

Summary: Plaintiff sued defendant for an order of ejectment from a room she is occupying in a Municipal Location in East London. The defendant's plea is that plaintiff is not the rightful owner of the premises and that the notice was of no force and effect. The Native Commissioner gave judgment in favour of plaintiff and appellant has appealed.

Held: (1) That the ejectment cannot be resisted.

Held: (2) that the lessor acquired full rights to the stand and premises thereon.

Held: (3) That the Municipality has the right to lease the site to any person of whom it approves once the previous lease is terminated.

Cases referred to:—

Mkwali *v.* Mkwali, 1943, N.A.C., (C. & O.), 64.

Dhlamini *v.* Kortman, 1938, N.A.C., (T. & N.), 125.

Appeal from the Court of Native Commissioner, East London. Steenkamp (Acting President) delivering the judgment of the Court:—

In the Native Commissioner's Court, East London, the plaintiff (now respondent) sued the defendant (now appellant) for an order of ejectment from a room she is occupying in a house situated on Hut Site 1312, Mbola Street, East London.

In his summons plaintiff avers that he is the owner of the premises and that he duly gave defendant notice in accordance with law to vacate the premises on or before the 31st December, 1951, by reason of the fact that defendant had paid no rental.

Defendant's plea is to the effect that plaintiff is not the rightful owner of the premises and that the property belongs to one Peter Mtendeni, who is the rightful owner and with whose consent she is occupying the property. She further alleges that as plaintiff is not the rightful owner, the notice to vacate is of no force and effect.

The evidence adduced was confined to the question of ownership of the house.

The Assistant Native Commissioner gave judgment in favour of plaintiff for an order ejecting defendant on or before the 31st March, 1952. Defendant to pay costs.

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

1. That the Assistant Native Commissioner erred in holding that the Municipality did not tacitly agree to lease the site to Peter Mtendeni.
2. That the Assistant Native Commissioner erred in holding that the Municipality was entitled to lease the site to another person.
3. That the Assistant Native Commissioner erred in granting a judgment for plaintiff.

The appellant filed additional grounds of appeal on the day of hearing. These are not new grounds but really an amplification of the grounds already filed and will be treated by this Court as a written argument.

From the evidence it transpires that at one time the hut site at 1312 Mbola Street was registered in the name of Wilfred Mtendeni. He was recognised as the lessor and occupier of the buildings on the site. On the 2nd December, 1949, the hut and buildings were transferred from the Estate of Hardy Wilfred Mtendeni to Abel Tembu Mtongana.

The transfer to Abel Tembu Mtongana, according to the Superintendent of the Municipal Location was effected on letters of administration from the Master of the Supreme Court dated the 12th April, 1948.

On the 30th October, 1950, the site was transferred from A. T. Mtongana to Oswald Ben Mazwi and on the 16th May, 1951, to Redvers M. Mfaxa, the present plaintiff, in whose name the property is presently registered and who is regarded as the owner of the property.

It is alleged by the defence that the Wilfred Mtendeni in whose name the property was originally registered did not have the name "Hardy" but that he had a brother by the name of "Hardy Wilson Ngwane".

Both "Wilfred Mtendeni" and "Hardy Wilson" are dead.

There is filed of record a photostat copy of a last will and testament executed on the 19th December, 1946, by W. Hardy Wilfred Mtendeni. In this will he appointed his sister, Linda Mtendeni as sole heiress to the whole of his estate and effects. She was also appointed Executrix. The testator died on the 6th January, 1947, at Grahamstown and there is evidence that after his death, the site rents were paid by a lawyer. In pursuance of the will made, the property in question was transferred as already mentioned.

It is further alleged by the defence that the Wilfred Mtendeni, in whose name the property was first registered, was a minor at the time, and that he died when still a child.

The father of these two persons concerned gave evidence for the defence and he states the names of his two sons were Wilfred, whose other names were Charles Lulame, the younger and Wilson Hardy Ngwane, the elder. He also states that when he acquired the right to the site he purposely had it registered in the name of Wilfred, who was the younger son, and he wanted this son, who will not inherit anything else, to have the property. This witness admits that he did not take steps to have the property placed into his name after Wilfred died during 1929, as he knew the property belonged to him. There is a suggestion in the evidence that the Will already referred to was a forgery.

The beneficiary under the Will was not called as a witness and the impression one gains from the evidence as a whole, is that there is a dispute in the Mtendeni family concerning the succession to the property. Peter, the father, admits he gave evidence at East London in Court in connection with the property. Whatever dispute there might be, and whatever deceptive methods might have been employed by the Testator, the beneficiary Linda, and other persons, the fact remains that the plaintiff is the registered occupier of the property, having acquired it by purchase and transfer and therefore the defendant who really bases her defence on a dispute existing amongst the members of the family, cannot resist the ejectment, even if that dispute is decided favourably in an action brought before a competent Court to invalidate the Will.

To deal with the grounds of appeal:

In numerous decisions of the Native Appeal Courts *inter alia* John Mkwali *v.* Hennoth Mkwali 1943 N.A.C., (C.O.), 64 which was a case from East London, the principles governing the occupation of municipal sites have been set forth.

From that decision it is clear that such a site is the property of the Municipality, the holder of the site permit being merely a lessee, and that the structures affixed to the soil are immovables, the legal right of ownership vesting in the Municipality. The site or site permit is not a right capable of sale and transfer except with prior consent of the Dominus (Municipality).

Section 10 of the location regulations contained in Provincial Notice No. 217 of 1928 d.d. 28/6/1928 as amended provides that: "No site permit or residential permit shall be transferred and no site or dwelling shall be sub-let, except with the *written* permission of the Superintendent and to a person approved by him".

There is no evidence to indicate that the Municipality was ever aware of the existence of Peter Mtendeni let alone that it approved in any way of him as a tennant and in view of the statutory requirement that permission must be in writing there can be no question of a tacit agreement by the Municipality.

With regard to the second ground of appeal, the Municipality as the Dominus clearly has the right to lease the site to any person of whom it approves once the previous lease has been terminated. The previous lease was between the Municipality and Wilfred Mtendeni and the right to the stand was personal to the holder (Alfred Dhlamini *v.* Kortman Kunene 1938, N.A.C., (N. & T.), at p. 125. On Wilfred's death therefore the lease terminated and the Municipality was in a position to enter into a valid lease with some other person of whom it approved. The new lessor acquired all rights to the stand and the buildings thereon and cannot be disturbed in his possession by any third party, whatever rights the third party may have as against the Dominus of other parties.

The decision given by the Assistant Native Commissioner is therefore correct and the appeal is dismissed with costs.

For Appellant: In person.

For Respondent: In default.

NORTH EASTERN NATIVE APPEAL COURT.

MKIZE *v.* MKIZE.

N.A.C. Case No. 27 of 1952.

Pietermaritzburg: 16th July, 1952. Before Balk, Acting President; Bridle and Oftebro, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Appeal from Chief's Court—Condonation of late noting—Application for condonation to be preceding or accompanied by notice of appeal—Costs of appeal.

Summary: A native commissioner refused an application for condonation of late noting of appeal as the reason for the delay was not supported by the evidence.

Held: That although this Court agrees that the reason given for the delay in noting the appeal was not supported by the evidence, that does not dispose of the matter as the merits of the applicant's case in the Chief's Court also fall to be considered.

Held further: That, as respondent could well have abandoned the judgment in his favour and did not do so but opposed the appeal, and as the sole question on appeal to this Court is whether the Native Commissioner should have condoned the late noting of the appeal to his Court, appellant should be awarded costs of appeal.

Held further: That as it is not incumbent on the chief concerned to furnish his reasons for judgment until an appeal has been noted against it, and the fact that it is highly desirable that those reasons should have been furnished before an application was made, must be again emphasised.

Cases referred to:—

Lekhetha *v.* Toane, 1946, N.A.C. (C. & O.), 22.
Gezane *v.* Gabuza, 1946 N.A.C. (T. & N.), 100.
Mbele *v.* Mbanjwa, 1947 N.A.C. (T. & N.) 89.

Meer Leather Works Co. *v.* African sole Leather Works (Pty.), Ltd., 1948 (1), S.A. 321 (T.P.D.).

Appeal from the Court of the Native Commissioner, Weenen. Balk (Acting President):—

This is an appeal against a Native Commissioner's refusal to entertain an application for condonation of the late noting of an appeal from the judgment of a Chief's Court.

The reason given by the applicant (present appellant) for the delay in noting the appeal against the Chief's judgment, viz., that that judgment first came to his knowledge when the Chief's messenger came to make an attachment thereunder, is not supported by the evidence, and I therefore agree with the Native Commissioner that the applicant cannot succeed on that ground. But this does not dispose of the matter, since the merits of the applicant's case in the Chief's Court also fall to be considered [Lekhetha *v.* Toane, 1946, N.A.C. (C. & O.), 22; Qina's case referred to therein, and Gezane *v.* Gabuza, 1946, N.A.C. (T. & N.), 100].

It emerges from the evidence that at least two of the eleven head of lobolo cattle for which the Chief's Court gave judgment in favour of the plaintiff (now respondent) are still in the possession of the payer of that lobolo, viz., Mdinga Mcunu. It follows that Mdinga and not the defendant (present appellant), who merely acted as an agent in the lobolo transaction concerned, is responsible for the payment of those two head of cattle to the person entitled to receive the lobolo in question. It is true that it also emerges from the evidence that the defendant intimated in the Chief's Court that he would give the plaintiff the eleven head of cattle, but obviously in so far as the two head of cattle referred to above were concerned, his statement could have meant no more than that he would hand them over to the plaintiff when he received them from Mdinga.

The judgment of the Chief's Court therefore appears to be manifestly unjust and the application for condonation of the late noting of the appeal ought to have been granted.

A further aspect remains to be dealt with, viz., the appellant's omission to note an appeal against the judgment of the Chief's Court. The noting of such appeal forms part and parcel of the approved practice in applications of the nature in question [Mbhele *v.* Mbanjwa, 1947, N.A.C. (T. & N.) 89], and although it was not done in this instance, this omission has not proved fatal, as the particulars required in terms of Rule 7 of the Old Rules for Chief's Courts published under Government Notice No. 2255 of 1928, as amended, which still apply in this case, have been furnished.

The necessity for observing the approved practice referred to above must, however be again emphasised, since even under the new Rules for Chiefs' Courts, published under Government Notice No. 2885 of 1951, it is not incumbent on the Chief concerned to furnish his reasons for judgment until an appeal has been noted against it and it is highly desirable that those reasons should have been furnished before an application for the necessary extension of time to validate the late noting of the appeal is heard, as they assist in determining whether or not the Chief's decision is contrary to law or manifestly unjust.

Counsel for respondent contended that if the appeal succeeded, the appellant should not be awarded the costs thereof as no good reason had been given by him for the delay in noting the appeal to the Native Commissioner's Court. The respondent could, however, well have abandoned the judgment given in his favour in that Court. He did not do so but opposed the appeal. That being so and as the sole question on appeal to this Court is whether the Native Commissioner should have condoned the late noting of the appeal to his Court, I am of

opinion that the ordinary rule should prevail and that the appellant should be awarded the costs of appeal. [Meer Leather Works Co. *v.* African Sole and Leather Works (Pty.), Ltd., 1948 (1) S.A. 321 (T.P.D.) at pages 327 and 328].

It should be added that according to the Native Commissioner's notes of the proceedings the point on which the appeal to this Court succeeds was taken in the Court *a quo*.

In the result the appeal should, in my view, be allowed with costs and the Native Commissioner's judgment should be altered to read:—

> "Application granted. Applicant allowed until the 15th August, 1952, within which to note his appeal against the Chief's judgment in question. Applicant to pay the costs of the application".

Bridle (Member): I concur.

Oftebro (Member): I concur.

For Appellant: Adv. O. A. Croft-Lever, instructed by Mr. J. M. K. Chadwick.

For Respondent: Adv. J. A. Meachin, instructed by Mr. A. M. Buchan.

NORTH EASTERN NATIVE APPEAL COURT.

CEBEKULU *v.* **SHANDU.**

N.A.C. CASE No. 29/52.

MTUBATUBA: 22nd July, 1952. Before Balk, Acting President. Ashton and Craig, Members of the Court.

NATIVE CUSTOM.

Contract—Exchange—Delivery—Pointing out cattle.

Practice and Procedure—Onus, on pleadings, resting on defendant—Failure to discharge such onus.

Summary: Plaintiff sued defendant for delivery of two head of cattle, being balance due under a contract of exchange. Defendant had pointed out two head of cattle to plaintiff but the cattle were found to be the property of another.

Held: That as defendant could not confer on the plaintiff a better title to the cattle than he himself possessed, the pointing out of those cattle by defendant to plaintiff constituted an imperfect delivery.

Held further: That, as on the pleadings, the onus of proving discharge of all his obligations under the contract, rested on defendant, and as he had failed to discharge such onus, plaintiff was entitled to judgment on his claim.

Statutes referred to: Section *twelve* of Act No. 38 of 1927. Appeal from the Court of Native Commissioner, Empangeni. Balk (Acting President):—

This is an appeal from the judgment of a Native Commissioner's Court reversing on appeal the judgment given by a Chief's Court in favour of the plaintiff (present appellant) for the two head of cattle claimed by him from the defendant (now respondent), and costs.

The two head of cattle in question were claimed by the plaintiff in the Chief's Court as "being balance of cattle exchanged with defendant".

The claim, as elaborated in the Native Commissioner's Court, and the plea in that Court, read as follows:—

"*Claim:* Two head of cattle—balance of six I exchanged with defendant, he only gave me four.

Plea: That six head were pointed out to plaintiff who accepted them and re-sisaed them in the respective kraals".

The grounds of appeal are:—

"1. That the judgment is against the evidence and the weight of the evidence.

2. That the learned Native Commissioner erred in holding if he did so hold that the plaintiff's claim was not for two specific head of cattle or otherwise if he correctly held that the claim was not for two specific head of cattle, erred in holding that the plaintiff was not entitled to a judgment in spite of the fact that the defendant had failed to tender delivery or payment before commencing legal proceedings.

3. That the learned Native Commissioner erred in holding that the pointing out by the defendant of the two head of cattle was a complete discharge of the defendant's obligation and that there was no obligation on the defendant to guarantee to the plaintiff free and undisturbed possession of such cattle.

4. That the learned Native Commissioner took no account of the evidence led to the effect that it was on the defendant's orders that the two head of cattle in question were held back from the plaintiff when he attemped to move them".

The facts of this case emerge from the presiding Native Commissioner's reasons for judgment which are appended:—

"Facts found proved:

Plaintiff effected an exchange with defendant of six head of cattle. At that time one Samuel Biyela owed defendant six head of cattle. Plaintiff and defendant went to the kraal of Christiaan Biyela where samuel Biyela had four head of cattle. Plaintiff states that at this kraal two head of cattle were pointed out and that they both went to other kraals where two more were pointed out. They then went to the kraal of Macansana for the other two head but it is common cause that no cattle were pointed out in this kraal. Plaintiff then states that they returned to Christiaan's kraal where defendant pointed out two head of cattle on the grazing field and that neither Christiaan nor Samuel Biyela were present. It is common cause that these two head were also the property of Samuel Biyela. The two head pointed out at Christiaan's kraal were duly delivered to plaintiff but delivery was refused of the last two head of cattle.

Plaintiff advised defendant that he could not get delivery and defendant took no action in the matter. Plaintiff then sued Samuel in a Chief's Court for the delivery of the two head of cattle and defendant gave evidence on his behalf but he was unsuccessful in his action; no appeal was lodged against this decision.

Reasons for judgment:—

"It is clear that the two head of cattle were pointed out by defendant to plaintiff in exchange for two head of the latter's cattle which were accepted by defendant. In Native law this pointing out constituted the passing of ownership and the risk passed to plaintiff. Plaintiff could vindicate his cattle from whoever had possession of them. According to his own evidence he left the two head on

the grazing fields without any arrangements for their safety. Normally the seller would hold the animals as agent for the purchaser but plaintiff was well aware that these were not defendant's grazing fields and the cattle were most probably with those of Christiaan Biyela, and it is the latter who refused to give delivery of the cattle.

Plaintiff cannot suc defendant for the delivery of these animals as defendant had already delivered them to plaintiff, unless he can prove that defendant stole these animals or had no right to dispose of them. The appeal is allowed with costs and the Chief's judgment is altered to read—judgment for defendant with costs".

It must be added that the defendant does not dispute the plaintiff's evidence that the latter delivered the six head of cattle due to him (defendant) under the contract of exchange in question and that he (plaintiff) has thus fulfilled his obligations under that contract.

It is common cause that the plaintiff failed in his vindicatory action in the Chief's Court for the recovery of the two head of cattle in dispute (hereinafter referred to as "the cattle") from Samuel Biyela who, as properly found by the Native Commissioner on the evidence, was the owner of the cattle. As also properly found by the Native Commissioner on the evidence, neither Samuel Biyela nor his brother, Christiaan Biyela, were present when the defendant pointed out the cattle to the plaintiff. Samuel Biyela denied in his evidence for the defendant that he delivered the cattle to the defendant or that he authorised the defendant to deliver them to the plaintiff. The plaintiff's evidence tend to indicate that Samuel Biyela did authorise the defendant to deliver the cattle to the plaintiff or at least that the plaintiff believed that to have been the case, but the obviously unreliable evidence of the defendant regarding this aspect leaves the matter inconclusive. It follows that the evidence cannot be said to establish that the dominium in the cattle passed from Samuel Biyela and accordingly the Native Commissioner appears to have erred in holding that the pointing out of the cattle by the defendant to the plaintiff passed ownership therein to the latter, as the former could obviously not confer on the latter a better title than he himself possessed.

It seems clear to me from the revelant record and was in fact found by the Native Commissioner, that what the plaintiff claimed in the instant action was the two specific head of cattle pointed out to him by the defendant and not any two head of cattle. It also seems clear to me that

(*a*) the evidence as a whole establishes that it was agreed upon between the plaintiff and the defendant that the cattle, i.e. the two specific head, were to form part and percel of the contract of exchange in question; and

(*b*) the evidence does not support a finding that the plaintiff agreed to accept any other cattle in lieu of the two specific head.

Had the common law been applicable in deciding this case, it may well be that, as contended in the third ground of appeal, the correct approach would have been from the angle of warranty against eviction which also applies to contracts of exchange, see Mackeurtan on Sale (Third Edition) at page 26 and pages 186 to 188.

The plaintiff's unsuccessful vindicatory action in the Chief's Court against Samuel Biyela and what is implied in the latter's defence in that action, as disclosed by the evidence in the instant case, viz., that he, Samuel Biyela, had neither delivered the cattle to the defendant nor authorised him to deliver them to the plaintiff, indicate clearly that the plaintiff was evicted owing to a flaw in the defendant's title to the cattle, see Mackeurtan on Sale (Third Edition) pages 189 *et seq.*

The evidence in the present case does not disclose whether or not the plaintiff noted an appeal against the Chief's judgment in the action in which he unsuccesfully sued Samuel Biyela for the cattle. But even assuming that the plaintiff did not note an appeal against that judgment, it seems to me that he was not obliged to do so as it is manifest from the evidence in the instant case that he gave the defendant due notice of his action against Samuel Biyela and there is nothing in that evidence to indicate that the defendant, who was present and gave evidence for the plaintiff in the latter's case against Samuel Biyela, advised the plaintiff to appeal against the judgment therein; and for the reasons given earlier in this judgment, it seems to me that the plaintiff had no reasonable prospect of success on appeal. It follows that the eviction was due to no fault of the plaintiff and that under common law he would have been entitled to judgment against the defendant, see Mackeurtan on Sale (Third Edition) pages 191 *et seq.* But as the present case emanated from a Chief's Court in which the jurisdiction is restricted to the determination of Native civil claims arising out of *Native law and custom,* see section *twelve* of the Native Administration Act, 1927, it obviously had to be decided according to that system of law, under which contracts of exchange are recognised, see Stafford's Principles of Native Law at page 271.

As pointed out earlier in this judgment, the evidence in the instant case does not establish that the dominium in the cattle passed from Samuel Biyela, and therefore the pointing out of the cattle by the defendant to the plaintiff obviously constituted an imperfect delivery. That being so the defendant has failed to discharge the onus of proof resting on him on the pleadings, and as the plaintiff has proved that he discharged his obligations to the defendant under the contract of exchange in question in full, he is entitled to judgment on his claim; and as the defendant made no proper tender, the plaintiff is entitled to costs.

Since a decree of specific performance would obviously be valueless in the present action, and as a Court in such a case may *ex proprio motu* give damages as an alternative, see Mackeurtan on Sale (Third Edition), pages 386 to 388, it seems to me that the latter course should have been adopted in the Courts below.

The plaintiff in his evidence states that the value of the cattle was £22, whereas the defendant in his testimony gives their value at £18. It seems to me that the mean, viz., £20, would be a fair value and this was conceded by counsel for both parties.

In the result I am of the opinion that the appeal should be allowed with costs and that the Native Commissioner's judgment should be altered to read:—

> "The appeal is dismissed with costs, but the Chief's judgment is altered from one for the plaintiff for two head of cattle with costs to one for the plaintiff for £20 with costs".

Ashton (Member): I concur.

Craig (Member): I concur.

For Appellant: Mr. W. E. White of Eshowe.

Respondent: Mr. G. D. E. Davidson of Empangeni.

NORTH EASTERN NATIVE APPEAL COURT.

JIYANE *v.* MTHEMBU.

N.A.C. CASE No. 31/52.

MTUBATUBA: 22nd July, 1952. Before Balk Acting President, Ashton and Craig, Members of the Court.

COMMON LAW.

Interpleader—Cattle attached at kraal of judgment debtor—Presumption raised that he is owner—Clear and satisfactory evidence required to rebut that presumption.

Practice and Procedure—Revelant warrants of execution to accompany record of proceedings.

Summary: Cattle, attached at kraal of judgment debtor, were claimed by appellant.

Held: That as there is a material discrepancy in the evidence tendered for the claimant, the necessary clear and satisfactory evidence to rebut the presumption raised as to ownership was lacking.

Held further: That it is essential for the proper determination of interpleader actions on appeal that the relative warrants of execution should accompany the record of proceedings.

Cases referred to:—
Zandberg *v.* van Zyl, 1910, A.D., 302.

Appeal from the Court of the Native Commissioner, Empangeni.

Balk (Acting President):—

This is an appeal from the judgment of a Native Commissioner's Court in an interpleader action in which it declared certain four head of cattle to be executable. The grounds of appeal are:—

"1. The judgment is against the weight of evidence;

2. The presumption of ownership operating in favour of the respondent was rebutted by the evidence adduced for and on behalf of the appellant."

It is common cause that the cattle were attached at the kraal of the judgment debtor (Ntukuteli Jiyane), which raised a presumption that he was their owner, and it was incumbent on the claimant (present appellant) to rebut that presumption by clear and satisfactory evidence to entitle him to succeed in his action (Zandberg *v.* van Zyl, 1910, A.D.,302).

There is a material discrepancy between the evidence of the claimant and that of his witness, Ntukuteli Jiyane (judgment debtor), on an important aspect of the case, viz., as regards the alleged acquisition of the cattle by the claimant. The latter stated that the widow of the late Mpikinini, whose heir he is, *sold the meat of the late Mpikinini's cattle as soon as they died* and that with the proceeds thereof, she had the judgment debtor, at whose kraal she lived, purchase the cattle at present in dispute; whereas, according to Ntukuteli, *he sold two of the late Mpikinini's bullocks,* and with the proceeds, purchased the two cows which, with their two calves, form the subject matter of the instant action. Then there is the evidence for the judgment creditor, given by the judgment debtor's cousin, that all of the late Mpikinini's cattle which were removed to the judgment debtor's kraal, *were slaughtered.*

I am therefore of opinion that the grounds of appeal have not been substantiated and that the appeal should accordingly be dismissed with costs.

A further matter calls for comment. The relevant warrants of execution did not accompany the record of the proceedings in this case. The Clerk of the Court *a quo* states that they have been mislaid and cannot be traced. It should be impressed upon the officer responsible that every precaution should be taken to ensure that the relevant warrants of execution accompany the records of the proceedings in interpleader actions on appeal, as those warrants are often essential for the proper determination of the appeals.

Ashton (Member): I concur.

Craig (Member): I concur.

For Appellant: Mr. G. D. E. Davidson of Eshowe.

Respondent in default.

NORTH EASTERN NATIVE APPEAL COURT.

MNYANDU *v.* ZULU.

N.A.C. Case No. 32 of 1952.

DURBAN: 28th July, 1952. Before Balk, Acting President; Leibbrandt, and Wessels, Members.

COMMON LAW.

Defamation—Damages—Words used actionable per se, *and their mere use gave rise to a presumption of malice.*

Practice and Procedure: Costs, where wrong judgment resulted solely from the trial Court having acted *mero motu.*

Summary: Plaintiff sued defendant for damages for defamation . The presiding Additional Native Commissioner, at the close of plaintiff's case, *mero motu* and without hearing the defendant, entered judgment for the latter with costs.

Held: That as the words complained of were actionable *per se* and their mere use gave rise to a presumption of malice, which in the circumstances has not been rebutted, and as there has been no public retraction and apology in terms of the first proviso to Section 132 (2) of the Natal Code of Native Law, the appeal should succeed.

Held: Further that as neither party was responsible for the wrong judgment, as it resulted solely from the Additional Native Commissioner having acted *mero motu* and as the position could not have been cured by the defendant's abandoning the judgment, the Court ordered that costs already incurred in the Court below and costs of appeal be costs in the cause.

Cases Referred to:—
Wiggill *v.* Gqangasholo, 1909, E.D.C., 237.
Mtalane *v.* Ngcobo, 1941, N.A.C. (T. & N.), 26.
Fischer *v.* Pieterse, 1952 (2), S.A. 488 (S.W.A.).

Statutes, etc., referred to:—
Section 132 (2) of Proclamation No. 168 of 1932.
Rule 17 published under Government Notice No. 2887 of 1951.

Appeal from the Court of the Native Commissioner, Durban.

Balk (Acting President):—

This is an appeal from a judgment given by a Native Commissioner's Court for the defendant (now respondent) in an action in which he was sued by the plaintiff (present appellant) for damages for defamation.

The defendant in his plea in the Court *a quo* denied having used the sladerous words which form the subject of this action.

At the close of the plaintiff's case, the Court *a quo, mero motu,* and without hearing the defendant, entered judgment for the latter with costs.

The ground of appeal is that "the Native Commissioner was wrong in holding that the word 'Prostitute' was used under circumstances that did not amount to defamation".

The presiding Additional Native Commissioner in the Court *a quo* states in his reasons for judgment that he found as a fact that defendant had called the plaintiff a prostitute in the course of a quarrel and that in the circumstances the words complained of were not defamatory but constituted mere vulgar abuse.

The only evidence in regard to the quarrel between the parties is that their voices were raised in anger. There is no evidence whatsoever to show that the plaintiff made use of any words or expressions or that her conduct was otherwise such as could have provoked the words complained of. Those words, i.e. that the plaintiff was a prostitute, were actionable *per se,* and their mere use gave rise to a presumption of malice which, in the circumstances, has not been rebutted (Wiggill *v.* Gqangasholo, 1909, E.D.C. 237); nor according to the evidence has there been any public retraction and apology in terms of the first proviso to sub-section (2) of section 132 of the Natal Code of Native Law, published under Proclamation No. 168 of 1932, and the appeal should accordingly succeed. [Mtalane *v.* Ngcobo, 1941, N.A.C. (T. & N.), 26]

There remains the question of costs of the appeal.

It is obvious from what has been stated above that neither party was responsible for the wrong judgment, as it resulted solely from the Additional Native Commissioner's having acted *mero motu;* nor could the position have been cured by the defendant's abandoning the judgment since, in that event, the Additional Native Commissioner would have been bound to have entered either judgment for the plaintiff, or an absolution judgment, depending on the extent of the abandonment, see Rule 17 of the Rules of this Court published under Government Notice No. 2887 of 1951; and either of these courses would have created a position that the parties could not have been expected to accept, since, on the one hand the defendant's plea is a denial that he used the words complained of, and on the other hand the plaintiff had, at the time of judgment, made out a *prima facie* case, so that both parties are entitled to have the case tried to a conclusion; and an order from this Court is necessary for that purpose. It seems to me therefore that following the general practice in such circumstances, the costs of appeal should be ordered to be costs in the cause. [Fisher *v.* Pieterse, 1952 (2), S.A. 488 (S.W.A.)].

In the result I am of opinion that the appeal should be allowed, that the Additional Native Commissioner's judgment should be set aside and that the record of the proceedings should be returned to him for trial to a conclusion on the existing pleadings. Costs already incurred in the Court below and costs of appeal to be costs in the cause.

Leibbrandt (Member): I concur.

Wessels (Member): I concur.

For appellant: Mr. T. J. D'Alton.

Respondent in person.

NORTH EASTERN NATIVE APPEAL COURT.

ZULU *v.* MDHLETSHE.

N.A.C. CASE No. 35/52.

VRYHEID: 2nd July 1952 before Steenkamp, President, Balk and Bayer, Members of the Court.

ZULU CUSTOM.

Native customary Union—Infant betrothal—Agreement repugnant to principles of public policy—Payments made thereunder not recoverable.

Native Estate: Liability of heir to late father's debts to extent of assets derived from that estate.

Summary: Cattle and money claimed by plaintiff alleged to have been advanced by his father to defendant's father in pursuance of an agreement between them that the former woud marry the then infant daughter of the latter when she reached maturity. That daughter later married another man who paid lobolo for her to defendant's father. Plaintiff and defendant are the general heirs of their respective late fathers.

Held: That as an agreement of infant betrothal is repugnant to the principles of public policy, any payments made thereunder are not repayable.

Held further: That as it is manifest from defendant's uncontroverted evidence that his late father left him in all three head of cattle which were slaughtered in connection with the cleansing ceremonies at his late father's death, and two horses which died soon thereafter, and that defendant was obliged to meet his late father's funeral expenses from his own pocket, the defendant cannot be held liable for his late father's debts.

Cases referred to:

Butelezi *v.* Ndhlela, 1938, N.A.C. (T. & N.), 175.
Dhlamini *v.* Zwane, 1947, N.A.C. (T. & N.), 10.
Ngcobo *v.* Mkize, 1 N.A.C. (N.E.), 249.
Ngcango *v.* Jele N.O. 1 N.A.C. (N.E.), 275.
Mlaba *v.* Ciliza, 1 N.A.C. (N.E.), 391.
Jajbhay *v.* Cassim, 1939, A.D., 538.

Statutes referred to:
Section 116 of Proclamation No. 168 of 1932.

Appeal from the Court of Native Commissioner, Nongoma.

Balk (Permanent Member):—

This is an appeal from the judgment of the Native Commissioner's Court at Nongoma dismissing with costs an appeal against the judgment of a Chief's Court given in favour of the plaintiff (now respondent) in an action in which he claimed from the defendant (present appellant) the recovery of twenty-two head of cattle and £10.

In my view it is manifest from the evidence for the plaintiff that he relies on the following facts to establish his case:—

(*a*) That the cattle and money in question were advanced by the plaintiff's father to the defendant's father in pursuance of an agreement between them that the then infant daughter of the defendant's father, viz. Nombikinyana, would marry the plaintiff's father when she reached maturity;

(*b*) that the plaintiff's father had not married Nombikinyana, when he died;

(*c*) that after the death of plaintiff's father, Nombikinyana married another man who paid lobolo for her; and

(*d*) that the plaintiff and defendant are the general heirs of their respective late fathers.

As the plaintiff thus has to rely on an agreement of infant betrothal and as it has been laid down by this Court that such an agreement is repugnant to the principles of public policy and that any payments made thereunder are not recoverable, it seems to me that the present appeal should succeed on that ground, see Butelezi *v.* Ndhlela, 1938, N.A.C. (T. & N.), 175, and Sibeko's case referred to therein, which, to my mind, are not affected by the judgment in Jajbhay *v.* Cassim, 1939, A.D. 538 because the reasoning in Mlaba *v.* Ciliza, 1, N.A.C. (N.E.), 391, applies in the former cases.

Another factor conducive to the success of this appeal is that the defendant derived no assets from his late father's estate wherewith to pay the latter's debt's, as is manifest from the defendant's uncontroverted evidence that his late father left him in all three head of cattle which were slaughtered in connection with the cleansing ceremonies at his late father's death, and two horses which died soon thereafter, and that he (defendant) was obliged to meet his late father's funeral expenses from his own pocket; and in terms of section *one hundred and sixteen* of the Natal Code of Native Law published under Proclamation No. 168 of 1932 which, according to the plaintiff's evidence applies, the defendant cannot in my view, in the circumstances, be held to be liable for his late father's debts since, to give effect to what appears to have been intended by the legislature, that Section falls to be construed to mean that an heir of a deceased person is liable for the latter's debts only to the extent that he derived assets from the deceased's estate wherewith to pay such debts and that therefore a claim for a deceased person's debts against his heir cannot succeed where, as in the present case, the livestock which formed the only assets in the estate of such deceased person had either died or had of necessity been legitimately used on behalf of that estate many years before the claim was brought.

As regards the contention by the respondent's Counsel that no cognisance could be taken of the defendant's evidence regarding the extent to which he had succeeded to the assets in his late father's estate as the defendant had not specifically pleaded that aspect as a defence, it seems to me that no special plea in that respect was necessary as the case emanated from a Chief's Court in which the pleadings are not precise and as the old Rules for those Courts which apply in the instant case, i.e. those published under Government Notice No. 2255 of 1928, make no provision for a re-statement of the pleadings in a Native Commissioner's Court on appeal thereto as do the present Rules for those Courts published under Government Notice No. 2885 of 1951.

To my mind it is unnecessary in the present case to consider the question of onus of proof arising out of the provisions of section *one hundred and sixteen* of the Natal Code of Native Law, as the only evidence on record in that connection is that of the defendant which, as intimated above, therefore falls to be accepted. It should be added that the defendant in his evidence stated that he is not the heir of the house of his late father to which the girl, Nombikinyana, belonged, and that that evidence is uncontroverted.

In the result I am of opinion that the appeal should be sustained with costs and that the judgment of the Court *a quo* should be allowed to read:—

> "The appeal is allowed with costs and the Chief's judgment is altered to one for the defendant with costs".

Bayer (Member): I concur. I feel that in this case it becomes unnecessary as regards the question of onus to go beyond the remarks embodied in my brother Balk's judgment.

Steenkamp (P): I agree that the appeal should be allowed.

Section 116 of the Code reads: "An heir succeeding to property.....". The emphasis should be laid on the word "succeeding". In the case of Ngcango *v.* Jele N.O. 1, N.A.C. (N.E.), 275, it was stated that on the death of a person the estate immediately devolves upon the heir. The question arises whether a distinction should be drawn between the words "succeeding" and "devolving". In my view an estate may devolve on the heir immediately on the death of the deceased person, but can it be said that the heir succeeds thereto immediately. Surely he cannot succeed until he takes charge of the property. Let me quote the example of an heir who is away at work; his father dies and leaves a number of cattle but before the heir can go home to take possession of the cattle they all die. The cattle admittedly devolved on him but he has not succeeded thereto. Moreover the underlying principle of the Section in question would appear to mean that if an heir receives any benefit from an estate he must defray the debts of that estate to the extent of the assets to which he had succeeded.

Council for respondent advanced the argument that a defendant to escape liability as provided in Section 116 of the Code, must specifically plead that he inherited nothing from his father.

On the other hand it was submitted that a plaintiff must aver in his summons that the defendant inherited property from the estate of his late father and it then becomes the duty of the defendant either to deny or admit such an averment.

It seems to me that neither of these submissions should be accepted unequivocally as in cases before a Chief no written summons or other pleadings are filed, and what would appear to be most important is that during the course of the proceedings it should be elicited by the Presiding Officer or by the legal representatives whether the defendant did in fact inherit property. If there is a dispute on this question, it is my considered view that the onus rests on the defendant to satisfy the Court that he did not inherit sufficient property to liquidate the debt incurred by his late father.

In the case of Dhlamini *v.* Zwane, 1947, N.A.C. (T. & N.), 10, this Court decided that the onus was on defendant to prove that he did not inherit. In the later case of Ngcobo *v.* Mkize, 1, N.A.C. (N.E.), 249, it is mentioned that the provisions of Section 116 are opposed to ancient Native Law and custom under which an heir was liable for his father's debts irrespective of the value of assets inherited. The legislature having seen fit to grant relief to the heir, it seems only correct that if an heir wants to benefit from a statutory provision, the onus rests on him to take such a defence or to prove what his inheritance was as such a fact can only be peculiarly within his own knowledge.

For Appellant: Mr. Turton of Guy, Turton & Hannah, Vryheid.

For Respondent: Mr. H. H. Kent of Eshowe.

NORTH EASTERN NATIVE APPEAL COURT.

MNIKATI *v.* CEKWANA.

N.A.C. CASE No. 36 of 52.

PIETERMARITZBURG: 17th July, 1952. Before Balk, Acting President; Bridle and Oftebro, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Secondary evidence as to contents of document—When admissible—Appeal—Remittal for further evidence. Circumstances justifying granting.

Summary: In an action in which the contents of a document were in issue, defendant had failed to produce that document, and had also not brought any evidence to substantiate the facts that the document had been lost and that search had been made therefor. The presiding judicial officer held that secondary evidence as to its contents was inadmissible.

Held: That the presiding Native Commissioner in the Court *a quo* rightly held that secondary evidence of that document was inadmissible.

Held further: That as it has not been shown on appeal that there are present in the instant case any of the special circumstances justifying the granting of that indulgence, and as it is clear from the record of the proceedings in the Court *a quo* that the appellant was afforded every opportunity of presenting his case in that Court, the application to remit the case to the Native Commissioner for further hearing should be refused.

Cases referred to:
du Plessis *v.* Ackerman. 1932 (E.D.L.) 139.

Statutes referred to:
Section 15 Act No. 38 of 1927.

Appeal from the Court of Native Commissioner, Impendhle.
Balk (Acting President):—

This is an appeal from the judgment of a Native Commissioner's Court in an action in which the plaintiff (now respondent) claimed from the defendant (present appellant)—

(*a*) delivery of certain five head of cattle or alternatively damages in the sum of £68;
(*b*) damages in the sum of £25 for certain wrongful grazing; and
(*c*) damages in the sum of £10 by reason of the defendant's wrongful action in depriving the plaintiff of the said cattle.

In his particulars of claim the plaintiff *inter alia* averred that:—

"(1) On or about the 11th day of August, 1951, defendant wrongfully and unlawfully removed five (5) head of cattle belonging to plaintiff from plaintiff's property. Despite demands made, defendant has failed, neglected and refused to restore the said cattle to plaintiff's possession and control.

(2) From the 1st day of July, 1951, to the 31st day of August, 1951, defendant wrongfully and unlawfully, and without plaintiff's permission, grazed or caused to be grazed, certain 1,000 sheep on plaintiff's property. By reason of defendant's action plaintiff has suffered damages on this score in the sum of twenty-five pounds (£25)."

The defendant pleaded:—

"(1) I did remove 5 head of cattle belonging to plaintiff. I will return the cattle when plaintiff pays me the £35 which he owes me for unlawfully ploughing my lands.

(2) I admit grazing 1,000 sheep on a piece of land which I have leased from David Molife. It is my land. Plaintiff has not yet any right over this land. I do not owe plaintiff any money.

(3) I am prepared to pay damages".

Judgment was entered for plaintiff with costs as follows:—

On claim (*a*): For five head of cattle.
On claim (*b*): For £25.
On claim (*c*): For £5.

The appeal is brought on the following grounds:—

"1. That the judgment is against the weight of evidence.

2. That the learned Commissioner erred in not admitting secondary evidence by Attorney Leslie Simon, of the contents of a document alleged to have been lost".

It is manifest from the defendant's plea and the evidence that he had no right whatsoever to deprive the plaintiff of his cattle and there can therefore be no question of the awards by the Court *a quo* to the plaintiff of the five head of cattle and damages on claims (*a*) and (*c*), respectively, not being justified.

As regards claim (*b*), it emerges from the evidence that—

(1) the plaintiff purchased portion of a certain land from David Molife (since deceased) in terms of a deed of sale dated the 2nd August, 1949, handed in by the plaintiff at the trial;

(2) it is stipulated in the said deed of sale that possession of the said portion of land shall be given to the plaintiff immediately;

(3) the said portion of land was duly surveyed in December, 1949, in pursuance of the said sale;

(4) whilst the said portion of land has not been transferred to the plaintiff, he, at the latest, took possession of it in December, 1950, when he commenced fencing it; and that

(5) during the period 1st July, 1951, to the 31st August, 1951, defendant had one thousand of his sheep grazing on the said portion of land without the plaintiff's consent.

The defendant's case is that he had leased the said portion of land with ajoining land from the said David Molife under a written agreement, which was still current at the time of the sale referred to above and at other material times. The defendant, however, did not produce that agreement of lease at the trial, so that the Court *a quo* properly awarded the plaintiff damages on claim (*b*).

As regards the second and final ground of appeal, the defendant's witness, Sibhamu Molife, said in his evidence that the written agreement of lease in question was in the possession of Mr. Attorney Simon, who, however, in his evidence for defendant, stated that he had handed that agreement back to the defendant at the latter's request. Neither the defendant nor any of his other witnesses made any mention in their evidence as to what had become of the said agreement of lease, so that there cannot be said to be any evidence substantiating it loss. It follows that the presiding Native Commissioner in the Court *a quo* rightly held that secondary evidence of that document was inadmissible, see Scoble's "Law of Evidence in South Africa" (Second Edition) at pages 20 and 338, and the authorities there cited.

Counsel for the appellant conceded that the appeal could not succeed on the grounds dealt with above but he urged that, as the appellant had not been represented in the Court below, this Court should, as an indulgence, set aside the judgment on claim (b) and remit the matter to the Court *a quo* to to enable the appellant either to produce the alleged deed of lease or to lead evidence of its loss and thereupon secondary evidence of its contents.

The indulgence sought is tantamount to a request by the appellant for leave to call further evidence after he had closed his case, and it has not been shown that there are present in the instant case any of the special circumstances justifiying the granting of that indulgence as were laid down in du Plessis *v.* Ackerman, 1932 (E.D.L.) 139, in which the whole position in regard to the aspect in question was reviewed. Furthermore it has not been shown that the appellant suffered any substantial prejudice warranting relief under the wide powers conferred on this Court under section *fifteen* of the Native Administration Act, 1927. On the contary, it seems clear to me from the record of the proceedings in the Court *a quo* that the appellant was afforded every opportunity of presenting his case in that Court for, at his instance, the case was postponed to enable him to engage an Attorney and at the resumed hearing at which the appellant continued to conduct his case in person the presiding officer ruled whilst the appellant's witness, Mr. Attorney Simon, was giving evidence, that secondary evidence regarding the alleged deed of lease was inadmissible. This ruling must have made it apparent to the appellant that he must either produce the alleged deed of lease or lead evidence as to its loss to prove his case. He failed to adopt either of these courses at that hearing, nor did he apply for a postponement in order to enable him to do so but instead he called another witness who took the case no further and then closed his case.

In the result I am of opinion that the appeal should be dismissed with costs.

Bridle (Member): I concur.

Oftebro (Member): I concur.

For Appellant: Mr. C. Nathan of Pietermaritzburg.

For Respondent: Adv. J. H. Niehaus instructed by Messers. C. C. C. Raulstone & Co. of Pietermaritzburg.

NORTH EASTERN NATIVE APPEAL COURT.

SHANGASE *v.* MTIYANE.

N.A.C. CASE No. 37/52.

PIETERMARITZBURG: 17th July, 1952. Before Balk, Acting President, Bridle and Oftebro, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure: Application for recall of defendant by plaintiff— Failure to advance any special ground justifying such indulgence.

Summary: Appellant, plaintiff in the Court below, appealed *inter alia* on the ground that the Native Commissioner erred in refusing plaintiff's application to recall defendant for further cross-examination "as there were a few questions he would like to put to him".

Held: That as the plaintiff did not advance any special ground justifying that indulgence the Court *a quo* cannot be said to have erred in refusing the application.

Cases referred to:
du Plessis *v.* Ackerman, 1932, (E.D.L.), 139.
Mkize *v.* Mkize, 1, N.A.C. (N.E.), 336.

Statutes referred to:
Sub-Rule 2 (1) of Government Notice No. 2887 of 1951.

Appeal from the Court of Native Commissioner, Camperdown.

Balk (Acting President):—

This is an appeal from the judgment of a Native Commissioner's Court dismissing both of the plaintiff's (present appellant's) claims with costs in a action in which he sued the defendant (now respondent) for payment firstly of the sum of £252 and secondly of £159 12s. for remuneration of services rendered by the plaintiff to the defendant in terms of two separate verbal agreements entered into by them.

The defendant, in his plea in the Court *a quo,* denied that he was indebted to the plaintiff.

The grounds of appeal are:—

"1. That the learned Native Commissioner erred in refusing plaintiff's application to lead further evidence and to recall some witnesses; and for ruling the application was based on no law.

2. That the Native Commissioner was wrong in denying plaintiff a right to reply to defendant's address.

3. That the Native Commissioner was influenced by outside factors in arriving at the said judgment.

4. That in any event the said judgment is bad in Law and is against the weight of evidence adduced.

5. That the learned Native Commissioner has further erred in refusing to furnish appellant with reasons for judgment despite payment to him of the prescribed fee".

Dealing with these grounds seriatim—

1. According to the presiding officer's notes of the proceedings in the Court *a quo,* the plaintiff applied for the recall of the defendant for further cross-examination "as there were a few questions he would like to put to him". The appellant, who argued his appeal in person, alleged in this Court that he had also applied to the Court *a quo* to re-open his case but that he was not even afforded an opportunity of advancing his reasons in support of that application. There is nothing in the record of the proceedings in question to indicate that such further application was ever made and as the appellant did not apply for the amendment of that record in that respect, that record must be accepted as correct. Furthermore the appellant did not furnish any proof in regard to the irregularly alleged by him. As regards the plaintiff's application in the Court *a quo* for the recall of the defendant for further cross-examination, the former did not advance any special ground justifying that indulgence, see du Plessis *v.* Ackerman, 1932 (E.D.L.) 139, and the authorities there cited, and in my view therefore the Court *a quo* cannot be said to have erred in refusing that application, and accordingly this ground of appeal fails.

2. There is no entry in the record in question that the plaintiff intimated in the Court *a quo* that he wished to reply to the defendant's address nor did the plaintiff apply for an amendment of the record in so far as concerns his verbal intimation in this Court that he had stood up to reply but had been told to sit down by the presiding officer in the Court *a quo.* Furthermore the appellant did not

furnish any proof in regard to the alleged irregularity. That being so and as the prescribing officer has categorically stated in his reasons for judgment that not only was the plaintiff not refused an opportunity of replying but that no such application was ever made, I am of opinion that there is no substance in this ground of appeal, see Mkize *v.* Mkize, 1, N.A.C., (N.E.), 336 and the authorities cited therein.

3. There appears to be nothing in the record of the proceedings in this action indicating that the presiding officer in the Court *a quo* was influenced by factors outside that record in arriving at his findings nor did the appellant show that the presiding officer was influenced by any such extraneous factor. That being so and as the latter made it quite clear in his reasons for judgment that no outside factors had influenced him in his decision and that it was arrived at solely on the evidence on record in this case, this ground of appeal is without substance.

4. It is manifest from his reasons for judgment that the presiding officer in the Court *a quo* gave due consideration both to the demeanour of the witnesses and to the probabilities and improbabilities as were disclosed by the evidence to have been material in arriving at his judgment, which amounts to no more than one of absolution from the instance on both claims, see "The Civil Practice of the Magistrates' Courts" by Jones & Buckle (Fifth Edition) at the foot of page 327; and to my mind the appellant has not shown that the Court *a quo* erred in that judgment. In my view therefore this ground of appeal fails.

5. It emerges from the reasons for judgment referred to above that the appellant's request for a written judgment was only received on the 5th April, 1952, whereas judgment in this case had been entered on the 25th March, 1952. The request was therefore out of time, see Sub-Rule 2 (1) of the Rules of this Court published under Government Notice No. 2887 of 1951. It is also clear from his reasons that the presiding officer concerned prepared them timeously and that the delay in their transmission to the appellant's Attorney was due to the furnishing of additional reasons necessitated by the notice of appeal, which was received on the 19th April, 1952. Obviously, therefore, this ground of appeal is obviously not well founded.

I am therefore of opinion that the appeal should be dismissed with costs.

Bridle (Member): I concur.
Oftebro (Member: I concur.
Appellant in Person.
For Respondent: Adv. J. H. Niehaus, instructed by Randles & Davis, Camperdown.

NORTH EASTERN NATIVE APPEAL COURT.

MBATA *v.* MDHLALOSE.

N.A.C. Case No. 39 of 1952.
VRYHEID: 1st July, 1952. Before Steenkamp, President; Balk and Bayer, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Appeal from Chief's Court—Condonation of late noting—Lack of funds and unsubstantiated allegation of illness—No indication Chief's decision in any way unlawful or unjust.

Summary: An appeal was brought to this Court by the unsuccessful applicant for condonation of late noting of appeal to a Native Commissioner's Court against a judgment of a Chief's Civil Court.

Held: That lack of funds and the unsubstantiated allegation of illness do not constitute good cause for condonation of late noting of an appeal against the judgment of a Chief's Civil Court.

Held further: That on the merits of the case the application could not succeed.

Appeal from the Court of the Native Commissioner, Nqutu.

Balk (Permanent Member):—

This is an appeal against a Native Commissioner's refusal to entertain an application for extension of the prescribed period for noting an appeal to his Court from a judgment of a Native Chief's Court in a civil matter.

The reasons given by applicant (present appellant) in the Native Commissioner's Court for the delay in noting the appeal against the Chief's judgment are lack of funds (in this case, 5s.), and illness. It has repeatedly been laid down by this Court that the mere allegation of lack of funds does not in itself constitute good cause for condonation of the late noting of an appeal and it is manifest from the evidence that the alleged illness has not been substantiated. It follows that the application cannot succeed on those grounds. But this does not conclude the matter, as the merits of the applicant's contemplated appeal have to be considered. Neither the records nor the reasons for judgment furnished by the Chief concerned indicate that his decision is in any way unlawful or unjust. On the contrary, it emerges therefrom and is borne out by the evidence for the applicant, i.e. that given by his son, Sikawoti, that in the Chief's Court the applicant admitted his liability to refund to the respondent *the whole* of the lobolo paid by the latter in respect of his contemplated customary union with the applicant's daughter, which had failed, i.e. the seven head of cattle and £9, for which judgment was given for respondent in that Court.

It is true that in a supporting affidavit handed in by the applicant at the hearing of the application, he stated that two of the cattle in question had died from natural causes and their death had been reported to the respondent, that he had advised the respondent that two other of those cattle had been attached in satisfaction of a judgment against his (applicant's) son, Sikawoti (who is referred to above) but that the respondent had failed to intervene, and that £4 of the £9 constituted damages for the abduction of his daughter by the respondent. But it appears from that affidavit that the alleged abduction amounted to no more than an engagement visit in respect of which no damages were payable, see Stafford's "Principles of Native Law" (Second Edition) at page 243; and there is nothing in the applicant's affidavit or *viva voce* evidence, nor in his cross-examination of the Chief concerned, to indicate that he had mentioned in the Chief's Court the death of the cattle or the damages or the respondent's failure to intervene in the matter of the attachment. Moreover those defences run counter to the applicant's unqualified admission of liability in the Chief's Court in respect of the whole of the claim, and to his statement in that Court that he had intended to come and pay but had lost the money. And in the absence of any explanation as to why those defences had not been brought in the Chief's Court, it is difficult to escape the conclusion that they savour of an afterthought designed to evade repayment in full of the respondent's just claim.

It therefore seems to me that the application is entirely devoid of merit and that the appeal should accordingly be dismissed with costs.

Steenkamp (President): I concur.

Bayer (Member): I concur.

Appellant in Person.

Respondent in default.

NORTH EASTERN NATIVE APPEAL COURT.

DHLAMINI AND OTHERS *v.* GAZU.

N.A.C. CASE No. 42/52.

PIETERMARITZBURG: 17th July 1952: Before Balk, Acting President, Bridle and Oftebro, Members.

ZULU CUSTOM.

Damages: Assault—Liability of father or guardian for tortious acts of child or ward under Native Law.

Summary: Plaintiff sued and obtained judgment against the three defendants for damages for an assault committed on him by the first two defendants, the third defendant being sued solely on grounds that he was the guardian of the second defendant and that the latter had been resident in the former's kraal when the alleged assault was committed.

Held that: As it has not been admitted in the pleadings, or at any other stage, nor is there any evidence that the second defendant was living at the kraal of the third defendant at the time of the commission of the alleged assault, third defendant's appeal against the judgment must succeed.

Cases referred to:

Andrews *v.* Levy, 1930, S.R., 101.
Mokgohloa *v.* Senomadi, 1 N.A.C. (N.E.), 325.
Kuzwayo and Ors, *v.* Zwane, 1948, N.A.C. (T. & N.), 11.
Rex vs. Geere & Ors, 1952, (2), S.A., 319, (A.D.).

Statutes referred to:

Section 141 of Proclamation No. 168 of 1932.

Appeal from the Court of Native Commissioner, Bulwer.

Balk (Acting President):—

Good cause having been shown the late noting of the appeal to this Court was condoned.

This appeal has been brought by the three defendants against a judgment of a Native Commissioner's Court awarding the plaintiff (now respondent) damages for assault in the sum of £51. 19s. and costs against them, jointly and severally, the one paying, the others to be absolved.

The grounds of appeal advanced by the first and second defendants are:—

"(*a*) That the evidence given by plaintiff and his witnesses Mpandeni Dhlamini was contradictory and Magobeyana, the wife of Mpandeni Dhlamini, who was present, was not called, and there was therefore no corroboration of plaintiff's evidence and Mpandeni Dhlamini admitted that he was the first to use the axe by which plaintiff, thereafter, suffered an injury to his eye.

(*b*) In any event, there was no evidence that defendants Nos. 1 and 2 acted in concert as averred in the summons and it was common cause that plaintiff's witness Mpandeni Dhlamini threw the axe at defendant No. 2.
(*c*) Defendant No. 1 was in any event, not liable for the use of the axe or for the injury caused to plaintiff's eye.
(*d*) That in any event the verdict is against the weight of evidence and contrary to law".

The ground on which the appeal is brought by the third defendant is:—

> "That the case was tried under Common law and that no liability could, therefore, attach to him for any delict committed by any inmate of his kraal".

It is convenient to deal with the third defendant's appeal first as, to my mind, that appeal can readily be resolved independently of the plaintiff's case against the first and second defendants.

It is manifest from the summons in this case that the third defendant was sued solely on the grounds that he was the guardian of the second defendant and that the latter had been resident in the former's kraal when the alleged assault was committed. In other words, the third defendant's liability was wholly contingent upon the application of Native Law, in this instance that set out in Section 141 of the Natal Code of Native Law published under Proclamation No. 168 of 1932.

According to his notes embodied in the record of the proceedings in question, the presiding Native Commissioner, however, applied Common law in deciding this case. But under Common law the liability of a father or guardian for the tortious acts of his child or ward is not based on their relationship as such, but rests upon other principles which have no application in this case. (See Andrews *v.* Levy, 1930, S.R. 101, Mokgohloa *v.* Senomadi, 1 N.A.C. (N.E.), 325, and the authorities quoted in those judgments).

It is difficult to understand why the Native Commissioner decided to apply Common law instead of Native Law in the instant case as the evidence indicates that the parties are resident in a rural Native location, apparently under the ordinary tribal conditions obtaining in such areas and as an action for damages for assault lies under Native Law in Natal, see Stafford's "Principles of Native Law" at page 250. However that may be, it has not been admitted in the pleadings or at any other stage, nor is there any evidence that the second defendant was living at the kraal of the third defendant at the time of the commission of the alleged assault, so that the third defendant's appeal must succeed, even if Native Law were applied, see Stafford's "Principles of Native Law" at page 246, and Kuzwayo & Others *v.* Zwane, 1948, N.A.C. (T. & N.), 11.

Coming to the appeal by the first and second defendants, it seems to me that the evidence of the plaintiff's witness, Mpandeni Dhlamini substantially corroborates the plaintiff's testimony. Furthermore there are a number of material discrepancies between and in the evidence of the first and second defendants and certain material improbabilities are disclosed by that evidence. For example, the first defendant stated that the plaintiff did not attack him at all, whereas the second defendant stated that the plaintiff struck at the first defendant with an axe. Again the first defendant in his evidence in chief made no mention of the second defendant's having also

hit the plaintiff with a stick, but stated that after the second defendant had struck the plaintiff one blow with an axe, "that was the end of it". Under cross-examination, however, the first defendant stated that the second defendant had inflicted three head wounds on the plaintiff with a stick whilst the plaintiff was down; and the second defendant stated that he had hit the plaintiff only twice with a stick but could not explain the latter's third head injury, adding that perhaps he had caused it. The first defendant admitted that the plaintiff and Mpandeni were ploughing at the time in question and it is therefore more probable that the plaintiff at that time only had a whip with which he drove the oxen, as averred by him and Mpandeni in their evidence. That this was so gains support from the fact that the first and second defendants did not cross-examine the plaintiff regarding a loaded stick which they alleged in their evidence he had, and from the first defendant's unconvincing explanation as to why they had not cross-examined him about it, viz., because no injury had been caused with that stick. Moreover, the first defendant stated that the plaintiff had an axe and a loaded stick, whilst the second defendant stated that the plaintiff had an axe, a loaded stick and another stick. Again the first and second defendants stated that plaintiff dropped the axe but they do not explain why he dropped it. The second defendant specifically stated that he could not say what made the axe drop. Nor could he explain why Mpandeni should have thrown the axe at him, a matter which Mpandeni makes clear in his evidence.

All these factors lead me to believe that the version emerging from the evidence for plaintiff is by far the more probable, and to my mind the appellants concerned have not shown any good reason for holding that the Native Commissioner erred in accepting that version.

It is clear from Mpandeni's evidence that the first and second defendants acted in concert in pursuance of a common purpose in assaulting the plaintiff with both the stick and axe, so that they are both jointly responsible in Law for all the injuries inflicted by them on him in the course of that assault. [Rex *v.* Geere & Others, 1952 (2), S.A. 319 (A.D.).]

In the result I am of opinion that the appeals by the first and second defendants should be dismissed with costs, that the third defendant's appeal should be allowed with costs, and that the Native Commissioner's judgment should be altered to read as follows:—

> "For plaintiff in the sum of £51 19s. with costs against the first and second defendants jointly and severally, the one paying, the other to be absolved to the extent of such payment. The claim against the third defendant is dismissed with costs".

Bridle (Member): I concur.

Oftebro (Member): I concur.

For Appellant: Mr. J. Hershensohnn, of Pietermaritzburg.

For Respondent: Adv. J. H. Niehaus, instructed by Mr. H. L. Bulcock, of Ixopo.

NORTH EASTERN

NATIVE APPEAL COURT.

TSHANGE *v.* KUNENE.

N.A.C. Case No. 48 of 1952.

PIETERMARITZBURG: 18th July, 1952. Before Balk, Acting President; Bridle and Oftebro, members.

COMMON LAW.

Practice and Procedure—Plea of *Res Judicata:* Previous judgment must be definite and final judgment.

Summary: A Native Commissioner's Court dismissed the Plaintiff's claim on the ground that it was *res judicata.*
Held: That the judgment in the prior case relied upon is couched in such uncertain terms that it cannot be regarded as a definite and final judgment and therefore cannot found the defence in question.

Appeal from the Court of the Native Commissioner, Richmond.

Balk (Acting President:—

This is an appeal from the judgment of a Native Commissioner's Court dismissing the plaintiff's (present appellant's) claim on the ground that it was *res judicata.*

That claim was dismissed on the application of the defendant's Attorney after the plaintiff and his witness, Mjanyelwa, had given evidence, and the plaintiff had been recalled and further cross-examined.

Apart from the fact that the defence of *res judicata* was not pleaded, it seems to me that the presiding Assistant Native Commissioner in any event erred in holding that the matter was *res judicata,* as the judgment of the Chief in the prior case relied upon is couched in such uncertain terms that in my view it cannot be regarded as a definite and final judgment and therefore cannot found the defence in question.

I am therefore of opinion that the appeal should be allowed with costs and that the Assistant Native Commissioner's judgment should be set aside and the record of the proceedings returned to him for trial to a conclusion. Costs already incurred in the Court below to be costs in the cause.

Bridle (Member: I concur.

Oftebro (Member): I concur.

For Appellant: Adv. J. H. Niehaus, instructed by Messrs. Wynne, Cole and Tod.

For Respondent: Mr. J. R. N. Swain, of Messers. C. C. C. Raulstone & Co.

NORTH EASTERN NATIVE APPEAL COURT.

NCUBE *v.* DUVE.

N.A.C. CASE No. 59/52.

PRETORIA: 10th September 1952. Before Steenkamp, President. Balk and Vermeulen, Members of the Court.

COMMON LAW.

Contract of Loan—Illegal object.

Summary: Plaintiff alleged that he had lent £10 to defendant in order that it should be paid to a policeman to "fix" defendant's passes to enable him to work in Pretoria. Both plaintiff and defendant are foreign Natives.

Held: That as plaintiff lent the money to defendant well knowing that is was required by defendant for an illegal purpose, plaintiff is not entitled to recover the loan.

Cases referred to:—

Ley *v.* Ley's Executors & Others 1951, (3), S.A., 186, (A.D.)
Jajbhay *v.* Cassim, 1939, A.D., 537.

Appeal from the Court of Native Commissioner, Pretoria.
Balk (Permanent Member):—

This is an appeal against a decree of absolution from the instance with costs granted by a Native Commissioner's Court after both parties had given evidence and closed their cases, in an action in which the plaintiff (present appellant) sued the defendant (now respondent) for the recovery of a loan of £10 and costs.

The appeal is brought on the following grounds:—

"A. The judgment is against the evidence and the weight of evidence in that the Native Commissioner should have found—

(i) that the plaintiff lent to defendant £10 as alleged;
(ii) that the plaintiff and his corroborative witness were reliable;

B. The Native Commissioner erred in Law and/or fact in holding that plaintiff had to prove his case beyond doubt to obtain judgment."

It is convenient to deal first with the final ground of appeal.

The presiding Native Commissioner in the Court *a quo* states in his reasons for judgment that it was necessary for the plaintiff to prove his case beyond doubt to obtain judgment. It is obvious therefrom that the Native Commissioner required too high a standard of proof from the plaintiff to establish the facts of his case, for the onus of proving facts in civil cases is discharged on a preponderance of probability, see Ley *v.* Ley's Executors & Others, 1951 (3) S.A. 186 (A.D.), at page 192.

It remains to examine the evidence in the instant case to determine whether the plaintiff can be said to have on a preponderance of probability discharged the onus of proof resting on him on the pleadings in consequence of the denial therein by the defendant that the alleged loan was made.

In this connection it seems to me that the following points put forward by Counsel for appellant are well taken:—

(1) That the evidence of the plaintiff's witness, Mackson Moyo, substantially corroborates that of the plaintiff regarding the making of the loan.

(2) That the only real discrepancy between the evidence of the plaintiff and that of Mackson, viz., that regarding the positions in which they and the defendant sat when the loan was made, is of minor importance in that that discrepancy can be accounted for by the considerable period that elapsed between the time of making the alleged loan and their giving evidence.

(3) That the inference adverse to the plaintiff's case drawn by the Native Commissioner on account of Mackson's not having mentioned in his evidence what Detective van Rensburg had said at the interview between the latter and the defendant, was not justified inasmuch as whilst the evidence indicates that Mackson accompanied the defendant to Detective van Rensburg it is not at all clear therefrom whether Mackson was present at the interview between Detective van Rensburg and the defendant. The inference in question, it should be added, emerges from the Native Commissioner's reasons for judgment.

(4) That the criticism of the Native Commissioner in his reasons for judgment regarding the plaintiff's failure to call Detective van Rensburg as a witness is also not justified as in the very nature of things Detective van Rensburg could not be regarded as plaintiff's witness, regard being had to the plaintiffs' evidence as follows:—

> "He (defendant) said that a European van Rensburg (a Detective in the Police) had said that as a Rhodesian, defendant could not work in town but if Lazarus (defendant) brought him £10 he would fix it up and get him passes".

(5) That the defendant under cross-examination admitted that the plaintiff and his family had been very friendly to him, thus indicating that there was no motive for fabrication of the plaintiff's claim.

(6) That the contradictions in the defendant's evidence (which is the only evidence for the defence) are such that he cannot be regarded as an honest witness.

It must also be mentioned that—

(*a*) it is common cause that the plaintiff and defendant are both Rhodesian Natives, that the defendant whilst out of work lived with the plaintiff during December 1951 when the loan is alleged to have been made and that the defendant went to interview Detective van Rensburg about his employment; and these factors together with the purpose of the loan as disclosed in the excerpt from the plaintiff's evidence quoted above undoubtedly add to the probabilities in favour of the plaintiff's case;

(*b*) the Native Commissioner found no facts to have been proved and he did not comment on the demeanour of the witnesses.

In these circumstances I am of opinion that the plaintiff has on a preponderance of probability discharged the onus resting on him on the pleadings.

But this finding does not dispose of the case as the question of illegality still remains to be considered.

To my mind it is obvious from the excerpt from the plaintiff's evidence quoted above as also from his other testimony and that of his witness, Mackson, that the plaintiff when making the loan of £10 was aware that the defendant required that money for an illegal purpose or in other words that the plaintiff lent the money well knowing that it was required by the defendant for an illegal purpose, viz., that the £10 was to be handed by the defendant to a member of the Police to procure passes to which he was not entitled.

It seems to me, therefore, applying the principles enuciated in Jajbhay *v.* Cassim, 1939 A.D., 537, that notwithstanding that there is no proof whatsoever that Detective van Rensburg either solicited or received the money in question the plaintiff in the instant case is not entitled to recover the loan and that the appeal should accordingly be dismissed with costs.

Steenkamp (President): I Concur.

Vermeulen (Member): I Concur.

For Appellant: Adv. D. J. Curlewis, instructed by Messrs. Hazelhurst, Galgut & Courtis.

For Respondent: Mr. Nel, of Messrs. Nel and Nel.

SOUTHERN NATIVE APPEAL COURT.

MXAMLI *v.* MABANDLA.

N.A.C. Case No. 32/1952.

Port St. Johns: 26th September, 1952. Before Warner Acting President; Wilbraham and Holdt, Members.

PRACTICE AND PROCEDURE.

Practice and Procedure—Chief's Court—Appeal from—Lapsing of Appeal on Grounds of Non-Prosecution.

Appellant obtained judgment against respondent on 12th August, 1947, in the Court of Chief Victor Poto for five head of cattle and costs. Respondent noted an appeal to the Native Commissioner's Court on 14th August, 1947. Notice of appeal was served on appellant personally and no further steps were taken in regard to the appeal until 25th October, 1951, when respondent's attorney issued a notice stating that the Native Commissioner, Ngqeleni, had fixed the 7th February, 1952, as the day for trial of the appeal case.

Appellant lodged an objection against the hearing of the appeal in the Native Commissioner's Court on the grounds *inter alia* that the appeal having been duly noted was not prosecuted within the limit of time fixed by sub-section (4) of section *twelve* of Act No. 38 of 1927, as amended.

The appeal is against the Court's decision overruling the objection.

Held:

(1) That the notice of appeal should have been served on the Chief or his representative in terms of section 5 of Government Notice No. 2255 of 1928.

(2) That it is the duty of the appellant if he is not notified of the day of hearing by the Clerk of the Court, to request the latter to fix the day so that notice can be served on the respondent. In other words, the appellant should not remain inactive until notified of the date as he has to make arrangements for the serving of the notice on the respondent in terms of section 6 of the Regulations published under Government Notice No. 2255 of 1928.

(3) That it is incorrect that the Clerk of the Court shall merely fix a date for the hearing of the appeal and notify the appellant and the respondent accordingly. The Clerk of this Court is required to fix a day for the hearing of the appeal and notify the appellant and issue a notice to the respondent, but before the appeal can be heard the appellant is required either to obtain the Notice from the Clerk of the Court and serve it on the respondent or make the necessary arrangements for it to be served by the Messenger.

(4) That section *twelve* (4) of Act No. 38 of 1927 provides for the suspension of the execution of a judgment if an appeal has been noted against it and provides further that the suspension of execution shall continue until the appeal is decided or until the expiration of the period prescribed for its prosecution if it was not prosecuted within that period, or until the appeal has been withdrawn or lapsed.

It is thus clear that the act contemplated that a time should be fixed for the prosecution of the appeal although provision for this is not made in the regulations.

(5) That an appeal cannot be held to have "lapsed" for want of prosecution if the appellant fails to appear and prosecute his appeal on the day fixed as the case could be postponed or dismissed If the latter, then it must be held to have been decided.

(6) That as section *twelve* (4) of Act No. 38 of 1927 contemplates a period for the prosecution of an appeal at the expiration of which such appeal would lapse and as the Regulations do not prescribe a period for the prosecution of an appeal the Court should be guided by the fact that it is in accord with convenience, reason, justice and legal principles that litigation should be brought to finality as expeditiously as possible. (*Vide* Maxwell, p. 198, 9th edition, "Interpretation of Statutes".)

(7) That respondent failed *within a reasonable time* to carry out the duties imposed on him by section 6 of the Regulations (Government Notice No. 2255 of 1928).

(8) That the appeal had lapsed in September or October, 1951, when the judgment was executed and the notice of trial issued.

Appeal succeeds.

Statutes referred to:

Act No. 38 of 1927.
Government Notice No. 2255 of 1928.

Works of Reference:

Maxwell "Interpretation of Statutes", 9th edition, p. 198.

Appeal from the Court of the Native Commissioner, Port St. Johns.

Warner (Acting President):

Plaintiff sued defendant in the Court of Chief Victor Poto for eight head of cattle or their value £40. On the 12th August, 1947, the Chief's Court gave judgment for plaintiff for five head of cattle or their value £25.

On the 14th August, 1947, a document signed by defendant stating that he was noting an appeal against the judgment of the Chief's Court was lodged with the Clerk of the Court. This document bears an endorsement that it was served by the Messenger of the Court on "Defendant personally" and also bears a note "Advise return L. Carey Miller".

No further steps appear to have been taken in regard to the appeal until the 25th October, 1951, when defendant's attorney, Mr. L. Carey Miller, issued a notice to the effect that the Native Commissioner, Ngqeleni, had fixed the 7th February, 1952, as the day for trial of the appeal case.

Plaintiff lodged an objection to the hearing of the appeal on the following grounds:—

"1. (*a*) Judgment of Chief's Court was granted on 12th August, 1947, and appeal noted on 14th August, 1947, such being within the period of time fixed by Act No. 38 of 1927, section *twelve* sub-section (4) as amended.

(*b*) That the appeal having been duly noted, was not prosecuted within the limit of time fixed by the said sub-section (4) of section *twelve* of Act No. 38 of 1927, as amended.

(*c*) That by reason of paragraph (*b*) the said appeal failed to operate by reason of lack of due prosecution and was abandoned or lapsed.

(*d*) That during or about September or October, 1951, the plaintiff in original action, now respondent, obtained from the Chief's Court a writ of execution under the said judgment and recovered payment thereof.

(*e*) That only after the execution of above-mentioned writ did the appellant take steps to have the appeal set down for trial.

(*f*) (i) That respondent will be prejudiced to great extent should the appeal be now proceeded with, inasmuch as having received payment he has disposed of the proceeds of the execution.

(ii) As regards availibility of witnesses as to his claim.

2. The notice fixing date of trial of appeal has been issued by appellant's attorney and does not comply with section 6 of Government Notice No. 2255 of 1928 as amended."

After hearing argument the Native Commissioner overruled the objection and plaintiff has appealed against this ruling on the ground that on a true construction of the Laws and Regulations applicable to appeals from Chiefs' Courts the objection taken to the hearing of the appeal was valid and should have been upheld.

In this judgment, the term "the Act" means the Native Administration Act, No. 38 of 1927, as amended, and the term "the regulations" means the rules for Chiefs' Civil Courts as promulgated by Government Notice No. 2255 of 1928 which was in force when the appeal in the present case was noted.

Section 5 of the regulations requires a party desiring to appeal against any judgment or order of a Chief's Court to notify the Chief or his representative of his intention and lodge his appeal in person with the Clerk of the Native Commissioner's Court within thirty days from the date of pronouncement of the Chief's judgment or order.

In the present case, it is not understood why the notice of appeal was served on the defendant instead of on the Chief or his representative as required by the rules.

Section 6 of the regulations provides that the Clerk of the Court with whom such appeal is lodged shall record the information of the appellant in regard to the claim before the Chief and the judgment thereon and shall thereupon fix a day for the hearing of the appeal, notify the appellant and also issue a notice for service on the respondent. Appellant may serve this notice on the respondent personally or he may request that it be served by the Messenger upon payment to the Clerk of the Court of the fees prescribed.

The Native Commissioner, in his reasons for judgment, states that section 6 of the regulations requires that the Clerk of the Court shall fix a date for the hearing of the appeal and notify the appellant and the respondent accordingly. This is incorrect. The Clerk of the Court is required to fix a day for the hearing of the appeal and notify the appellant and issue a notice to the respondent but, before the appeal can be heard, appellant is required either to obtain the notice from the Clerk of the Court and serve it on the respondent or make the necessary arrangements for it to be served by the Messenger. In this case, the notice was not served on plaintiff, so defendant failed to carry out the duty imposed upon him by this regulation.

Section *twelve* (4) of the Act provides that if appellant has noted his appeal in the manner and within the period prescribed by regulation under sub-section (6), the execution of the judgment shall be suspended until the appeal has been decided (if it was prosecuted at the time and in the manner so prescribed) or until the expiration of the last-mentioned period if the appeal was not prosecuted within that period, or until the appeal has been withdrawn or has lapsed. It is clear from this that the Act contemplated that a time should be fixed for the prosecution of the appeal although provision for this was not made in the regulations.

The Native Commissioner states "But my reading of section *twelve* (4) of the Act is simply this that execution of the judgment

shall be suspended until the appeal has been decided if it was prosecuted at the time and in the manner prescribed by sections 5 and 6 of the regulations or if he did not note the appeal within the prescribed period of 30 days the execution is only suspended until the expiration of the 30 days." It is difficult to understand on what grounds he has made the last portion of this statement because there is no provision for the suspension of execution if an appeal is not noted. Section *twelve* (4) merely provides for the suspension of the execution of a judgment if

Section *twelve* (4) of the Act provides that the suspension of execution shall continue until the appeal is decided or until the expiration of the period prescribed for its prosecution if it was not prosecuted within that period or until the appeal has been withdrawn or has lapsed. The Native Commissioner states "it is only if the appellant fails to appear and prosecute his appeal on the day so fixed that the appeal can be held to have lapsed for want of prosecution". But if appellant failed to appear on the day fixed for the hearing of the appeal, the Native Commissioner could either postpone it to a later date or dismiss the appeal. If he adopts the latter course, the appeal has been decided and cannot be held to have lapsed. On the day fixed for hearing of the appeal the matter would be before the Court which would have to take some action whereas the word "lapse" is defined in Bell's legal dictionary as meaning "to pass away; to become void".

Section 6 of the regulations requires the Clerk of the Court to fix a day for the hearing of the appeal and notify the appellant but this does not mean that the latter can remain inactive until he receives such notification. Before the appeal can be heard, he has to make arrangements for the serving of the notice on respondent. It is thus his duty, if he is not notified of the day of hearing by the Clerk of the Court, to request the latter to fix the day so that notice can be served on the respondent.

The regulations do not prescribe a period for the prosecution of an appeal, at the expiration of which such appeal would lapse, but it is clear that section *twelve* (4) of the Act contemplates that such a period should be fixed. In deciding whether the appeal lapsed on appellant's failure to carry out the duty imposed upon him by section 6 of the regulations, we are guided by the following passage on page 198 of Maxwell's Interpretation of Statutes (9th edition): "In determining either the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice, and legal principles should, in all cases of doubtful significance, be presumed to be the true one." It is in accord with convenience, reason, justice and legal principles that litigation should be brought to finality as expeditiously as possible and, in our view, the appeal must be regarded as having lapsed when defendant failed, within a reasonable time, to carry out the duty imposed upon him by section 6 of the regulations in regard to the serving of the notice on plaintiff.

Without fixing a period for the prosecution of an appeal (this being the function of the legislature) we hold that the appeal had lapsed in September or October, 1951 when the judgment was executed and the notice of trial was issued by defendant's attorney.

The appeal is allowed with costs and the judgment of the Native Commissioner altered to read:— "Objection to the hearing of the appeal from the Chief's Court is upheld with costs."

Wilbraham and Holdt (Member): Concur.

For Appellant: Mr. L. D. Crowther, Ngqeleni.

For Respondent: Mr. H. H. Birkett, Port St. Johns.

SOUTHERN NATIVE APPEAL COURT.

GWAJI *v.* SODEM.

N.A.C. Case no. 33 of 1952.

Port St Johns: 26th September, 1952. Before Warner, Acting President; Wilbraham and Holdt, Members of the Court.

PONDO CUSTOM.

Pondo Custom—Dowry—Refund on Dissolution of Union—Wedding Outfit— Deduction in Respect of.

Appellant's (Plaintiff in the Court below) wife deserted him. Refund of the dowry was claimed—this was duly refunded by respondent less two head of cattle—one in respect of "the woman's services" and the other in respect of the wedding outfit supplied. Appellant sued for the return of this beast but was unsuccessful.

The appeal is against the Court's ruling that a wedding outfit provided becomes the sole property of the wife and that whether she does or does not take it away with her upon desertion of her husband a beast must be allowed as a deduction upon refund of the dowry.

Held:

(1) That the father of a woman deserting her husband and taking with her the wedding outfit, is not entitled when returning the dowry to deduct a beast in respect of such wedding outfit.

(2) That gifts of clothing at the time of marriage are not included in the wedding outfit.

(3) That if a woman deserting her husband took her personal clothing but left the other gifts, her father could then deduct a beast when refunding the dowry.

Appeal succeeds.

Cases cited: Sihoyo *v.* Mandobe, 1941 N.A.C. (C. & O.), 5.

Appeal from the Court of the Native Commissioner, Ngqeleni.

Warner, Acting President:

It is common cause that plaintiff married defendant's daughter by native custom and paid nine head of cattle and a horse as dowry. Plaintiff's wife deserted him and returned to defendant who then refunded eight head of cattle to plaintiff being restoration of dowry paid, less two head of cattle as deductions—one in respect of the woman's services and one in respect of the wedding outfit supplied. There was no pregnancy as a result of the marriage.

Plaintiff in his summons stated that when his wife deserted she took with her the wedding outfit which had been provided and that is was with defendant so that the latter had no right to deduct a beast in respect of this outfit when restoring the dowry. He therefore claimed delivery of one beast or its value £9 and costs.

In his plea, defendant denied that the woman took the wedding outfit with her when she returned to his kraal.

When the matter came before Court, the Assistant Native Commissioner without hearing evidence held that the wedding outfit is a personal gift to the woman and belongs to her and can be used or disposed of by her as she pleases so that defendant was entitled to deduct a beast in respect of the wedding outfit whether the woman took it with her to defendant's kraal or whether she left it at plaintiff's kraal. He therefore entered judgment for defendant.

Plaintiff has appealed against this judgment on the ground that the Native Commissioner erred in ruling that a wedding outfit provided becomes the sole property of the wife and that whether she does or does not take it away with her upon desertion of her husband, a beast must be allowed as a deduction upon refund of dowry in respect of her marriage.

The Native Commissioner does not quote any authority for his statement that a wedding outfit is a personal gift to the woman and can be used by her as she pleases.

The question has been put to the Native Assessors who have given the following unanimous opinion:—

> "If a woman deserts her husband and takes with her the wedding-outfit, her farther is not entitled, when returning the dowry to deduct a beast in respect of such wedding-outfit.
>
> Gifts of clothing at the time of marriage are not included in the wedding-outfit. Such articles are the personal property of the woman.
>
> If a woman, on deserting her husband, took her personal clothing but left the other gifts her farther could then deduct a beast when refunding the dowry."

This expression of opinion is accepted as being consistent with that which was given and accepted by the Court in the case of Sihoyo *v.* Mandobe, 1941 N.A.C. (C. & O.) 5.

It follows, therefore, that plaintiff has a cause of action and the case should be tried on its merits.

The appeal is allowed with costs, the judgment of the lower Court is set aside and the record is returned for furher hearing.
Wilbraham and Holdt, members, concur.

Opinion of Native Assessors.

Names of Assessors.	*Tribe.*	*District from.*
Tolikana Mangala.....	Pondo	Libode
Lumaya Langa.....	Pondo	Flagstaff.
Mdabuka Mqikela.....	Pondo	Lusikisiki
Nombekile Libode.....	Pondo	Ngqeleni
Sinyokobede Ndevu.....	Pondo	Port St. Johns.

Question: A man married a woman and paid 9 cattle and one horse as dowry. She deserted him and took with her, her wedding outfit. She then rejected her husband and 8 cattle were *keta-ed* the father retaining one beast for services of the woman and one for the wedding outfit. In these circumstances is the father entitled to deduct one beast for the wedding outfit?

Answer (per Tokikana Mangala): No. A beast may not be deducted for the wedding outfit.

The others agree.

Question (per Mr. Birkett): Part of the wedding outfit is clothing. When a woman leaves her husband, can she go away with the clothing?

Answer (per Mdabuka): Gifts of clothing at the time of marriage are not included in the wedding outfit, such articles are the personal property of the woman.

Question: If she leaves the rest of the gifts (not personal clothing, etc.), would her father have to refund a beast for the wedding outfit?

Answer (per Mdabuka): No. He could then deduct a beast for the wedding outfit.

Other assessors agree.

For Appellant: Mr. L. D. Crowther: Ngqeleni.
For Respondent: Mr. H. H. Birkett: Port St. Johns.

NORTH–EASTERN NATIVE APPEAL COURT.

ZULU *v.* MCUBE.

N.A.C. Case No. 57/52.

Vryheid: 29th September 1952. Before Steenkamp, President; Balk and McCabe, Members of the Court.

ZULU CUSTOM.

Native Customary Union—Refund of lobolo—Previous civil marriage with another woman subsisting when lobolo paid. Summary: Appellant sued respondent for the refund of lobolo paid for respondent's sister, who jilted appellant before the union was solemnised. An allegation that at the time appellant paid the lobolo he was married by civil rites to another not properly canvassed in the Native Commissioner's Court.

Held: That as neither party was legally represented in his Court, the Native Commissioner should have elicited from plaintiff whether it is true that a civil marriage subsisted between him and another woman at the relevant time.

Held: Further that as the evidence stands that aspect is not clear and that the Native Commissioner's judgment should be set aside and the record of proceedings returned to him for such further evidence as either party may wish to adduce in regard to the alleged illegality and thereupon for a fresh judgment.

Cases referred to:

Mlaba *v.* Ciliza 1 N.A.C. (N.E.) 391.

Appeal from the Court of the Native Commissioner, Mahlabatini.

Steenkamp (President):—

In the Native Commissioner's Court the plaintiff (now respondent) sued the defendant (now appellant) for twelve head of cattle plus £28, being refund of lobolo he had paid in respect of defendant's sister, Eldah, who had jilted plaintiff before a customary union had been solemnised.

Defendant's plea is to the effect that plaintiff and Eldah were legally married and that they have not been divorced. He also pleads that if the Court declares the union to be null and void defendant only knows of seven head of cattle and £15 which were paid to him by the plaintiff.

The Native Commissioner gave judgment for plaintiff for nine head of cattle and £10 with costs.

An appeal has been noted to this Court on the grounds that the judgment is against the weight of evidence and the law.

An application dated the 26th July, 1952, notice of which was duly served on plaintiff, was made today to this Court to allow the appellant to found his appeal on the additional and special ground that respondent was not entitled to claim a refund of any lobolo he may have paid for the woman, Eldah, because he had already been married to another wife by Christian rites and lobolo was paid in furtherance of an illegal object, viz. the contracting thereafter of a customary union.

Regarding this additional ground of appeal it should be pointed out that the question of a previous civil marriage between plaintiff and another woman was considered by the Native Commissioner. In his reasons for judgment he mentions that it is common cause that the plaintiff was married to another woman according to Christian rites. This conclusion of the Native Commissioner is not supported by the evidence, but that is a matter to be dealt with separately. At this stage it is sufficient

to state that the question was apparently considered by the Native Commissioner and therefore the additional ground of appeal should be allowed, especially as a proper notice of the application has been given to the respondent.

If it is true that at the time the plaintiff entered into nagotiations with the defendant for a customary union with Eldah, a civil marriage existed between himself and another woman, then the payment of lobolo was for an immoral purpose. This question was decided in no uncertain way in the case of Mlaba *v.* Ciliza 1 N.A.C. (N.E.) 391, in which various other authorities were quoted.

The only evidence we have in this respect is that of the defendant where he states:—

> "He (meaning plaintiff) said he wanted to marry by customary union because he married his first wife according to Christian rites",

and again

> "He (meaning plaintiff) said he did not require an official witness as he is married by Christian rites".

Court below and the Native Commissioner should have elicited from plaintiff whether it is true that a civil marriage subsisted between him and another woman at the relevant time. As the evidence stands this aspect is not clear.

In my opinion therefore the appeal should be allowed with costs, the Native Commissioner's judgment should be set aside and the record returned to him for such further evidence as either party may wish to adduce in regard to the alleged illegality, and thereupon for a fresh judgment.

Balk (Permanent Member): I concur.

McCabe (Member): I concur.

For Appellant: Mr. A. G. Turton of Messrs. Guy, Turton and Hannah.

Respondent in person.

NORTH-EASTERN NATIVE APPEAL COURT.

DHLONGOLO *v.* DHLONGOLO.

N.A.C. Case No. 76/52.

Vryheid: 1st October, 1952. Before Steenkamp, President; Balk and McCabe, Members of the Court.

LAW OF PROCEDURE.

Appeal against Chief's judgment—Chief's judgment to be on record in Native Commissioner's Court before appeal on such judgment can be heard—Chief's reasons likewise to be on record except where it is not possible to obtain such reasons—Chiefs' Courts Rule No. 11 (3).

Summary: Before the Native Commissioner's Court, on appeal from a judgment in a Chief's Court, the parties admitted that the judgment in the Chief's Court was incorrectly recorded and that plaintiff actually had four claims, and the Native Commissioner allowed plaintiff's claim to be amplified.

The Native Commissioner, notwithstanding the fact that the Chief's judgments, if any, on the additional three claims were not on record before him, adjudicated thereon.

Held: That unless the Chief agreed that he had adjudicated on all four claims the admissions made by the parties cannot be accepted as reflecting the true judgment of the Chief.

Held: Further that there is no provision whereby a Native Commissioner's Court may proceed with the hearing of an appeal without being in possession of the Chief's judgment.

Held: Further that a Native Commissioner's Court may *only* exercise its discretion and proceed with the hearing of an appeal without the reasons for judgment of the Chief being on record, as provided in Chiefs' Courts Rule 11 (3), where it is not possible to obtain such reasons.

Statutes, etc. referred to:

Chiefs' Courts Rules Nos. 6 (1), 10, 12 and 11 (3).

Appeal from the Court of the Native Commissioner, Paulpietersburg.

Steenkamp (President):

The late Madetshane had at least six wives and he established two sections, viz. the *Indhlunkulu* and the *Ikohlo*.

The *Indhlunkulu* wife was Kantsungulu I and to that House were affiliated Kantsungulu II, the second wife married and Gaplovunga the fifth wife married. The *Ikohlo* wife was Gamgogo and to her section were affiliated the fourth and sixth wives married.

Plaintiff is the eldest son and heir to the *Ikohlo* section and defendant is the eldest son and heir to the *Indhlunkulu* section. In the *Indhlunkulu* section there was a son named Maliba born out of Kantsungulu II, i.e. the second wife married by the late Madetshane. Defendant first denied that Maliba's mother was affiliated to the *Indhlunkulu* section but afterwards admitted it.

When defendant married his second wife nine head of cattle from the *Ikohlo* section were advanced for the payment of his lobolo. These cattle therefore became refundable to that House.

When Maliba married his first wife eight head of cattle were advanced by the *Ikohlo* section for the payment of his lobolo, and again when he took his second wife seven head of cattle were advanced by the *Ikohlo* section. Maliba left no sons but three daughters. The property rights in these three girls accrued to the *Indhlunkulu* section.

Before the Chief the plaintiff i.e. the heir in the *Ikohlo* section sued the defendant i.e. the heir in the *Indhlunkulu* section. The claims, as amplified before the Native Commissioner, are as follows:—

(*a*) Four head of cattle being the balance still owing out of the nine head of cattle advanced to defendant as lobolo for his second wife.

(*b*) Two head of cattle advanced by the *Ikohlo* to defendant when he married his first wife, and which cattle were slaughtered at the marriage ceremony.

(*c*) Eight head of cattle advanced by the *Ikohlo* section to Maliba when he married his first wife.

(*d*) Seven head of cattle advanced by the *Ikohlo* to Maliba when he married his second wife.

The Chief gave judgment in favour of defendant with costs. Plaintiff appealed to the Native Commissioner, but the claim as set out by the Chief in his reasons for judgment only mentions four head of cattle which defendant used as lobolo for his second wife.

When the case was heard by the Native Commissioner and before any evidence was led the plaintiff, through his attorney, informed the Court that the judgment in the Chief's Court was incorrectly recorded and that plaintiff actually had four claims. The defendant admitted this and plaintiff's claim was then amplified (as already set out above).

Defendant's plea before the Chief was "Not liable Cattle have been repaid". Before the Native Commissioner the plea

was more explicit and reads to the effect that on—

claim (*a*) all nine head of cattle have been repaid;

claim (*b*) only one beast was advanced by his father, which he is not supposed to return;

claim (*c*) admits the cattle were paid by plaintiff's house i.e. the *Ikohlo* house, but as he is not Maliba's general heir he denies liability;

claim (*d*) defendant denies liability as he is not Maliba's general heir.

After evidence was heard the Native Commissioner upheld the appeal from the judgment of the Chief's Court and altered that judgment to one for plaintiff as claimed on all counts with costs.

An appeal against the whole judgment has now been noted to this Court on the following grounds:—

(1) (*a*) That the Court erred in admitting three additional claims contrary to Rule 12 of the Chiefs' and Headmens' Civil Courts Regulations.

(*b*) ALTERNATIVELY: The Court erred in not calling upon the Chief to furnish his reasons in terms of Rule 11.

(2) That the Appeal Notice against the Chief's judgment is defective in that it did not set out the particulars of the claim as provided for in Rule 10 read with Rule 6 (1) (*c*).

(3) ALTERNATIVELY: That the Court erred in not amending the Appeal Notice against the Chief's judgment to—

(*a*) include Claim No. 1.

(*b*) include Claims Nos. 2, 3 and 4.

(4) That defendant showed that he did return eight head of cattle.

(5) (*a*) That in any event defendant is not liable to return under Native Law and custom the two head of cattle slaughtered at his wedding.

(*b*) That sufficient evidence was not brought to show that defendant is liable to return the cattle advanced to Maliba.

(*c*) That defendant inherited nothing from Maliba's Estate.

(6) That defendant should have been given an opportunity to call further witnesses.

Counsel for appellant contended that as according to the Chief's judgment and reasons for judgment, the claim before him was in respect of four head of cattle, as mentioned in claim (*a*) above, and as there is no indication that he adjudicated on the other three claims i.e. (*b*), (*c*) and (*d*), the Native Commissioner could not consider these claims as a Court of appeal from the Chief's Court.

Counsel for respondent has strongly urged that both plaintiff and defendant agreed before the Native Commissioner that the judgment of the Chief's Court was incorrectly recorded and that plaintiff actually had four claims in the Chief's Court, and that therefore the argument now raised by appellant's Counsel is of a technical nature.

This Court however holds the view that unless the Chief agreed that he had adjudicated on all four claims, the admissions made by the parties cannot be accepted as reflecting the true judgment given by the Chief. This Court is entitled, as also was the Native Commissioner's Court, to have on record the Chief's judgment on all four claims and also his reasons for judgment, unless the Native Commissioner exercises his discretion and proceeds without such reasons as laid down in Rule 11 (3) of the Chiefs' Courts Rules, which only applies where it is not possible to obtain such reasons. There is certainly no provision whereby a Native Commissioner's Court may proceed with an appeal without being in possession of the

Chief's judgment. In so far as we know the Chief might not have given a judgment on claims (*b*), (*c*) and (*d*) and therefore no appeal can lie until he has done so.

It is my view that the proceedings in the Native Commissioner's Court concerning claims (*b*), (*c*) and (*d*) should be set aside and it does not become necessary to deal with the evidence and other points raised regarding these three claims.

Regarding claim (*a*), in which the Native Commissioner upheld the appeal from the Chief's Court, and altered the judgment to one for four head of cattle, it is only necessary to deal with this very briefly. Ground 4 of the Notice of Appeal mentions that defendant showed that he did return eight head of cattle. Counsel for appellant during the course of his argument suggested that two head of cattle slaughtered at plaintiff's wedding were included in the eight returned.

The evidence adduced on behalf of plaintiff, and which the Native Commissioner accepted, is that defendant borrowed nine head of cattle and that he only returned five to the *Ikohlo* house, leaving a balance of four yet to be returned. Defendant's own witness Aaron states that only five head of cattle were repaid. He however states that only six head were borrowed, but defendant states nine head were borrowed. Defendant's other witness also mentions that nine head were borrowed, but he states that in actual fact only five were returned to the plaintiff.

If only five were returned then defendant still owes four head of cattle and plaintiff is entitled to judgment for this number. The cattle slaughtered at defendant's wedding form the subject of a separate claim, namely claim (*b*).

In my opinion the appeal in respect of claim (*a*) should be dismissed and the appeal regarding claims (*b*), (*c*) and (*d*) should be allowed, and the proceedings and judgment in the Native Commissioner's Court concerning these claims should be set aside.

Appellant has succeeded substantially in this Court and he is entitled to costs of appeal.

Costs in the Native Commissioner's Court to be borne by defendant.

Balk (Permanent Member): I concur.

McCabe (Member): I concur.

For Appellant: Mr. H. B. Myburgh of Messrs. Bennett & Myburg.

For Respondent: Mr. du Toit of Messrs. S. E. Henwood & Co.

NORTH–EASTERN NATIVE DIVORCE COURT.

MTIYANE *v.* MTIYANE.

N.D.C. Case 274 of 52.

Pietermaritzburg: 7th October, 1952. Before Steenkamp, President.

COMMON LAW.

Jurisdiction—Native Divorce Court—Claims for orders compelling defendant to transfer immovable property to plaintiff's name, placing her under guardianship, and concerning the number of lobolo cattle returnable.

Summary: Plaintiff claimed an order for restitution of conjugal rights and in addition also claimed certain orders for the

transfer into her name of certain immovable property, the placing of her under guardianship of her son-in-law and that no lobolo cattle were returnable to defendant.

Held: That the Native Divorce Court has no jurisdiction to deal with the additional claims and that they be deleted from the prayer.

NATIVE DIVORCE CASE.

Steenkamp (President):

The parties in this divorce action were married by civil rites on the 16th December, 1933. Community of property was excluded by virtue of the provisions of section *twenty-two* (6) of the Native Administration Act, No. 38 of 1927.

Plaintiff, in her summons avers that since 1919 she and defendant lived together as man and wife and during the period from that date until a date which is given as 9th March, 1935, i.e. about fifteen to sixteen months after she had entered into the civil marriage with defendant, certain immovable property was purchased out of her earnings and transferred into defendant's name on 9th March, 1935. She also alleges in the summons that between 1943 and 1951 she, out of her own enterprise earned a considerable amount of money out of which she purchased further land which was transferred into defendant's name on 8th March, 1952.

In addition to her claim for restitution of conjugal rights and for an order of forfeiture of benefits introduced into the marriage, plaintiff also claims:

(1) an order that she is entitled to transfer into her name the immovable property already mentioned;

(2) an order that plaintiff shall be under the guardianship of Absolom her son-in-law; and

(3) an order that no lobolo cattle be returned by plaintiff's guardian to the defendant.

After hearing Counsel for both parties the Court held that it had no jurisdiction to deal with the additional claims and ordered that they be deleted from the prayer.

In any case prayer (2) is something foreign to common law and peculiar to Native law, i.e. it is only when the dissolution of a customary union is sought that the Court having jurisdiction, i.e. the Native Commissioner's Court concerned, is called upon to deal with the furture guardianship of a Native woman, *vide,* section *eighty-three* of the Natal Code of Native Law.

Prayer (3) is a matter between the lobolo holder and the husband and no claim for the forfeiture of lobolo may be considered in an action for divorce between the woman and her husband. Furthermore, it is also a matter foreign to common law and peculiar to Native law and is thus not cognisable by this Court which, as is clear from the statute creating it, is purely a Court of *Common law* matrimonial causes with no jurisdiction in matters peculiar to Native law.

Dealing with prayer (1) if section *ten* (1) of Act No. 9 of 1929, as amended by Act No. 56 of 1949, is referred to, it will be found that the Native Divorce Court is granted jurisdiction to hear and determine suits of nullity, divorce and separation between Natives in respect of marriages and to decide any question arising therefrom.

This Court has in the past made an order of forteiture of benefits and has also made orders concerning the custody of the children, but in no way has it concerned itself as to what specific property belongs to the respective parties.

In the instant divorce proceedings the plaintiff asks this Court to hear evidence and determine whether the property in question belongs to her.

This Court does not possess inherent jurisdiction and must, in dealing with divorce proceedings, confine itself to the wording of the Act which grants the jurisdiction. Can it be said in

determining a suit of divorce, the Court has been granted jurisdiction to hear evidence and determine whether the property concerned was acquired out of the earnings of the party who seeks relief? I do not think that this aspect is covered by the statute in question as the matter is not ancillary as for instance is an order for the forfeiture of benefits arising from the marriage or an order for the custody of the children of the marriage.

If, after a divorce is granted, the woman i.e. plaintiff claims that she is the owner of certain property in possession of her ex-husband, then it will be competent for her to bring a suit against him in the Native Commissioner's Court for a declaration of ownership.

For Plaintiff: Mr. D. B. Davies of Messrs. J. Fraser & Co.

For Defendant: Adv. J. H. Nichaus, i/b Messrs. Randles & Davis.

SOUTHERN NATIVE APPEAL COURT.

NDZONDZA *v.* WILLEM.

N.A.C. Case No. 34 of 1952.

Kokstad: 13th October, 1952. Before Warner, Acting President; Cockroft and Strydom, Members of the Court.

NATIVE LAW AND CUSTOM

Marriage according to Native Custom—Desertion—Duty of Husband to Putuma-Dowry—Return of Dowry compellable only on Fulfilment of Certain Conditions—Dowry not Returnable if Wife has died—Practice and Procedure—Form of Judgment Delivered.

Appellant (Plaintiff in the Court below) sued respondent (defendant in the Court below) for return of certain dowry paid to respondent for his (respondent's) daughter Nokwenzani, the latter it was alleged having deserted appellant.

Appeal against the Court's judgment of "action dismissed with costs".

Held:

(1) That when a woman leaves her husband's kraal it is his duty to look for her first and it is essential for the woman to be produced to her people before the husband can claim the return of his dowry.

(2) That only after the wife has, when putumaed, refused to return to her husband is an obligation cast on her father to persuade her to return or to restore the dowry.

(3) That plaintiff has failed to shew that after his wife deserted him for the last time he reported to her father, that she refused to return to him and that defendant failed to persuade her to do so.

(4) That as plaintiff admitted that he had received a report that his wife had died and as defendant brought evidence (which was not disputed) to shew that the wife had died, plaintiff is not entitled to the return or refund of dowry which is what was asked for the summons.

Cases referred to:

Mampeyi *v.* Rarai 1937, N.A.C. (C. & O.), 148.

Sibovana *v.* Dlokova 1951, N.A.C. (S.D.), 281.

Appeal from the Court of the Native Commissioner, Mount Fletcher.

Warner (Actg. President):

Plaintiff sued defendant for the restoration of his wife, Nokwenzani failing which, for return of 12 head of cattle paid as dowry for her. In his particulars of claim, he stated that Nokwenzani deserted him in March, 1945 and although "putumaed" by plaintiff had not returned to him.

In his plea defendant admitted that his daughter Nokwenzani had been married by native custom to plaintiff but stated that he had received 8 head of cattle and one horse on account of dowry and not 12 head as stated by plaintiff. He admitted that Nokwenzani had left plaintiff's kraal and stated that this was due to ill-treatment by plaintiff. He also stated that in or about September, 1950, plaintiff's wife died in Port Shepstone or thereabouts.
to her people before the husband can claim the return of his dowry.

After hearing evidence the Native Commissioner entered judgment of "action dismissed with costs".

Plaintiff has appealed against this judgment on the grounds that it is against the weight of evidence and contrary to law in that, by Native Law, upon the desertion of the wife, the father—the dowry holder—became liable to return the woman or the dowry paid.

The Assistant Native Commissioner has found as a fact that Nokwenzani died at Port Shepstone in 1950 and it has not been shewn to us that he was wrong in doing so. If the woman is dead, it means that it would be impossible for defendant to comply with plaintiff's claim and judgment could not be given for plaintiff for the return of his wife.

In the case of Mampeyi *v.* Rarai 1937, N.A.C. (C. & O.), 148, the Court accepted a statement by the Native Assessors that when a woman leaves her husband's kraal it is his duty to look for her first and it is essential for the woman to be produced to her people before the husband can claim the return of his dowry.

In the case of Sibovana *vs.* Dlokova 1951,N.A.C. (S.D.), 281, it was stated that the underlying principle is that the matter primarily concerns the husband and it is only after the wife has refused to return to her husband that an obligation is cast on her father, on a report being made to him, to persuade the wife to return or to restore the dowry.

In the present case it is common cause that plaintiff's wife deserted him on several occasions and went to defendant's kraal and when plaintiff fetched her she returned to his kraal. In his evidence plaintiff stated "The last time I went to putuma my wife she was not at her father's place. This was in 1946. Defendant said he did not know where she was. He said that he had last seen her when she was returned to my father at our kraal. He said she had not returned to his kraal after that. From then I did nothing to get my wife back except searching for her. I have never seen or heard of her since then." These statements corroborate defendant's evidence that he returned the woman to plaintiff's kraal on each occassion when she deserted to his (defendant's) kraal.

Plaintiff has thus failed to shew that, after his wife deserted him for the last time, he reported to defendant that she refused to return to him and that defendant failed to persuade her to do so.

Plaintiff admitted that he received a report that his wife had died. He does not appear to have made investigations with a view to ascertaining whether the report was true but issued summons for the return of his wife or refund of dowry. Defendant brought evidence to show that the woman died at Port Shepstone and this has not been contradicted.

If the woman is dead, plaintiff is not entitled to her return or refund of dowry which is what he has asked for in his summons.

The judgment given was "action dismissed with costs". This is equivalent to an absolution judgment (Manqume *v.* Tole 1950, N.A.C. (S.D. 222), but the judicial officer's attention is invited to the provisions of section 54 of Government Notice No. 2886 of 1951 which do not provide for a judgment being given in the words used by him.

The appeal is dismissed with costs.

Cockcroft and Strydom (members): Concur.

For Appellant: Mr. Eagle, Kokstad.

For Respondent: Mr. Walker, Kokstad.

CENTRAL NATIVE APPEAL COURT.

KUMALO *v.* SMIT N.O.

N.A.C. Case No. 27/52.

Johannesburg: 14th October, 1952. Before Marsberg, President, Rein and Venter, Members of the Court.

PRACTICE AND PROCEDURE.

Practice and procedure: Sale of land.

Plaintiff sued defendant in his capacity as representative in the estate of the late Emma Tunzi for an order compelling defendant to transfer Lot 1372, Evaton Township, into plaintiff's name. It was alleged that the property was bought in 1913 from Emma Tunzi who died in 1915. At the trial a Deed of Sale was not produced and it transpired that Lot 1372 had been transferred to William Tunzi in the Deeds Registry on 25th September, 1945. At the close of plaintiff's case a native commissioner's court gave judgment of absolution from the instance. Plaintiff appealed on the grounds that the judgment was against the evidence and was bad in law. Application was also made for review of proceedings by reason of the fact that the judicial officer who presided at the trial should have recused himself on the ground that he imported into the conduct of the trial, facts and matters concerning the parties and their witnesses of which he had previous knowledge.

Held: That the cause of action had became prescribed.

Held further: That proof of the alleged sale had to be evidenced before the Native Commissioner by a written instrument and parol evidence was not admissible.

Held further: That the property claimed was not an asset in the estate so that there was no privity between defendant and plaintiff on the claim as framed in the summons.

Held further: That the allegation that a judgment is "bad in law" is not a compliance with the rules.

Held further: That the terms of the application for review were exceptionable as no allegation of irregularities should be lightly made and supporting affidavits are prerequisites and should accompany the application.

Statutes, etc. referred to:

Section *thirty* of Proclamation No. 8 of 1902 (Transvaal).

Appeal from the Court of the Native Commissioner, Vereeniging.

Marsberg, P., delivering judgment of the Court:—

In the Native Commissioner's Court at Vereeniging plaintiff, Harold Hubert Tembu Kumalo, in his capacity as the Executor

Testamentary in the estate of the late Lucy Kumalo, sued defendant Johannes Gerhardus Smit in his capacity as the representative in the estate of the late Emma Tunzi for an order compelling the defendant to effect the registration of the transfer of certain property, being Lot No. 1372, Evaton Township, into plaintiff's name.

The particulars of claim allege:—

> During or about 1913 the said Emma Tunzi sold Lot No. 1372, Evaton Township, to Lucy Kumalo for the sum of £50. A formal Deed of Sale was drawn between the parties and the total purchase price was paid.
>
> At the time of her death in 1915 the said Emma Tunzi had failed to effect transfer of the said Lot No. 1372 into the name of the said Lucy Kumalo.
>
> Lucy died on 26th June, 1949.

At the end of evidence given for plaintiff the Native Commissioner decreed absolution from the instance. Plaintiff had conducted his case in person. Plaintiff, now represented by Mr. H. Helman, has appealed against the judgment and applied for review in the following form:—

> Please take notice that the plaintiff hereby notes an appeal against the judgment delivered on the 29th May, 1952, wherein plaintiff's action was dismissed, on the grounds that the said judgment—
>
> (*a*) Was against the evidence and the weight of the evidence;
>
> (*b*) Bad in Law.
>
> The full grounds as to why the said judgment is bad in law will be extended in a supplementary Notice when the Reasons for Judgment, which have been applied for, have been received from the judicial officer.
>
> Application will also be made to review the proceedings by reason of the fact that the judicial officer who presided at the trial of this action should in fact have recused himself on the ground that he imported into the conduct of the trial, facts and matters concerning the parties and/or their witnesses of which he had previous knowledge. His introducing such facts and extraneous knowledge into the conduct of this trial constituted an irregularity. Affidavit will be forwarded in due course.

As paragraph (*b*) of the grounds of appeal and the application for review do not comply with the Appeal Court rules, they fall away. The only point in the notice of appeal left for our consideration is that the judgment was against the evidence and the weight of evidence.

We are somewhat surprised that a notice of appeal has been lodged. It is clear from the record—

(*a*) that the cause of action arose in 1913, that is 38 years before issue of summons, and long over the period of prescription. Though defendant has not raised this point he should have done so.

(*b*) By the provisions of Proclamation No. 8 of 1902 (Transvaal), section 30—

> "No contract of sale of fixed property shall be of any force or effect unless it be in writing and signed by the parties thereto or by their agents duly authorized in writing."

The evidence of plaintiff and his witnesses was that the alleged deed of sale was burnt and a copy of it was stated to be in some other person's possession. Obviously proof of the alleged sale had to be evidenced before the Native Commissioner by a written instrument. Parole evidence was not admissible. The deed was not produced.

(c) Lot 1372 was transferred in the Deeds Registry to William Tunzi on 25th September, 1945.

At the time summons was issued the Lot was not an asset in the estate of Emma Tunzi. There, therefore, appears to be no privity between defendant and plaintiff on the claim as framed in the summons.

With these disabilities plaintiff appears to have been ill advised to take action and more particularly to bring the judgment of the Native Commissioner on appeal and review. The notice of appeal and review has obviously been framed without due regard to the facts of the case. No supplementary notice has been lodged timeously as indicated. To allege that the judgment is "bad in law" is not a compliance with the rules.

The terms of the application for review are exceptionable. No allegation of irregularities should be lightly made. Supporting affidavits are prerequisites and should accompany the application. Without the supporting affidavits the application assumes the character of an unwarranted reflection on the judicial officer. It is, moreover, clear in this instance that the record itself contains no grounds on which the imputations of irregularity could be substantiated. Happily the request for review was not brought up for consideration and we therefore make no further comment.

It seems purposeless to review the judgment on the grounds that it is against the evidence and the weight of evidence. On the facts placed before the Court by plaintiff, the Native Commissioner could give no other than the judgment which was entered. In view of the inherent disabilities to which we have drawn attention we see no good reason to disturb the judgment.

The appeal is dismissed with costs.

Rein and Venter (Member): Concurred.

For Appellant: Mr. H. Helman of Messrs. Helman & Michel, P.O. Box 3592, Johannesburg.

For Respondent: Mr. I. Maltz, i/b., Messrs. Smit & Malan, Vereeniging.

SOUTHERN NATIVE APPEAL COURT.

MBONISWA AND ANOTHER *v.* MBONISWA.

N.A.C. Case No. 35 of 1952.

Kokstad: 14th October, 1952. Before Warner, acting president; Cockroft and Strydom, Members of the Court.

COMMON LAW.

Natives estates—Three successive marriages by Christian Rites—Devolution of estate property can be decided only if type of marriage is known—Evidence—Best evidence rule production of marriage certificates.

Late Tiyo S. Mboniswa was married thrice by Christian Rites, he survived all his wives. The exact dates of the marriages were not stated. He died intestate. Respondent (plaintiff in the Lower Court and the only son by the first wife) sued appellants successfully in Chief Makaula's Court for delivery of dowry paid for deceased's daughter by the econd wife, and for the return of sundry movable property of the deceased. He also claimed guardianship of his half-sister liziwe a daughter by deceased's third wife. Moses is the eldest son by deceased's second wife. Solomon is a younger brother of deceased. An appeal was noted to the Native Commissioner's Court in terms of section 5 of Government Notice No. 2255 of 1928 on the grounds that the Chief erred in granting judgment in favour of Respondent.

The Native Commissioner ruled in terms of the decision given in C. Mrasi and P. Juta *v.* A. Majavu (1932 N.A.C. 4) that the children of the three wives of respondent's father must be regarded as belonging to one family and that respondent as eldest son was heir according to Native Law and Custom and entitled to succeed to his father's estate, as he considered also that in terms of section 2 (*e*) of Government Notice No. 1664 of 1929 the estate had to be administered according to Native Law.

The Appeal is against this finding of the Native Commissioner's Court.

Held:

(1) That as the respective marriage certificates had not been produced it was not possible to determine whether the deceased's estate should be distributed as if he had been a European. [*Vide* section 2 (*c*) (ii) of Government Notice No. 1664 of 1929.]

(2) That in proof of the marriages the best evidence was the production of the marriage certificates and that secondary evidence was inadmissible until it be shewn that production of primary evidence was out of the party's power.

(3) That it was essential to produce the marriage certificates before the respective rights of respondent and appellants could be determined as, if one of the marriages were in community of property or under ante-nuptial contract then it would seem that the property of that marriage should devolve as if deceased had been a European in terms of section 2 (*c*) (ii) of Government Notice No. 1664 of 1929, as amended.

(4) That the decision of the Native Commissioner was in conflict with the diction in Ngcwayi *v.* Ngcwayi 1950 N.A.C. (S.D.) 231 regarding the status of a woman married by Christian Rites.

Cases referred to:

C. Mrasi and P. Juta *v.* A. Majana, 1932, N.A.C., 4.

Rubushe *v.* Jijane P. H., 1952, (1) R. 11 P. 39.

Lourens *v.* Lourens, 1936, C.P.D., 353.

Njobe *v.* Njobe and Dube, N.O.., 1950 (4), S.A.L.R., 545.

Julia Shata *v.* Mocholo D. Shata, 1942, N.A.C. (C. & O.), 42.

Damane *v.* Damane, 1944, N.A.C., (C. & O.), 84.

Ngcwayi *v.* Ngcwayi, 1950, N.A.C., (S.D.), 231.

Tonjeni *v.* Tonjeni, 1947, N.A.C., (C. & O.), 8.

Statutes, etc., referred to:

Ordinance No. 72 of 1830 (Cape).

Proclamation No. 142 of 1910, Section *five* (1).

Act No. 38 of 1927, Sections *five, fifteen, twenty-two, twenty-three.*

Government Notice No. 2255 of 1928.

Government Notice No. 1664 of 1929, as amended, Section 2.

Government Notice No. 2886 of 1951, section *fifty-three* (13).

Appeal from the Court of Native Commissioner, Mount Frere.

Cockroft (Member):

Respondent, plaintiff in the Lower Court, sued appellants in the Court of Chief W. S. Makaula for delivery of seven head of cattle, dowry paid for the first daughter of his father's second wife Madlomo, three yokes, a planter, plough, four pots, personal clothing and assegais, which were the property of respondent's deceased father. He also claimed guardianship of the girl Liziwe, daughter of his late father by his third wife.

The Chief's Court found that plaintiff as heir of the first house was entitled to the seven head of cattle as Madlomo's dowry was paid out of his house and should be refunded.

As there was no male heir in her house, the girl Liziwe was awarded to plaintiff. The three yokes, personal clothes, planter and assegais that belonged to Plaintiff's farther during his mother's lifetime were also awarded to plaintiff.

An appeal was noted to the Native Commissioner's Court in terms of section 5 of the Regulations framed under section *twelve* of Act No. No. 38 of 1927 (Government Notice No. 2255 of 1928) against the whole of the judgment delivered by Chief W. Makaula on the grounds that the Chief erred in granting judgment in favour of Respondent.

After hearing evidence, the Native Commissioner found that the following facts were common cause or not disputed:—

1. The late Tiyo S. Mboniswa married three wives successively according to Christian Rites in the following order:—
   (1) Mantolo (2) Madlomo. (3) Mabovu.
2. Johnson, hereinafter referred to as the plaintiff is the only son by the first wife, Moses, first appellant is eldest son by the second wife and Liziwe is the daughter by the third wife.
3. Deceased left no will and made no allocation of his property.
4. Deceased survived all his wives.
5. That the property, the subject matter of this dispute were assets in the estate of the late Tiyo S. Mboniswa.

On these facts he came to the conclusion that, in terms of section 2 (*e*) of G.N. 1664 of 1929, as amended, the property in this estate falls to be distributed according to Native Custom.

The Native Commissioner considered that he was bound by the decision in C. Mrasi and P. Juta *v.* A. Majane, 1932, N.A.C. 4 in which case the deceased also married three wives successively according to Christian Rites. There it was held that there were no houses recognised by Native Custom as separate establishments each having an heir and the gelding in dispute fell to be dealt with under sub-section (3) of section *twenty-three* of the Native Administration Act, No. 38 of 1927, and as such was capable of being devised by will.

He therefore came to the conclusion that the children of the three wives of Respondent's father must be regarded as belonging to one family, and that the respondent, as the eldest son, was the heir according to native law and custom and as such was entitled to succeed to his late father's estate.

Appellants have appealed against the whole of the judgment delivered by the Native Commissioner on the following grounds:—

1. That the late Tiyo Mboniswa's estate has to be administered according to native custom in accordance with which custom all rights to dowry paid or to be paid in respect of any daughters born to the deceased by his wife Madlomo Mboniswa, belong to and were inherited by the deceased's eldest son by the said Madlomo, namely the appellant Moses, who also under Native Custom inherited all other property acquired by the deceased during the subsistence of his marriage to Madlomo.
2. The Native Commissioner erred in coming to the conclusion that the respondent, Johnston, can have any right to the actual or prospective dowries of the deceased's daughters by Madlomo, white there are sons alive born of Madlomo.
3. Dowry disputes must in any event be decided by pure Native Custom.

Mr. Zietsman for appellant, did not contest the correctness of the Native Commissioner's finding declaring plaintiff to be the guardian of the girl Liziwe, and that part of the judgment will stand. This must not be construed, however as a decision of this Court that plaintiff will be entitled to her dowry.

The rest of the subject matter of the claim in this case concerns a dispute as to the distribution of assets in the estate of the late Tiyo S. Mboniswa.

In terms of section *twenty-three* (4) of the Native Administration Act, No. 38 of 1927, any dispute or question which may arise out of the administration or distribution of any estate in accordance with Native Law *shall* be determined by the Native Commissioner.

The dispute could, therefore, in the first instant, have been brought before the Native Commissioner in his administrative capacity at little or no cost to the parties. It is not clear from the record on what evidence the Native Commissioner came to the conclusion that this estate did not fall under any of the classes described in paragraphs (*a*), (*b*), (*c*), and (*d*) of section 2 of Government Notice No. 1664 of 1929, as amended, and thus in terms of paragraph (*e*) of that section fell to be distributed according to native law and custom.

In terms of paragraph (*c*) (ii) of section 2 of Government Notice No. 1664 of 1929, as amended by Government Notice No. 939 of 1947, if the deceased at the time of his death was a widower of a marriage in community of property or under ante-nuptial contract, the property shall devolve as if he had been a European.

The only evidence on the record regarding the conjugal status of the father of respondent and his three wives, was that of respondent when he states:—

"My father married my mother by Christian Rites."
"My father married his second wife by Christian Rites";

and that of the appellant Solomon Mboniswa when he says:—

"Samuel married all his wives by Christian Rites. He married his first wife before the first Great War."

The best evidence of the marriages of the three wives, to respondent's father, namely, copies of the respective marriage certificates, has not been produced. *Vide* section *thirty-seven* of Ordinance No. 72 of 1830 (Cape), and Rubushe *v.* Jiyane P.H. 1952 (1) R. 11 at page 29. Consequently it is not possible to determine whether respondent's father at the time of his death was a widower of a marriage in community of property or under ante-nuptial contract, in which case his property, would, in terms of paragraph (*c*) (ii) of section 2 of Government Notice No. 1664 of 1929, as amended, devolve as if he had been a European.

The rule of law is that the best evidence must be produced to the exclusion of any inferior evidence or information on the point.

Secondary evidence is inadmissible until it be shewn that the production of primary evidence is out of the party's power. (Scoble's Law of Evidence in South Africa, second edition at Page 20.)

In a matter such as divorce affecting status or the rights of the children it is the practice of the Court to require the production of the marriage certificate if such production is at all possible. (Lourens *v.* Lourens, 1936, C.P.D. 353.) See also Njobe *v.* Njobe and Dube N.O. 1950 (4) S.A.L.R. 545 regarding the protection afforded to the parties as well as the issue of a marriage out of community of property.

In the present action the production of the marriage cetificates of their father and his three wives is essential to determine the respective rights of respondent and appellant Moses Mboniswa in the estate of their late father. If any of the three marriages were in community of property or under ante-nuptial contract, then it seems that the property of that marriage should devolve as if he had been a European, *vide* paragraph (*c*) (ii) of section 2 of Government Notice No. 1664 of 1929 quoted above. In that event respondent would not be entitled to all the property to the exclusion of the other children. In Mrasi and Juta *vs.*

Majevu, supra, the provisions of section 2 (*c*) of Government Notice No. 1664 of 1929 appear to have been overlooked. In view of the marriage of the late Zekwa in community of property, the property in his estate devolved as if he had been a European, and was capable of being devised by will in terms of section *twenty-three* (3) of Act No. 38 of 1927.

In Julia Shata *v.* Mocholo D. Shata, 1942 .N.A.C. (C. & O.), 42, the Assistant Native Commissioner had held that as the marriage between the late Daniel Shata and appellant, was in terms of section 5 (1) of Proclamation No. 142 of 1910, out of community of property, it obviously is not one of the forms of marriage referred to in section 2 (*c*) of Government Notice No. 1664 of 1929 and therefore the estate fell to be administered under sub-section (*e*) of section 2 of the said Government Notice.

At pages 43 and 44, the learned President stated: "If we examine Government Notice No. 1664 of 1929, we find that it deals with the intestate estates of deceased natives... natives married in community of property or by ante-nuptial contract and detribalised natives generally. The object clearly was to deal with these estates in a different manner to those of ordinary tribal natives. The regulations do not include the estates of those natives whose only marriage was one out of community of property by virtue merely of sub-section (6) of section *twenty-two* of Act No. 38 of 1927 (which re-enacted in slightly modified from section 5 (1) of Proclamation No. 142 of 1910). In the opinion of this Court this constitutes a *casus omissus*, in cases where there has been no prior customary union, but it is not of any consequence in the present enquiry, where the deceased was first married in community of property.

The words used in paragraph (*c*) of Government Notice No. 1664 are clear and definite and admit of only one meaning, namely, that if the deceased had at any time contracted a marriage in community of property or by ante-nuptial contract, his estate on his decease had to devolve as though he had been a European" (The *casus omissus* mentioned above has since been remedied by Government Notice No. 939 of 1947.)

This Court feels that there is no room for doubt as to the intention of the legislature in framing the regulations under Government Notice No. 1664 of 1929. As the late Daniel Shata had during his lifetime contracted a marriage in community of property his estate must devolve as if he had been a European, and the fact that he contracted a second marriage which itself does not fall within the terms of paragraph (*c*) does not affect the position.

Damane *v.* Damane, 1944, N.A.C. (C. & O.), 84 is an instance of a case in which the deceased father and husband of the parties was married neither in community of property nor by ante-nuptial contract and thus any property not falling under sub-sections (1) and (2) of section *twenty-three* of Act No. 38 of 1927 was in terms of section 2 (*e*) of Government Notice No. 1664 of 1929, as amended, to be distributed according to Native Law and Custom.

There is a conflict of evidence as to when some of the property claimed was acquired, and the Native Commissioner has made no finding on these points. As it is important to know during the subsistence of which of his three successive marriages such property was acquired, he should give findings on this matter.

The decision of the Native Commissioner that the children of the three wives must be regarded as belonging to one family, and that the eldest son was entitled to succeed to the whole estate is in conflict with the following statement which appears on page 232 in the case of Ngcwayi *v.* Ngcwayi, 1950, N.A.C. (D.S.), 231:—

"A marriage by Christian Rites does not greate a 'house'. A woman so married is in the eyes of the law her husband's only wife. Her status is independant of any of her husband's

'house' or other wives. Her eldest son succeeds to such property as was acquired by her husband during the subsistence of the marriage. In this connection see the decision in the case of Tonjeni *v.* Tonjeni, 1947, N.A.C. (C. & O.), 8, in which the circumstances were somewhat similar and in which the question of succession was also in dispute."

The production of the marriage certificates or certified copies thereof are essential to the just decision of this case and this Court will exercise the wide discretion conferred by section *fifteen* of Act No. 38 of 1927, by setting aside that part of the judgment awarding the assets in the estate to plaintiff, to enable either of the parties to tender the necessary evidence regarding the three marriages of the late Tiyo Samuel Mboniswa. In terms of rule 53 (13) promulgated under Government Notice No. 2886 of 1951, the presiding officer may himself call a witness not called by either party if he thinks his evidence is necessary, in order to elucidate the truth or for the solution of the question.

The judgment of the Court below awarding the assets in the estate to plaintiff is therefore set aside and the record of the proceedings is returned for such further evidence as either of the parties may tender, and for a fresh judgment to be entered thereafter. Costs of appeal to be costs in the cause Warner (Acting President) and Strydom (Member): Concurred.

For Appellant: Mr. Zietsman, Kokstad.

For Respondent: Mr. Elliot, Kokstad.

NORTH-EASTERN NATIVE APPEAL COURT.

SHANGASE *v.* KUMALO.

N.A.C. Case No. 66 of 1952.

Pietermaritzburg: 14th October, 1952. Before Steenkamp, President, Balk and Richards, members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Appeal—Late noting—Application for condonation.

Summary: Appellant was late in noting his appeal and embodied in his notice of appeal a paragraph reading:—

> "Whereas reasons for judgment were only given to Appellant on the 12th July, application for condonation of appeal is hereby made."

Held: That the rules, as interpreted, have not been complied with and as the appeal was not noted timeously, and there being no proper application for condonation of the late noting before the Court, the appeal should be struck off the roll with costs.

Cases referred to:

Dhludhla *v.* Zungu, 1947, N.A.C. (T. & N.), 60.

Statutes, etc. referred to:

Native Appeal Court Rules Nos. 2, 4 and 14 and No. 6 of the "Old Rules".

Appeal from the Court of the Native Commissioner, Camperdown.

Steenkamp (President):

Judgment for defendant (now respondent) was delivered on 19th June, 1952. On 26th June, 1952, the appellant requested the Native Commissioner to be supplied with the facts found proved and reasons for judgment. This request was received

on the 30th June, 1952. The Native Commissioner duly complied with the request and a written judgment dated 1st July, 1952, was filed of record, but it was not until 30th July, 1952, that the appellant filed his notice of appeal.

In the notice of appeal appellant states that whereas reasons for judgment were only given to appellant on 12th July, application for condonation of appeal is hereby made.

According to rule 4 of the Native Appeal Court Rules an appeal should be noted within fourteen days after the delivery to the Clerk of Court of the written judgment by the presiding officer.

In the first instance the appellant should have enquired from the Clerk of the Court, on the expiration of ten days after his request, whether a judgment had been filed. It was not the duty of the Clerk of the Court to notify the appellant that such a judgment had been filed. In this case the presiding officer filed the written judgment well within the time limit of ten days fixed by rule 2.

What this Court has to decide primarily is wether the request for condonation, embodied in the notice of appeal can be treated as a proper application for extension of time in which to note the appeal. The relevant portion of rule 4 reads that the Court of Appeal may in any case at the hearing of the appeal extend such period on application and upon just cause being shown.

Rule 14 deals with objections, exceptions and applications in connection with an appeal. It is provided in that rule that such an application shall be filed, in triplicate, with the Registrar (or in his absence with the Clerk of the Native Commissioner's Court at the centre where the session of the Native Appeal Court is to be held) not less than 24 hours prior to the commencement of such session and a copy of such application shall be served on the other party.

The old rule 6 reads that the Court of Appeal may in any case extend such period upon just cause being shown. That rule did not definitely state that an application in writing should be made, yet in the case of Dhludhla *v.* Zungu, 1947, N.A.C. (T. & N.). 60, this Court decided that an application for condonation of late noting of appeal must be supported by affidavit. How necessary this is cannot be too strongly emphasized because the Appeal Court firstly has to decide whether the late noting is due to the fault of the appellant. This can only be decided if evidence by means of an affidavit giving reasons for the late noting is before the Court. If the reasons are such that the Appeal Court feels there was no excuse for the late noting, then the question of whether a manifest injustice is apparent from the evidence adduced in the case will have to be considered.

There can be no doubt that the rules as interpreted have not been complied with.

The appeal is struck off the roll with costs on the grounds that it was noted late, and there being no proper application for condonation.

Balk (Permanent member):

I agree that this appeal should be struck off the roll with costs as it was not noted timeously and no proper application for condonation of the late noting is before this Court.

Richards (Member):

I agree that the appeal should be struck off the roll with costs.

For Appellant: Mr. D. B. Davies of Messrs. J. Fraser & Co.

For Respondent: Adv. D. Shearer instructetd by Messrs. Cowley & Cowley.

NORTH–EASTERN NATIVE APPEAL COURT.

MKIZE *v.* MNGUNI.

N.A.C. Case No. 68 of 1952.

Pietermaritzburg: 14th October, 1952. Before Steenkamp, President; Balk and Richards, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Chiefs' Courts—Jurisdiction—Appeal to Native Commissioner's Court—System of Law to be applied.

Summary: An appeal against the judgment of a chief was heard by a Native Commissioner, who applied Common Law in deciding the case.

Held: That as Chiefs' Courts' jurisdiction is limited to civil claims arising out of Native law and custom, the Native Commissioner should have used his discretion in favour of Native law and custom, as it was a case tried under that system of law, which formed the subject of the appeal to his Court.

Held further: That the erroneous application of a particular system of law does not, in the instant case, affect the merits of the appeal as there is no prejudice, and therefore the appeal should be dismissed with costs.

Statutes, etc. referred to:
Section *twelve* (1) (*a*) of Act No. 38 of 1927, as amended.

Appeal from the Court of the Native Commissioner, Richmond.

Steenkamp (President):

In dismissing this appeal with costs, and which should never have been noted on the grounds set out in the notice of appeal, I wish to point out that the damages incurred by the plaintiff and as awarded by the Chief are fully justified from the evidence adduced before the Native Commissioner.

I wish, however, to draw the Native Commissioner's attention to the fact that he heard this case as an appeal from a Chief's Court. The Chief's jurisdiction is limited to civil claims arising out of Native law and custom, *vide* section *twelve* (1) (*a*) of the Native Administration Act, 38 of 1927, as amended by section *five*, Act No. 21 of 1943. Trespass and damage to crops are known to Native law and custom, *vide* section *one hundred* and *thirty-four* of the Code, and the Native Commissioner therefore erred in hearing the appeal under common law. He should have used his discretion in favour of Native law and custom seeing that it was a case tried under that system of law, which formed the subject of the appeal to his Court.

If the Native Commissioner wanted to apply common law he should, to be consistent, have set aside the proceedings in the Chief's Court, but this erroneous application of a particular system of law does not however affect the merits of the appeal as there is no prejudice and therefore the appeal should be dismissed with costs.

Balk (Permanent member): I concur.

Richards (Member): I concur.

For Appellant: Mr. J. N. R. Swain of Messrs. C. C. C. Raulstone & Co.

For Respondent: Mr. L. Weinberg i/b Messrs. Wynne, Cole & Tod.

NORTH–EASTERN NATIVE APPEAL COURT.

MSOMI *v.* MSOMI.

N.A.C. Case No. 58/52.

Pietermaritzburg: 16th October 1952. Before Steenkamp, President; Balk and Richards, Members of the Court.

ZULU CUSTOM

Maintenance of Kraal—Contributions by inmates.

Lobolo—Provision of cattle by kraal head for lobolo of younger brother.

Summary: Plaintiff claimed sixteen head of cattle (being three head with their progeny of thirteen head of cattle) alleging that the three head of cattle had been purchased by defendant on his (plaintiff's) behalf from an amount of £7 sent to defendant by plaintiff while he (plaintiff) was an inmate of defendant's kraal.

The £7 was the only amount sent by plaintiff to defendant during all the years in which plaintiff was an inmate of his kraal. Plaintiff requested defendant to furnish him with lobolo cattle, which was refused.

Held: That as plaintiff had contributed practically nothing towards the upkeep of the kraal, he was not entitled to any contribution towards his lobolo by defendant.

Held further: That the Native Commissioner had not considered the probabilities from a legal point of view, in that he had not dealt with the duties and obligations an inmate owes to the kraal head, and if he had so considered that aspect, he might have, on the evidence, come to a different conclusion.

Cases referred to:
Rex *v.* Dlumayo and another, 1948 (2), S.A. 677, (A.D.).

Statutes: Section *thirty-five* of the Natal Code of Native Law (Proclamation No. 168/32).

Appeal from the Court of the Native Commissioner, Ixopo.

Steenkamp (President), delivering the majority judgment of the Court:—

In the Chief's Court the plaintiff (now respondent) sued the defendant (now appellant) for three head of cattle and their progeny of 13 head of cattle which he alleges defendant purchased on his behalf out of an amount of £7 he had handed over to defendant.

Defendant's plea was a denial of plaintiff's allegation that the cattle were purchased on his behalf.

The Chief gave judgment for plaintiff for 14 head of cattle and costs. On appeal to the Native Commissioner the judgment was altered to one for plaintiff for 12 head of cattle and costs.

Defendant has now appealed to this Court on the following grounds:—

1. Plaintiff failed to discharge the onus of proof that cattle bought by defendant in the absence of plaintiff were in fact purchased for plaintiff and with his money—but on the contrary all the presumptions and probabilities of the case, as reflected by the evidence are in favour of ownership vesting in defendant.
2. The conflict of evidence between plaintiff and his witnesses negative their story.
3. It would be unlikely, and contrary to Native law and custom for defendant, plaintiff's kraal head, to agree to

use what was the only money alleged ever to have been brought home by plaintiff, and at a time when plaintiff was a young boy—to buy cattle for him. Such money, if brought home, vested in defendant.

At the outset I wish to point out that the evidence is not at all clear whether when he brought the £7 home plaintiff was still a young boy. On the contrary the evidence seems to indicate that he was already a taxpayer. He might still have been a minor but in any case for the purposes of this case it seems immaterial what his age was, as according to section *thirty-five* (1) of the Code a kraal head is entitled to a reasonable share of the earnings of other members of his family and of any other kraal inmates.

Plaintiff and defendant are brothers—defendant being the eldest and general heir to their late father. At the time of their father's death plaintiff was only a small herd boy. Defendant was much older and became the head of the kraal on his father's death. Plaintiff, therefore, fell under the guardianship of the defendant and was subject to all the obligations, restrictions and obedience a minor or inmate of a kraal owes to a kraal head.

Plaintiff first went to work at Port Shepstone and after having worked there for some time—it is not at all clear for how long he worked—he returned home, i.e. to the kraal of his late father where his mother and defendant, who was then already a married man, were residing. According, to plaintiff's evidence, which is denied by defendant, he gave defendant £7 of his earnings and asked him to purchase cattle on his (plaintiff's) behalf. Defendant handed the money over to their mother for safekeeping. It is not understood why defendant should have done so as he had his own wife who could have looked after the money, but this is only by the way. Plaintiff remained at home for a short while and then went to work at Johannesburg, where he remained for a period ranging from 10 to 16 years. During the period he was away his people, i.e. his mother and his brother, the defendant, never heard from him. In fact his mother who gave evidence on his behalf states that he was away for so long that she had given him up as lost. She was not even in possession of his address while he was away.

After plaintiff had had enough of Johannesburg—having stayed there for a long period—he returned to the kraal. This goes to prove that he still considered himself an inmate of that kraal. His return could be likened to that of the prodigal son, and while his mother must have been very pleased to see him again after so many years, his brother, the defendant, must have felt that plaintiff had neglected the obligations he owed to the kraal. Within a week they quarrelled. Plaintiff naturally blames his brother, the defendant, for the quarrel, whereas defendant, blames him. As a result of the quarrel plaintiff left the kraal and then claimed that out of the £7 he had given to defendant certain three head of cattle were purchased on his behalf and he wants those cattle and their progeny handed over to him.

According to the evidence given by defendant the cause of the quarrel was due to the fact that plaintiff on his return from Johannesburg asked defendant to point out cattle with which to pay lobolo. Defendant declined to do so whereupon plaintiff became annoyed and a quarrel ensued. This explanation rings true, especially as plaintiff's version of the quarrel seems rather frivolous when he states that this was due to the fact that he had asked defendant why one of the animals, i.e. one of those in dispute, had not been fed. When it is considered that defendant had looked after the cattle for so many years, it seems rather presumptuous on the part of plaintiff to question defendant about the feeding of one beast and I do not think he would have had the impertinence to do so and therefore the defendant's version of the quarrel seems the more probable and it is not surprising that he declined to give plaintiff any lobolo

cattle. I hold he was justified in taking up the attitude that his upkeep of the kraal, was not entitled to any contribution towards his lobolo.

In a case of this nature where plaintiff after an absence of many years claims that certain cattle at the kraal were purchased on his behalf, clear proof is required that this is so. I find myself unable to agree that plaintiff has proved ownership in the cattle. There are certain discrepancies in the evidence given by him and that given by this two witnesses but, before dealing with these, it is desirable to point out that plaintiff, if his evidence is to be believed, was at Port Shepstone when the cattle were bought for him by the defendant. He returned from Port Shepstone to the family kraal before proceeding to work at Johannesburg. Yet he did not take steps to have those cattle branded and earmarked.

Plaintiff states all these cattle were purchased while he was still at Port Shepstone and saw them at the kraal where the three cattle were pointed out before there was any increase, yet his mother who gave evidence on his behalf states that only one beast had been purchased before plaintiff left for Johannesburg and that plaintiff only saw this one animal.

It is difficult for me to understand why plaintiff if he had three head of cattle should have taken no steps to communicate with his mother and brother, the defendant, for so long a period and enquire after his cattle. Natives attach considerable value to cattle, especially as in this case two of the cattle were heifers, and his lack of interest militates strongly against his allegations that he owned any cattle. The probabilities here also favour the defendant.

In his case before the Native Commissioner the plaintiff's mother and his sister-in-law, wife of a deceased brother, gave evidence on his behalf. The Native Commissioner accepted their evidence that plaintiff had handed over the money to defendant for the specific purpose of cattle being purchased on his behalf Defendant denied that he ever received £7 or any amount from the plaintiff. His evidence stands alone.

If plaintiff only contributed £7 to the common household over a period of at least 10 years; then we must ask ourselves the question whether defendant would have been so generous as to inform his brother, the plaintiff, on his return to the kraal that such a large number of cattle, viz. 14 are his property. Plaintiff wants the Court to believe that on his return home the defendant pointed the animals out to him. Plaintiff gives a detailed description of the cattle and the Native Commissioner in his reasons for judgment emphasizes that he believed plaintiff where he states that defendant was his informant when he acquired a profound knowledge of the history and of progeny accruing to the original animals purchased.

I cannot agree with the Native Commissioner that it must have been the defendant who gave plaintiff all the information. His mother and sister-in-law could have done so as they had been living at the kraal and could quite easily have remembered the cattle defendant admits he purchased.

When we consider the legal issues as advanced in ground 3 of the Notice of Appeal, then a different phase is apparent in the case. The Native Commissioner has not considered the probabilities from a legal point of view, in that he has not dealt with the duties and obligations an inmate owes to the kraal head. If he had considered that aspect he might have, on the evidence, come to a different conclusion.

In my opinion the appeal should be allowed with costs and the Native Commissioner's judgment altered to read:—

"Appeal from Chief's Court is allowed with costs and the Chief's judgment altered to one of absolution from the instance with costs."

Richards (Member): I agree with the learned President.

Balk (Permanent Member—Dissentiente):—

The pleadings in this case, the judgments of the Courts below and the grounds of the instant appeal are set out in the majority judgment of this Court delivered by the learned President, with which I regret I am unable to agree.

To my mind it is manifest from the reasons for judgment furnished by the presiding Additional Native Commissioner in the Court *a quo* that he gave due consideration both to the demeanour of the witnesses and to the probabilities and improbabilities as were disclosed by the evidence to have been material in arriving at his findings of fact; and it seems to me that he has not misdirected himself therein. The presumption therefore is that his conclusion that the plaintiff had proved his case is correct and as the appellant has not, in my view, shown that conclusion to be wrong, there appears to be no justification for disturbing it, see Rex *v.* Dlumayo and another, 1948 (2), S.A., 677, (A.D.).

It is true that there are discrepancies in the evidence for plaintiff as regards the time when the initial three head of cattle were purchased by the defendant for the plaintiff, but to my mind those discrepancies assume minor importance in the light of the lengthy period that elapsed between the time of that purchase and the giving of the evidence in question—some twelve years.

It is also true that it emerges from the evidence of the plaintiff's witnesses that the £7 which the plaintiff handed to the defendant for the purpose of purchasing cattle for him (plaintiff) and with £5. 10s. of which the defendant purchased the initial three head of cattle for the plaintiff, was all that the latter gave to his elder brother, the defendant, during the lengthy period that the plaintiff was an inmate of the defendant's kraal; and whilst the defendant was, in terms of section *thirty-five* of the Natal Code of Native Law published under Proclamation No. 168 of 1932, entitled to a reasonable share of the plaintiff's earnings for kraal maintenance during that period, I do not see how these factors can affect the preponderance of probability that the £7 was in fact given by the plaintiff to the defendant for the purchase of cattle for the plaintiff and so used by him, seeing that—

(1) according to the plaintiff's uncontroverted evidence he was a taxpayer and engaged to be married at that time and he therefore then required cattle for lobolo purpose;

(2) it is no part of the defendant's case that the £7 was given to him by the plaintiff for kraal maintenance; on the contrary the defendant in his evidence denied the receipt of the £7 from the plaintiff and it is implicit in the defendant's testimony not only that he took no steps to obtain from the plaintiff any contribution towards kraal maintenance, but also that the question of any such contribution forms no part of his defence.

In the result I am of opinion that the appeal should be dismissed with costs but that in order to correct a patent error in the Additional Native Commissioner's judgment, it should be amended by the substitution of the word "two" for the word "four".

For Appellant: Adv. J. H. Niehaus (i/b. H. L. Bulcock).

For Respondent: Mr. G. S. Clulow.

NORTH–EASTERN NATIVE APPEAL COURT.

MBANJWA *v.* MBANJWA.

N.A.C. Case No. 69/52.

Pietemaritzburg: 16th October 1952. Before Steenkamp, President; Balk and Richards, Members of the Court.

ZULU NATIVE LAW AND CUSTOM.

Native Customary Union—Grounds for Dissolution—Necessity to cite father or protector of wife as party to case before order for repayment of lobolo competent—Sections eighty *and* eighty-three *of Natal Code of Native Law of* 1932.

Practice and Procedure—Appeals—Until contrary shown, findings of Judicial officer are presumed to be correct. Recission of order which is void ab origine *could have been applied for in Native Commissioner's Court.*

Summary: Appellant, the wife of respondent sued for dissolution of the Native customary union on grounds founded under sections *seventy-six* (1) (*f*) and *seventy-six* (2) (*a*) of the Natal Code of Native Law. The Native Commissioner granted the dissolution and ordered that there shall be no return of lobolo.

Held: That on the facts found proved the woman was entitled to a divorce solely on the ground of the husband's misdeeds.

Held further: That no order as to return of lobolo was competent as the woman's father or protector was not cited as a party to the action.

Held further: That as the order concerning return of lobolo was void *ab origine*, there was no necessity for appellant to have brought the matter on appeal to have that order set aside as he could have obtained the relief sought by him by making application to the Native Commissioner's Court for the rescission of the order in question.

Cases referred to:—

Finywase *v.* Jakobina, 1910, N.H.C., 115.
Dikazana *v.* Nozinga, 1916, N.H.C., 211.
Zulu *v.* Nkosi, 1, N.A.C. (N.E.), 227.
Masoka *v.* Mcunu, 1, N.A.C. (N.E.), 327.
Mbuyazi *v.* Mthethwa, 1952, N.A.C., 54, (N.E.).
Rex *v.* Dlumayo and Another 1948 (2), S.A., 677 (A.D.).

Statutes referred to:

Sections *seventy-six* (1) (*f*), *seventy-six* (2) (*a*), *eighty, eighty-one* and *eighty-three* of Natal Code of Native Law.
Rule 73 (*b*) of Native Commissioners' Courts Rules. Section *fifteen*, Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Bulwer.

Steenkamp (President):

In the Native Commissioner's Court the plaintiff (now respondent), the woman, duly assisted by her protector sued the defendant, her husband, for the dissolution of the customary union existing between herself and the defendant.

The grounds on which she sues are:—

1. That conditions are such as to render the continuous living together of the parties insupportable or dangerous.
2. Gross cruelty or ill-treatment on the part of the husband.

Ground 1 is that laid down by section *seventy-six* (1) (*f*) of the Code and ground 2 by section *seventy-six* (2) (*a*).

It seems to me that the circumstances under which a divorce may be sought under ground 1, must be of such a nature that there is fault on the part of both the husband and the wife. As mentioned by Stafford on page 130 in his book on the

principles of Native Law and the Natal code (2nd Edition) the provisions of this section, viz. section *seventy-six* (1) (*f*) will enable the Court to grand the divorce even when the blame cannot be laid at the door of either party and a fair order can be made regarding the lobolo to be returned to the husband. In the case of Dikazana *v.* Nozinga, 1916, N.H.C., 211, Mr. Justice Chadwick is reported to have stated:—

> "I think when it comes to the knowledge of the Court that a man and woman cannot live together in harmony, that it is much better that they should be separated."

Ground 2 should, I think, be dealt with independently of ground 1, and where divorce is sought under ground 2, and it is found that gross cruelty or ill-treatment on the part of the husband has not been established, then and then only should it be considered whether the Court should not grant a divorce on the ground that continuous living together is insupportable or dangerous. Under this ground, if a divorce is granted, some of the cattle paid as lobolo are returnable (see the case of Finywase *v.* Jakobina, 1910, N.H.C., 115), whereas if the divorce is granted by reason of the wrongful acts, misdeeds or omissions of the husband, no lobolo is returnable *vide* section *eighty-one* of the Code.

The Native Commissioner in granting a divorce made the following order:—

(*a*) That the customary union subsisting between the defendant and the plaintiff be dissolved;

(*b*) that the woman Gebelezi Mbanjwa become the ward of her father Siqongqotho Pungula and that she henceforth reside at the kraal of her guardian Siqongqotho;

(*c*) that the custody of the one child of the union be awarded to Gebelezi, and that the child shall remain in such custody until the 31st December, 1959. After that date the child shall be returned to the defendant. On such return, the plaintiff or any other person who has maintained the child shall be entitled to receive compensation from the defendant in respect of such maintenance;

(*d*) that there shall be no return of lobolo since the union has been dissolved on account of the wrongful acts and misdeeds of the defendant;

(*e*) that the plaintiff be awarded the costs of the action.

An appeal has been noted against the whole judgment on the following grounds:—

1. The judgment is against the weight of evidence and contrary to law.
2. In any event the Native Commissioner erred in ordering that no lobolo cattle should be returned to the defendant.

It is not mentioned in ground 1 of the notice of the appeal in what respect the judgment is contrary to law and therefore this part of ground 1 will be disregarded.

The Native Commissioner has found proved the following facts *inter alia:*—

1. That the defendant has an ungovernable temper and often assaulted his wife, the plaintiff.
2. That the defendant on a certain occassion became annoyed with his wife for coming home late from visiting. The defendant remonstrated with her and threatened to stab her.
3. That the defendant on a later occasion threatened to stab the plaintiff and advanced upon her with an assegai in his uplifted hand. Defendant's father intervened on hearing the screams of plaintiff. Defendant then turned on his father and fatally stabbed him with the assegai. Defendant was under the influence of liquor at the time of the occurrence.

That the defendant was sentenced by the Native High Court to four years' imprisonment with hard labour for this crime.

These facts are abundantly borne out by the evidence and it is not necessary to elaborate thereon. These wrongful acts and misdeeds on the part of the husband are in my opinion sufficient to entitle the wife, i.e. the plaintiff, to be granted a divorce.

Unfortunately the Native Commissioner in his reasons for judgment mentions that the Court was convinced that conditions were such as to render the continued living together of the parties to be insupportable and dangerous. In dealing with rulings of law the Native Commissioner also states that the union had to be dissolved solely on account of defendant's wrongful acts which had made living together absolutely insupportable.

These reasonings by the Native Commissioner would appear to be inconsistent, and as pointed out above, a divorce is either granted because living together is insupportable or dangerous from which will follow a return of some of the lobolo paid, or the divorce is granted solely by reason of the husband's wrongful acts, misdeeds or omissions, in which case no lobolo is returnable.

From the above it follows that if a divorce is granted by virtue of section 76 (2) (*a*), the question of insupportability or dangerous living together do not form part of the issue which is confined entirely to the sole misdeeds of the husband.
From the facts found proved there can be no doubt that the woman is entitled to a divorce solely on the ground of the husband's misdeeds which have been established in the evidence.

Regarding ground 2 of the notice of appeal, the Native Commissioner seems to have laboured under the misapprehension which has been so common amongst judicial officers that it is imperative in every case of divorce that an order must be made regarding the return of lobolo cattle. This is far from correct, and I must concede that the misunderstanding has arisen from the wording of section 83 (*c*) of the Code. There have been several decided cases by this Court in connection with the interpretation of this provision in the Code. The latest is the case of Masoka *v.* Mcunu, 1, N.A.C. (N.E.), 327. See also the case of Zulu *v.* Nkosi, 1, N.A.C. (N.E.), 227, and the cases referred to therein.

The substitution of section *eighty* by Proclamation 176 dated 1st August, 1952 now makes it clear beyond any doubt that, notwithstanding anything contained in section *eighty-three* no order for the return or forfeiture of lobolo shall be granted in any action for the dissolution of a customary union unless the father or protector of the wife is cited as a party to the action.

In the instant appeal the father of the woman was not cited as a party and as the order by the Native Commissioner is tantamount to a forfeiture of the lobolo paid by the husband, we are of opinion that that part of the judgment should be deleted, not on the grounds that the Code had been amended, which amendment after all only occurred after the hearing of the case, but by virtue of the previously decided cases referred to supra.

Before concluding I wish to refer to the summons, to point out that where defendant's name is first mentioned it should have been followed by the words "duly assisted by.....". The defect was cured later in the summons but a summons must be drawn up in the correct manner.

The grounds for the divorce leave much to be desired and I think it would have been more appropriate that (*b*) should have been (*a*) and in the alternative (*a*) should have been mentioned.

On the facts the appeal cannot succeed and in my view it should be dismissed with costs, but the judgment of the Native Commissioner should be altered by the deletion of paragraph (*d*)

Richards (Member): I concur.

Balk (Permanent Member):—

The pleadings in this case, the judgment of the Court *a quo* and the grounds of appeal are set out in the learned President's judgment.

To my mind it is manifest from the reasons for judgment furnished by the presiding Acting Native Commissioner in the Court *a quo* that he gave due consideration both to the demeanour of the witnesses and to the probabilities and improbabilities as were disclosed by the evidence to have been material in arriving at his findings of fact; and it seems to me that he has not misdirected himself therein. That being so and as the appellant has not, in my view, shown that those findings are wrong, the presumption that they are correct stands, see Rex *v.* Dlumayo and Another, 1948 (2), S.A. 677 (A.D.); and since those findings obviously justify the decree of divorce, the first ground of appeal fails.

Coming to the next and final ground of appeal, it is clear that it was not competent for the Court *a quo* to have ordered that there shall be no return of lobolo as the plaintiff's father was not a party to the instant action but appeared therein solely for the purpose of assisting his daughter, the plaintiff. That order was therefore void *ab origine* and there was thus no necessity for the defendant to have brought the matter on appeal to have that order set aside since he could have obtained the relief sought by him by making application to the Native Commissioner's Court for the rescission of the order in question under rule 73 (*b*) of the rules for those Courts published under Government Notice No. 2886 of 1951 and it is still open to him to do so, see Mbuyazi *v.* Mthethwa, 1952, N.A.C. 54 (N.E.).

I therefore agree that the appeal should be dismissed with costs and am also of the opinion that in order to save further costs in this matter, this Court should, under the wide powers vested in it by section *fifteen* of the Native Administration Act, 1927, amend the judgment of the Court *a quo,* by deleting therefrom paragraph (*d*), which reads as follows:—

"(*d*) that there shall be no return of lobolo since the union has been dissolved on account of the wrongful acts and misdeeds of the defendant."

For Appellant: Mr. J. R. N. Swain of Messrs. C. C. C. Raulstone & Co.

For Respondent: Adv. J. H. Niehaus instructed by Mr. H. L. Bulcock.

NORTH–EASTERN NATIVE APPEAL COURT.

ZULU *v.* MTOLO N.O.

N.A.C. Case No. 74/52.

Pietermaritzburg: 16th October, 1952. Before Steenkamp, President; Balk and Richards, Members of the Court.

COMMON LAW.

Damages—Seduction.

Practice and Procedure—System of Law applied—Action brought by father and natural guardian of girl in his capacity as such.

Summary: Plaintiff, in his capacity as father and natural guardian of his daughter, sued defendant for damages for his daughter's seduction by defendant. At the trial application was made and granted for the deletion of the claims for the ngqutu and imvimba beasts from the summons.

The Additional Native Commissioner, indicating that he was deciding the case under Native Law and Custom, gave judgment for plaintiff for a ngqutu and an imvimba beast (or their value) and costs.

Held: That as the summons discloses that Petros Mtolo sued in his capacity as the father and natural guardian of his daughter (a minor) for damages for her seduction by defendant, it postulates that the action was brought by her and not by her father.

Held further: That shorn of the two items, the ngqutu beast and imvimba beast, the case was definitely one to be tried under Common Law.

Cases referred to:

Mokhesi N.O. *v.* Demas, 1951 (2), S.A. 502T., P.D.

Mkize *v.* Makatini & Ano., 1 N.A.C. (N.E.), 207.

Mvemve *v.* Mkatshwa, 1 N.A.C., N.E. 284.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp (President):—

The plaintiff cites his capacity to sue as being Petros Mtolo in his capacity as father and natural guardian of his daughter Beatrice Mtolo (a minor).

He sues the defendant (now appellant) for £123. 17s. 10d. afterwards reduced to £112. 17s. 10d. being as and for damages sustained (it is not stated by whom the damages are sustained) as a result of defendant having seduced Beatrice Mtolo.

Paragraph 1 of the claim reads:

"Plaintiff is Petros Mtolo in his capacity as father and natural guardian of his daughter Beatrice Mtolo . . . ".

The alleged damages sustained are made up as follows:—

	£	s.	d.
To Ngqutu beast	6	0	0
To Imvimba Beast	5	0	0
To Doctor's expenses	8	0	0
To Ambulance expenses	0	16	0
To Bus fare Pietermaritzburg to Durban (for two)	0	17	10
To Bus fare Mayville to Durban (for two) 24 days	1	4	0
To Subsistence for two	2	0	0
To General damages for deflowerment and seduction	100	0	0
	£123	17	10

On the day the case was set down for hearing the claim was, on application by plaintiff's attorney, amended by the deletion of ngqutu beast £6, imvimba beast £5, and the total was amended to read £112. 17s. 10d. instead of £123. 17s. 10d.

After evidence of seduction had been led the plaintiff, Petros, gave evidence. It is necessary, in view of the remarks I intend making, to set out his evidence as given by him under oath:

"I am the father of the girl Beatrice. She is a minor. I am her legal guardian. As a result of her being deflowered I have suffered damages. I have suffered damages to the extent of £23. I am including the expenses I have incurred . . . . When my daughter gets married I will claim lobolo. I will claim 9 head of cattle. In effect damages I have suffered is loss of one lobolo beast and ngqutu beast."

After this evidence the attorney who appeared on behalf of defendant applied for an absolution judgment in that there is no evidence before Court to found an action at Common Law. The Additional Native Commissioner postponed the case and made a note on the record which reads "Provisionally to be decided under Common Law".

When the case was resumed a fortnight later the Additional Native Commissioner refused the application for an absolution judgment and then added a note which reads "Court indicates that at this stage it will provisionally decide action under Native Law".

The Court recalled the girl, Beatrice, and after she had given additional evidence, the defendant closed his case without adducing any evidence.

The Additional Native Commissioner then made a note "Case decided under Native Law" and entered judgment for plaintiff for ngqutu beast and imvimba beast or their value £11 with costs.

An appeal has now been noted to this Court against the whole of the judgment on the following grounds:—

(1) (*a*) That in view of the fact that plaintiff brought the action in his capacity as father and natural guardian of his minor daughter and not in the personal capacity, he was not entitled to judgment in his favour, under Native Law.

(*b*) Alternatively by reason of the plaintiff's specific abandonment of his claim under Native Law, the learned Native Commissioner erred in entering judgment under Native Law.

(2) That in view of plaintiff's failure to prove his right to claim damages, the learned Native Commissioner erred in dismissing defendant's application for absolution at the instance at the conclusion of plaintiff's case.

At the outset it is desired to state that those grounds are well taken. Here we have a case in which the plaintiff, according to his summons, obviously sued for damage on behalf of his daughter, Beatrice, who is a minor. The reason his name was used as plaintiff is not because he was suing in his own name and for damages sustained by him, but because Beatrice is a minor. She could have sued in her own name duly assisted by her father or her father could sue on her behalf.

In the case of Mokhesi, N.O. *v.* Demas, 1951 (2), S.A. 502 (T.P.D.) the summons set out a claim by "S. J. Mokhesi N.O. in his capacity as the father and natural guardian of his minor daughter Lena Mokhesi".

That citation is similar to the one in the instant appeal, with this exception, that the word "minor" is omitted.

In that case the Supreme Court of the Transvaal Provincial Division held that the summons was not a summons by the father claiming damages personally, but a summons in which the minor was the person alleged to be aggrieved and desirous of claiming compensation.

There is, however, this distinction in so far as Natives are concerned, that a father of a Native girl, whether she is a minor or a major, may claim damages in his own name according to Native Law and Custom, whereas amongst Europeans or non-Europeans other than Natives such a right does not exist.

There can be no doubt that in the present case the claim was on behalf of the girl Beatrice. It could not have been otherwise in view of the fact that an application was made and granted for the omission of the items imvimba and ngqutu beasts which

are the recognised form of damage suffered under Native Law and Custom and such damages accrue to the father or guardian of the girl and not to the girl personally. Shorn of these two items the case is definitely one under Common Law and the Additional Native Commissioner flagrantly erred in applying a system of law other than Common Law in finding for the plaintiff. Before the Additional Native Commissioner could even consider entertaining the idea of applying Native Law and Custom in finding for the plaintiff the citation of the plaintiff should have been altered. In other words there is no room in this case to apply any system other than the Common Law if judgment is to be given in the plaintiff's favour.

This is not all. The Additional Native Commissioner committed a grave error when he on his own motion included in his judgment items deliberately removed from the claim on application by plaintiff's attorney who, when he made the application, must have realised that in cases in which the girl claims damages there is no room to include therein items only known in Native Law and Custom. This goes to strengthen my views that only Common Law can be applied in the present case.

I am constrained to remark that it would be extremely advisable and desirable for attorneys before issuing a summons to ascertain with centainty whether the father of the girl or the girl herself is claiming damages. If attorneys will do that they will not, when the evidence is being adduced, be faced with evidence such as was given by the father as already set out. It serves no good purpose to issue a summons with two strings to the bow.

It is not the first time such confusion has arisen. In the case of Mkize *v.* Makatini and another, 1 N.A.C. (N.E.), 207, this Court remarked as follows:—

> "This Court must insist on summonses being drawn up in a more intelligent manner and it should be made clear in the summons whether the father is suing under the Common Law on behalf of his daughter, or is suing under Native Law and Custom on his own behalf."

As already remarked, it is obvious in the present case that the action was brought under common law but then the attorney for plaintiff argued and obtained a judgment in his favour under Native Law and Custom. Surely the least he could have done was to have abandoned this judgment or he should never have the action was brought under Common Law but then the attorney opposed the application for an absolution judgment at the end of plaintiff's case in view of the evidence given by the father.

In the case of Mvemve *v.* Mkatshwa, 1 N.A.C. (N.E.), 284, the summons was drawn up similar to the one in the present appeal but in that case the Court *a quo* decided the issue under Common Law and this Court on appeal confirmed the decision.

I therefore come to the conclusion that the summons was issued under Common Law and as that system had to be applied it was not competent to give a judgment under Native Law and Custom, and the attorney for defendant was justified in applying for an absolution judgment in view of the evidence given by the father of the girl.

In my view the appeal should be allowed with costs and the Additional Native Commissioner's judgment altered to one of absolution from the instance with costs.

Balk (Permanent Member):—

As pointed out by the learned President in his judgment, the the summons in the instant case discloses that Petros Mtolo sued in his capacity as the father and natural guardian of his daughter (a minor) for damages for her seduction by the defendant (present appellant) which postulates that the action was brought by her and not by her father, see Mokhesi N.O. *v.* Demas, 1951 (2), S.A. 502 (T.P.D.).

It is manifest from the reasons for judgment furnished by the presiding Acting Additional Native Commissioner concerned that he misconceived the position and laboured under the erroneous impression that the action was brought by the father in his personal capacity; hence he gave judgment for an *ngqutu* beast and an *imvimba* beast which is only competent in Native Law, under which system, however, the daughter has no *locus standi.* Moreover the evidence indicates that the father and not the daughter is making the claim. It follows that the judgment of the Court *a quo* is wrong and that the defendant is entitled to have it set aside.

I therefore agree that the appeal should be allowed with costs and that the judgment of the Court *a quo* should be altered to a decree of absolution from the instance with costs.

Richards (Member): I concur.

For Appellant: Mr. L. Weinberg of Messrs. C. Nathan & Co.

For Respondent: Mr. L. Simon of Messrs. L. Simon & Co.

NORTH–EASTERN NATIVE APPEAL COURT.

DHLADHLA *v.* NKOMO.

N.A.C. CASE No. 80/52.

PIETERMARITZBURG: 16th October, 1952. Before Steenkamp, President; Balk and Richards, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Appeal against Chief's judgment—Power of Native Commissioner's Court to confirm, alter or set aside the judgment of a Chief's Court on appeal—Application for variation of Native Commissioner's judgment made to Native Commissioner's Court—Competency of Native Commissioner's Court to have amplified its judgment, as it did, not considered—Judgment of Native Commissioner's Court altered by Native Appeal Court.

Summary: Plaintiff obtained judgment against defendant in a Chief's Court for three head of cattle. Three head of cattle were attached in pursuance of that judgment. Defendant appealed to the Native Commissioner's Court. The Native Commissioner upheld the appeal. At the instance of plaintiff's attorneys that judgment was subsequently amplified by the Native Commissioner.

Held: That a Native Commissioner's Court has power to confirm, alter or set aside the judgment of a Chief's Court on appeal.

Held further: That as the point was not raised on appeal, it was not necessary to decide whether or not it was competent for the Native Commissioner's Court to have amplified its judgment as it did.

Held further: That in order to obviate any further misconception of the effect of the Native Commissioner's judgment, it should, under the wide powers conferred upon the Native Appeal Court, be altered.

Cases referred to:

Shobede *v.* Shobede, 1 N.A.C. (N.E.), 340.

Statutes, etc., referred to:

Sections *twelve* (5) and *fifteen* of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Camperdown.

Balk (Permanent Member):—

The plaintiff (present appellant) obtained judgment for certain three head of cattle against the defendant (now respondent) in a Chief's Court.

The defendant appealed against that judgment to the Native Commissioner's Court having jurisdiction (hereinafter referred to as "the Native Commissioner's Court") which, at the close of the plaintiff's case, entered the following judgment:—

> "Appeal upheld with costs and cattle declared not executable."

Subsequently the Native Commissioner's Court at the instance of the plaintiff's attorneys amplified its judgment to read as follows:—

> "Appeal upheld with costs; Chief's judgment set aside and cattle (one beast and its increase of two) declared not executable. The said cattle are therefore returnable to the appellant (defendant) Zenzale Nkomo."

Thereafter the plaintiff made application in the Native Commissioner's Court, through his attorneys, "for a variation of the judgment delivered by the learned Native Commissioner on the 10th July, 1951, on the ground of the invalidity of the said judgment; said judgment be altered to such a form that it becomes a proper judgment in compliance with the Rules as in force and applicable to this case."

That application was refused by the Native Commissioner's Court, and this refusal has given rise to the instant appeal, the notice of which reads as follows:—

1. "Please take notice that the plaintiff (appellant) hereby notes an appeal against the whole of the judgment of the Native Commissioner of this Worshipful Court, delivered on the 14th August, 1952, in which he refused the application of plaintiff (appellant) for the variation of the judgment, delivered by the Native Commissioner aforesaid on the 10th July, 1951, on the ground that the said judgment of 10th July, 1951, was invalid.

2. The grounds of appeal are:—

   (*a*) The learned Native Commissioner's judgment in refusing the application was wrong in law in that plaintiff (appellant) submits that the judgment of the learned Native Commissioner of the 10th July, 1951, was in fact, invalid in that it does not comply with the Rules of this Worshipful Court as were applicable at the the time of judgment (10th July, 1951); and/or that

   (*b*) the said judgment of 10th July, 1951, is not a definite and/or final judgment and is therefore invalid and has no legal force and effect.

3. Plaintiff (appellant) submits that the learned Native Commissioner should have granted the application to vary the judgment delivered on the 10th July, 1951, and that his judgment should have been varied to one upholding the appeal to this Worshipful Court and to the setting aside of the judgment of the Chief's Court and to the alteration of the judgment to one of absolution from the instance with costs for the following reasons:—

   (*a*) Plaintiff (appellant) only gave evidence in the case;

   (*b*) the learned Native Commissioner apparently did not consider that the defendant (respondent) had a case to meet; and

   (*c*) defendant (respondent) neither gave evidence nor closed his case.

4. Wherefore plaintiff (appellant) prays that the Honourable Court of Appeal uphold this appeal and make—

(*a*) an order that the Native Commissioner's judgment be altered to one granting the application and varying the order of Court in the Native Commissioner's Court at Camperdown delivered on the 10th July, 1951, to one upholding the appeal from the Court of the Chief, and replacing the Chief's judgment with that of an absolution from the instance with costs; and order

(*b*) that defendant (respondent) be ordered to pay the costs of the application in the Court of the Native Commissioner appealed from and also the costs of this appeal; and/or

(*c*) any other order that the Honourable Court of Appeal may deem just."

Sub-section (5) of section *twelve* of the Native Administration Act, 1927, as amended, empowers a Native Commissioner's Court to confirm, alter or set aside the judgment of a Chief's Court on appeal so that the amplified judgment of the Native Commissioner's Court in the instant case, allowing the appeal with costs and setting aside the Chief's judgment, is obviously valid. Here it may be mentioned that the question of whether or not it was competent for the Native Commissioner's Court to have amplified its judgment as it did, does not call for consideration as this point has not been raised on appeal.

As the instant case was not an interpleader action, and as it is manifest from the record of the proceedings in the Court *a quo* that the cattle in question were attached and delivered to the plaintiff in pursuance of the Chief's judgment, it seems to me that the proper construction to be placed on the words "cattle declared not executable" embodied in the Native Commissioner's judgment is that those words are equivalent to an order for the restoration of the *status quo* i.e. the judgment of the Chief's Court having been set aside, the defendant was entitled to an order for the return to him of the cattle in question which had been attached and delivered to the plaintiff in pursuance of the Chief's judgment, see Shobede *v.* Shobede, 1 N.A.C. (N.E.), 340. That this is the correct view gains support from the fact that the words "the said cattle are therefore returnable to the appellant (defendant) Zenzale Nkomo" follow the words "cattle declared not executable" in the Native Commissioner's judgment.

It is true that the Native Commissioner states in his reasons for judgment that he intended to alter the Chief's judgment to an outright judgment for defendant, but to my mind that intention was not translated into actuality since there appears to be nothing in the language in which the Native Commissioner's judgment is couched indicating that any other judgment was substituted for the Chief's judgment which was set aside. The words "cattle declared not executable" cannot for the reasons given above be construed as a judgment in substitution of the Chief's judgment, but only as an order for the restoration of the *status quo*. In effect therefore the Native Commissioner's judgment is equivalent to one of absolution from the instance. That this is so follows from the fact that the setting aside of the Chief's judgment without its substitution by another judgment leaves it open to the plaintiff to pursue his action as in the case of an absolution judgment.

Beyond stating that it may perhaps be just as well that the Native Commissioner did not word his judgment so as to give effect to his intention of finding for defendant, it is unnecessary to consider the correctness of that judgment on the merits since that aspect is not covered by the instant appeal, which is confined to the question of whether or not the Native Commissioner's judgment was void.

In the result I am of opinion that the appeal should be dismissed with costs but that in order to obviate any further misconception of the effect of the Native Commissioner's judgment, it should, under the wide powers conferred upon this Court by section *fifteen* of the Native Administration Act, 1927, be altered to read:—

"The appeal is allowed with costs and the Chief's judgment is altered to one of absolution from the instance with costs. The plaintiff is ordered to restore the *status quo* by returning the three head of cattle concerned to the defendant".

Steenkamp (President): I concur.

Richards (Member): I concur.

For Appellant: Mr. C. A. H. Manning of Messrs. McGibbon & Brokensha.

Respondent in default.

CENTRAL NATIVE APPEAL COURT.

MATONSELA *v.* MATONSELA.

N.A.C. CASE No. 31/52.

JOHANNESBURG: 17th October, 1952. Before Marsberg, President, Rein and Venter, Members of the Court.

PRACTICE AND PROCEDURE.

Practice and Procedure—Exceptions: Appearance of Articled Clerks in Native Commissioners' Courts.

In an action for the return of a certain motor-car, defendant lodged a plea which was adjudged to be "excipiable" by the Native Commissioner who ordered it to be struck out and ordered defendant to file a fresh plea within seven days. Defendant appealed against this ruling and also applied for review of the proceedings on the grounds that the Native Commissioner's action constituted a grave irregularity or illegality in that the rules of the Native Commissioners' Courts do not provide for the taking of exceptions.

Held: That the ruling was not appealable.

Held further: That as the application for review did not allege any improper conduct on the part of the Native Commissioner, the proceedings were not reviewable.

Held further: That in interpreting and applying the new rules of the Native Commissioners' Courts, the provisions of section *fifteen* of Act No. 38 of 1927 should be kept in mind.

An articled clerk is not entitled to appear in a Native Commissioner's Court, despite the provisions of section twenty-one (3) *of Act No.* 23 *of* 1934.

Statutes, etc. referred to:—

Sections 22, 47 and 81 of Government Notice No. 2886 of 1951.

Section *fifteen* of Act No. 38 of 1927.

Section *twenty-one* (3) of Act No. 23 of 1934.

Appeal from the Court of the Native Commissioner, Springs. Marsberg (President), delivering the judgment of the Court:—

In the Native Commissioner's Court at Springs, plaintiff, Solomon Matonsela, sued defendant, Ishmael Matonsela, for the return of a certain motor-car or its value £116.

Defendant lodged a plea which was adjudged by the Native Commissioner after hearing argument by the parties to be "excipiable". The Native Commissioner ordered it to be struck out and ordered defendant to file a fresh plea within seven days.

Defendant has lodged an appeal against this ruling or order on the grounds that it was wrong in law in several respects.

Defendant has at the same time applied for review of the proceedings on the grounds that the Native Commissioner's action constituted a grave irregularity or illegality in that the rules of the Native Commissioners' Courts do not provide for the taking of "exceptions".

We are somewhat surprised that the defendant should pursue either the appeal or the application for review, after plaintiff had abandoned the order for costs which was made in his favour.

Perusal of the Native Commissioners' Courts rule (No. 81) would indicate that an appeal lies only in respect of—

(*a*) any judgment of the nature described in rule 54;

(*b*) any rule or order made in such suit or proceeding and having the effect of a final judgment including any order as to costs.

Obviously the Native Commissioner's ruling does not fall within either category and therefore no appeal lies.

The expression "grave irregularity" or "illegality" occurring in section *twenty-two* of the Native Appeal Court rules dealing with the review of proceedings are terms which connote *male fides* or improper conduct on the part of the judicial officer. Mere errors of judgment would not be "grave irregularities" or "illegalities". As the application for review does not allege any improper conduct on the part of the Native Commissioner, the proceedings in the case before us are not reviewable.

In interpreting and applying the new rules of the Native Commissioners' Courts it would be well for parties to keep in mind the provisions of section *fifteen* of Act No. 38 of 1927, which have been frequently invoked by the Native Appeal Court where there has been a tendency on the part of litigants to rely on technicalities. Parliament has expressly laid down that judgments shall not be reversed through irregularity in the proceedings unless substantial prejudice has resulted. The new rules are intended to improve the machinery for settlement of disputes between the parties. They must be used for that purpose not as weapons for further tactical disagreement. For instance, rule 47 clearly indicates the principle behind procedure in Courts of Native Commissioner, viz. to do things in such manner "as may aid in the disposal of the notion in the most expeditious and least costly manner". Defendant is quibbling about the expressions "exception" and "excipiable", but if the provisions of rule 44 be read with rule 84 it will be appreciated that the action taken by the Native Commissioner was substantially and in effect within the competence of the rules.

We observe from the record that defendant was represented by Mr. Robert Levin who describes himself in an affidavit as an articled clerk. As such he is not entitled to appear in a Native Commissioner's Court, despite the provisions of section *twenty-one* (3) of Act No. 23 of 1934.

The appeal and the application for review are both dismissed with costs.

Rein and Venter (Members) concurred.

For Appellant: Mr. Selvan of Messrs. Behrmann, Haarhoff & Cohen, Springs.

For Respondent: Mr. E Judes, Springs.

CENTRAL NATIVE APPEAL COURT.

OLIPHANT *v.* MOKOOI.

N.A.C. CASE No. 33/52.

JOHANNESBURG: 21st October, 1952. Before Marsberg, President, De Beer and Hattingh, Members of the Court.

Police—Action against Native Constable employed by South African Railways and Harbours Police—Damages for false imprisonment—Action not commenced within four months after cause of action had arisen—Whether protection afforded by section thirty *of Act No.* 14 *of* 1912 *applies to Railway Police—Section* fifty-seven (1), *Act No.* 22 *of* 1916, *as amended.*

In an action by a Native teacher claiming damages for wrongful imprisonment against a Native constable in the employ of the South African Railways and Harbours Police, the latter had pleaded specially that plaintiff was debarred by section *thirty* of Act No. 14 of 1912, read with section *fifty-seven* of Act No. 22 of 1916, as amended by section *eleven* of Act No. 36 of 1939, from bringing the action inasmuch as plaintiff had failed to commence the action within four months after the cause of action had arisen. A Native Commissioner's Court having uphelp the special plea, in an appeal, it was contended by appellant that it was necessary for defendant to prove that he was a Native constable in the employ of the South African Railways and Harbours Police and appointed to maintain law and order on the Railways and was carrying out his duty when he arrested plaintiff. It was also contended that a member of the South African Railways and Harbours Police is not entitled to the indemnities provided by section *thirty* of Act No. 14 of 1912.

Held: That as plaintiff in his summons had described defendant as a "Native Constable of c/o S.A.R. & H. Police" it was not necessary for defendant to prove that he was a policeman.

Held further: That the argument that the onus was on defendant to show that he was carrying out his duty when he arrested plaintiff, was without substance.

Held further: That a person appointed for the purpose of maintaining law and order upon Railways and who carries out that duty is entitled to the indemnities to which a member of the South African Police would in like circumstances be entitled.

Cases referred to:

Mphelo *v.* Bruwer [1951 (1), S.A. 433 (T.P.D.]

Statutes etc. referred to:

Section *thirty* Act No. 14 of 1912.

Section *fifty-seven* (1) Act No. 22 of 1916, as amended by section *eleven* of Act No. 26 of 1939.

Appeal from the Court of the Native Commissioner, Krugersdorp.

Marsberg (President), delivering judgment of the Court:—

On 31st December, 1951, plaintiff, Wilfred Oliphant, sued defendant, Elikana Mokooi, described as Native constable and in the employ of the South African Railways and Harbours Police at Krugersdorp, in the Native Commissioner's Court at Krugersdorp for payment of £150 damages for false imprisonment. Plaintiff alleged that on or about 30th March, 1951, and at Krugersdorp Railway Station defendant wrongfully and unlawfully arrested him and marched him to the Krugersdorp Police Charge Office where he was detained.

Defendant in a preliminary plea claimed that "plaintiff is debarred by section *thirty* of Act 14 of 1912, read with section *fifty-seven* of Act No. 22 of 1916, as amended by section *eleven* of Act No. 36 of 1939, from bringing this action in as much as plaintiff has failed to commence this action within four months after the cause of action had arisen.

Defendant says that at all relevant times and at the place alleged in the summons, he was acting in the execution of his duties under Act No. 14 of 1912 and the regulations promulgated thereunder."

The Native Commissioner upheld this plea and dismissed the summons with costs.

Plaintiff has appealed against this judgment on the following grounds:—

The Native Commissioner erred in law in the following respects:—

1. He found that it was not necessary to prove that the defendant is a Native constable in the employ of the South African Railways and Harbours Police.
2. He found that it was not necessary to show that the defendant was a person appointed to maintain law and order on the Railways.
3. He found that it was not necessary to show that the defendant was carrying out his duty when he arrested the plaintiff.
4. He found that Mphelo *v.* Bruwer was a direct precedent whereas Mphelo's case relates to the Police Act and not to the South African Railways and Harbours Police.
5. He found by implication that section *thirty* of Act No. 14 of 1912 is incorporated into the South African Railways and Harbours Act by section *fifty-seven* (1) of Act No. 22 of 1916 and that the limitation of time provided in the former act is included among the indemnities.
6. The Native Commissioner erred in fact by holding that on the language of the summons it could be found that the defendant was a duly appointed constable acting in the course of his duties as a constable.

Argument before us has taken the matter no further than where it rested before the Native Commissioner. For the purposes of our judgment it will suffice to quote his written judgment:—

" 1. In this matter the plaintiff, who is a Native teacher is sueing the defendent. who is described as a Native constable whose full and further names and occupation are to the plaintiff unknown, of c/o South African Railways and Harbours Police, Krugersdorp, for damages for false imprisonment.

2. In paragraph 2 of the particulars of the summons the defendant is further described as in the employ of the South African Railways and Harbours Police, Krugersdorp. It is further asserted that the defendant " wrongfully and unlawfully arrested the plaintiff and handcuffed the plaintiff ".

3. In his preliminary plea the defendant states that plaintiff is debarred by section *thirty* of Act No. 14 of 1912 read with section *fifty-seven* of Act No. 22 of 1916, as amended by section *eleven* of Act No. 36 of 1939, from bringing this action inasmuch as plaintiff has failed to commence this action within four months after the cause of action had arisen.

4. Section *thirty* of Act No. 14 of 1912 reads as follows:—

' For the protection of persons acting in the execution of this Act every civil action against any person in respect of anything done in pursuance of this Act or the regulations, *shall be commenced within four months after the cause of action has arisen,* and notice in writing of any civil action and the cause thereof shall be given to the defendant one month at least before the commencement thereof.'

5. Now, the wording of this section is very clear and leaves no doubt as to the procedure to be followed against a *person acting in the execution of this Act.*

6. Sub-section (1) of section *fifty-seven* of Act No. 22 of 1916, as amended by section *eleven* of Act No. 36 of 1939, reads as follows:—

'The Governor-General may, in manner provided in the Railways and Harbours Service Act, 1925, appoint so many persons as may be deemed necessary for the duty of maintaining law and order upon the Railways and at the Harbours, and when any such person so appointed is carrying out that duty, *he shall be capable of exercising all such powers and shall perform all such functions as are by law conferred on or are to be performed by a member of the South African Police Force,* established under the Police Act, 1912, *and shall be liable in respect of Acts done or ommitted to be done to the same extent as he would have been liable in like circumstances if he were a member of the said Force, and shall have the benefit of all the indemnities to which a member of such Force would in like circumstances be entitled.*'

7. There can be no doubt that a person appointed for the purpose of maintaining law and order upon Railways and who carries out that duty is entitled to the indemnities to which a member of the S.A.P. would in like circumstances be entitled.

8. The question to be determined therefore is whether the defendant is such a person.

9. The argument advanced by Mr. Lubinsky in favour of his contention that defendant must show that he was acting in the execution of his duty and that his action was lawful, are substantially the same as those advanced by Council for appellant in the case Mphelo *v.* Bruwer, 1951 (1), S.A. 433 (T). This argument can be rejected for the same reasons as that of the learned Judge.

10. Mr. Lubinsky's argument that defendant must show that he was a policeman must also be rejected because plaintiff has described him as a 'Native constable of c/o S.A.R. & H. Police' and plaintiff cannot now deny that defendant is in fact a 'Native Constable'. The averment that defendant is in the employ of the S.A.R. & H. Police also brings the defendant within the category of a 'servant' of the Railway Administration and it is clear from section *fifty-six* of Act No. 22 of 1916, as amended, that an authorised servant of the S.A.R. & H. also has the power of arrest. The averments in paragraph (4) of the summons describes exactly the procedure prescribed by this section.

11. The only conclusion one can arrive at on the summons is that the defendant is a Policeman and there is therefore also no substance in the argument that he must show at this stage, that he is a Policeman.

12. It is also clear *ex facie* the summons that action was not commenced within four months.

13. The defendant's preliminary plea is upheld and the Court holds that defendant is entitled to the protection of section *thirty* of Act No. 14 of 1912, and the summons is dismissed with costs."

The appeal is dismissed with costs.

Hatting and De Beer (Members) concurred.

For Appellant: Adv. Mr. I. Lubinsky, instructed by Mr. H. W. Chain, Johannesburg.

For Respondent: Adv. Mr. A. E. G. Trollip, instructed by Assistant Government Attorney, Johannesburg.

NORTH-EASTERN NATIVE APPEAL COURT.

NTANZI *v.* MPANZA.

N.A.C. CASE No. 78/52.

ESHOWE: 21st October, 1952. Before Steenkamp, President; Balk and Oftebro, Members of the Court.

ZULU CUSTOM.

SISA: Object to avoid attachment, prior to execution being levied: not illegal.

Summary: Plaintiff sisaed cattle with defendant so that they could not be attached under a judgment granted against plaintiff in a Chief's Court. This transaction took place before execution was levied.

Held: That no Native law or custom is known making it illegal for a judgment debtor to do away with his assets before execution is levied against him.

Statutes, etc., referred to:—

Native Commissioners' Courts Rule 79.
Appeal from the Court of Native Commissioner, Nkandhla.

Steenkamp (President):—

The Court condoned the late noting of the appeal.

It is not necessary to quote the pleadings *in extenso*. Suffice to state that plaintiff's claim before the Chief was in respect of eight head of *sisaed* cattle. The Chief gave judgment in favour of plaintiff. An appeal was noted to the Native Commissioner, who altered the Chief's judgment to one for defendant with costs.

In the Native Commissioner's Court only the plaintiff gave evidence and at the conclusion of his evidence the attorney for defendant applied for, and was granted, an amendment of his plea by the addition of the following alternative plea:—

> "Defendant pleads that, even if the Court accepts plaintiff's version, then plaintiff is debarred from recovering the cattle by operation of law, in that *in pari delicto potier est condictio defendentis vel possidentis.*"

The Court allowed this special plea and stated that as plaintiff cannot on his own showing succeed on his claim the Court enters judgment as follows:—

> "The appeal is allowed, with costs, and the Chief's judgment is altered to one for defendant, with costs."

An appeal has now been noted to this Court. It is only necessary to quote the second ground of appeal, which reads that the learned Native Commissioner erred in holding that the appellant's action depended upon his illegal conduct or that he was equal in guilt with the defendant and that defendant as possessor of the goods in dispute was allowed to succeed.

The facts briefly, as adduced by the plaintiff, are that he *sisaed* three head of cattle with the defendant because he was hiding them, as a judgment of the Chief's Court had been entered against him, and he hid the cattle so that they could not be attached under that judgment.

The illegality depended on is that a judgment debtor is not allowed to do away with his assets if a judgment had been granted against him. I can find no law, nor has any been mentioned by the Native Commissioner in his reasons for judgment, that it is illegal for a judgment debtor to do away with his assets before execution is levied against him. The only offence a judgment debtor can commit is when he gives false information to the Messenger of the Court when that officer seeks to attach property —see section 79 of the Native Commissioners' Courts Rules.

The judgment which the judgment debtor, that is the present plaintiff, attempted to evade was one given in a Chief's Court, and there is no provision in the Native Chiefs' Courts Rules that it is an offence to hide assets. I know of no Native Law and Custom under which it is a criminal offence for a judgment debtor to dispose of his stock after judgment had been given against him

and before execution is levied. If there is such a law then it was incumbent on the defendant to adduce evidence to that effect.

The Native Commissioner has erred in entering a judgment on the application of defendant's attorney and therefore, in my opinion, the appeal should be allowed with costs and the Native Commissioner's judgment set aside and the record returned to him for hearing to a conclusion and a decision on the merits of the case.

Balk (Permanent Member): I concur.

Oftebro (Member): I concur.

For Appellant: Mr. W. E. White.

For Respondent: Mr. H. H. Kent, instructed by Messrs. Bestall & Uys.

NORTH-EASTERN NATIVE APPEAL COURT.

DHLUDHLA *v.* DHLUDHLA.

N.A.C. CASE No. 79/52.

ESHOWE: 22nd October, 1952. Before Steenkamp, President; Balk and Oftebro, Members of the Court.

ZULU CUSTOM.

Customary Union—Affiliation—Right to confer status upon wives at any time, under Zululand Code of Native Law of 1878, *no longer in force after promulgation of Natal Code of Native Law of* 1932—*right to confer status on his wives under the former law not vested unless exercised while that law was still in force.*

Summary: In an Estate Enquiry, present appellant based his claim that he is the deceased's *indhlunkulu* and general heir on the ground that his mother, who was the deceased's fifth wife, was affiliated to the deceased's *indhlunkulu*. It was alleged that the affiliation occurred in about January, 1951.

Held: That the position falls to be determined not by reference to a repealed law, but to the law in force at the time when the status was conferred upon the wife concerned.

Held further: That in the absence of any saving clause in the 1932 Natal Code of Native Law the deceased had no vested right to confer status on his wives at all times after the celebration of his customary unions with them, merely because his initial or some of his customary unions were contracted when the 1878 Zululand Code of Native Law was in force.

Held further: That the deceased could have exercised the right in question up to the time that the 1932 Natal Code of Native Law came into force, i.e. up to the 1st November, 1932.

Cases referred to:

Nene *v.* Nene 1942 N.A.C. (T. & N.) 34.

Statutes referred to:

Section 3 (2) of Govt. Notice No. 1664 of 1929, as amended.

Sections *ninety-seven, one hundred and one* (1) (*b*), *one hundred and one* (2), *one hundred and one* (3) and *one hundred and ten* (*e*) of the Natal Code of Native Law of 1932.

Appeal from the Court of the Native Commissioner, Nkandhla.

Balk (Permanent Member):—

This is an appeal from the finding given by an Assistant Native Commissioner in favour of Maholoyi Dhludhla in an enquiry held in terms of section 3 (2) of the regulations for the administration and distribution of Native estates published under Government Notice No. 1664 of 1929, as amended, to determine the person entitled to succeed as *indhlunkulu* and general heir to the property concerned in the estate of the late Mzila Dhludhla (hereinafter referred to as "the deceased").

The appeal is brought by Kami Dhludhla on the ground that the finding is against the evidence.

It is common cause that—

(1) the deceased died in about February, 1951;

(2) he had in all seven wives;

(3) the deceased's first wife, Mamhlogo Gezile, constituted his *indhlunkulu;*

(4) there are no sons in the deceased's *indhlunkulu,* the only son therein having died in infancy;

(5) the deceased's second wife, Mampungose, constituted his *ikohlo:*

(6) Nkabiyana is the only surviving son in the deceased's *ikohlo,* the only other son therein having died without issue;

(7) Mkosi is the eldest son of the deceased's third wife, Okananqele;

(8) Maholoyi who, as indicated above, was found by the Native Commissioner to be the *indhlunkulu* and general heir of the deceased, is the latter's eldest son by his fourth wife, Mamhlongo Bonangwamuntu;

(9) Kami (appellant) is the eldest son of deceased's fifth wife, Mantuli;

(10) deceased's sixth wife, Mayangwayo, had no sons;

(11) Mhlungu is the eldest son of the deceased's seventh wife, Mabutelezi.

It emerges from the evidence that the deceased was a commoner and that he did not appoint an *iqadi.*

Maholoyi based his claim that he is the deceased's *indhlunkulu* and general heir on the ground that his mother, Mamhlongo Bonangwamuntu, who was the deceased's fourth wife, was at the time of the celebration of her customary union to the deceased, affiliated to his *indhlunkulu.* Nkabiyana, the heir to the deceased's *ikohlo,* supported Maholoyi's claim. Counsel for respondent contended that this factor was a very cogent one since it was inimical to Nkabiyana's interests to support Maholoyi's claim in that in the event of no affiliation to the *indhlunkulu* being proved, Nkabiyana would be the deceased's *indhlunkulu* and general heir in terms of section *one hundred and ten* (*e*) of the Natal Code of Native Law published under Proclamation No. 168 of 1932. But it is by no means clear that Nkabiyana appreciated that that was the position so that the contention loses much of its force. Moreover, the only evidence in support of Maholoyi's claim is his own and that is hearsay; and it emerges therefrom that his uncle, Mpunga, who was not called, has firsthand knowledge of the facts in issue.

Kami based his claim that he is the deceased's *indhlunkulu* and general heir on the ground that his mother, Mantuli, who was the deceased's fifth wife, was affiliated to the deceased's *indhlunkulu.*

Kami, however, admitted in his evidence that the alleged affiliation of his house to the deceased's *indhlunkulu* occurred about a month before the deceased's death, i.e. in about January, 1951, which was long after the celebration of his (Kami's) mother's customary union to the deceased. Kami also admitted in his evidence that the *lobolo* cattle paid for his mother were kraal property and had not belonged to any particular house.

In this connection Counsel for appellant submitted that the deceased's right under the Zululand Code of Native Law of 1878 to confer status upon his wives at any time subsequent to the celebration of his customary unions with them, continued notwithstanding the provisions of section *one hundred and one* (2) read with sub-section (1) (*b*) and (3) of section *ninety-seven* of the 1932 Natal Code of Native Law and notwithstanding that there was no saving clause in that Code preserving the right in question. But that submission is untenable since the position obviously falls to be determined not by reference to a repealed law, but to the law in force at the time when the status was conferred upon the wife concerned, in this instance the law in force in January, 1951, i.e. the 1932 Natal Code of Native Law, and therefore in the absence of any saving clause in that law in the respect in question, the deceased cannot be said to have had any vested right to confer status on his wives at all times after the celebration of his customary unions with them merely because his initial or some of his customary unions were contracted when the Zululand Code of Native Law of 1878 was in force. Admittedly he could have exercised the right in question up to the time that the 1932 Natal Code of Native Law came into force, i.e. up to the 1st November, 1932, but he was precluded from doing so thereafter by the provisions of that Code, see the penultimate and last paragraphs at page 35 of the report of Nene *v.* Nene, 1942, N.A.C. (T. & N.), 34.

It follows that in the light of Kami's admissions referred to above and the provisions of section *one hundred and one* (2) read with sub-sections (1) (*b*) and (3) of section *ninety-seven* of the 1932 Natal Code of Native Law, his house cannot be regarded as having been affiliated to the deceased's *indhlunkulu* and his claim therefore fails.

In the circumstances I am of opinion that the appeal should be dismissed with costs, but that the Assistant Native Commissioner's finding that Maholoyi is the deceased's general and *indhlunkulu* heir should be set aside since it is not supported by proper evidence, as is clear from what has been stated above, and that the enquiry should be remitted to him to hear Mpunga Dhludhla's evidence and that of any other available witness who may have firsthand knowledge of the facts in issue and thereupon for a fresh finding.

Steenkamp (President): I concur.

Oftebro (Member): I concur.

For Appellant: Mr. H. H. Kent instructed by Messrs. Bestall & Uys.

For Respondent: Mr. W. E. White.

SOUTHERN NATIVE APPEAL COURT.

QHOTSWAYO *v.* TAFENI.

N.A.C. CASE No. 36/52.

UMTATA: 24th October, 1952: Before Warner, Actg. President; Nel and Van Zyl, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Appeal to Native Commissioner's Court against a default judgment in Chief's Court—Objection to hearing of such appeal overruled—This order not a final judgment and therefore not appealable.

Appellant issued summons against respondent to appear in the Court of Chief K. D. Matanzima on 30th January, 1952, to answer a claim for four head of cattle or their value £48. Respondent was in default on the return day and again on 1st February, 1952, to which date the case had been postponed and on which day judgment was given in favour of appellant. On 5th February, 1952, respondent noted an appeal to the Native Commissioner's Court. Appellant excepted to the hearing of the appeal, *inter alia* on the following ground: "That the appeal against the judgment of the Chief's Court discloses no cause of action in that it does not allege that defendant applied to the Chief who gave judgment (or his successor in office) to rescind such judgment as provided for in section 2 (3) of Government Notice No. 2885 of 1951."

The Native Commissioner dismissed the exception and appellant has appealed against this ruling.

An objection was lodged to the hearing of the appeal in this Court on the grounds that the Native Commissioner's Court's Order which is appealed against is not one against which an appeal lies in terms of rule 81 (2) of the rules published under Government Notice No. 2886 of 9th November, 1951, in that—

(*a*) it is not a judgment of the nature described in rule 54 of the said rules; and

(*b*) it is not a rule or order having the effect of a final judgment.

Held:

(1) A party to a suit in a Chief's Court may appeal against any judgment or order of such Court and the case must then be re-heard and re-tried in the Court of the Native Commissioner as if it were one of first instance in that Court.

(2) That the Native Commissioner's order dismissing the exception does not have the effect of a final judgment and is therefore not appealable.

(3) That as the award of costs has not been specifically stated as a ground of appeal in terms of the Native Appeal Court Rules they cannot be considered.

The appeal is struck from the roll.

Cases referred to:

Pretoria Garrison Institutes *v.* Danish Variety Products (Pty.), Ltd., 1947 (1), S.A. (T.P.D.) 245.

Nkwenkwana *v.* Lizo, 1947 (N.A.C.) (C. & O.), 115.

Statutes referred to:

Act No. 32 of 1944, sections *eighty-one* and *eighty-three*.

Government Notice No. 2885 of 1951, sections 2 (3) and 9 (1) and 12 (4).

Government Notice No. 2886 of 1951, sections 81 (2) and 54.

Appeal from the Court of the Native Commissioner, Cofimvaba.

Warner (Acting President):

Plaintiff issued summons against defendant to appear in the Court of Chief K. D. Matanzima on the 30th January, 1952, to answer a claim for four head of cattle or their value £48.

Defendant was in default on the return day and the case was postponed to the 1st February, 1952, on which day defendant still being in default, judgment was given for plaintiff as prayed with costs.

On the 5th February, 1952, defendant noted an appeal against this judgment to the Court of the Native Commissioner for the District of St. Marks.

Plaintiff excepted to the hearing of the appeal on the following grounds:—

(*a*) That the appeal is vague and embarrassing and bad in law, in that respondent (plaintiff) is not informed as to what case he has to meet. The notice of hearing appeal against the judgment of the Chief's Court, presupposes that the default judgment granted by the Chief's Court has been set aside, which is not the case.

(*b*) The appeal against the judgment of the Chief's Court discloses no cause of action in that it does not allege that appellant (defendant) applied to the Chief who gave the judgment or his successor in office to rescind such judgment as provided for in section 2 (3) of the regulations published under Government Notice No. 2885 of 9th November, 1951.

The Native Commissioner dismissed the exception with costs and plaintiff has appealed against this ruling on the grounds that the Native Commissioner erred in dismissing Plaintiff's exception and in ruling that it was not necessary for the defendant to exhaust his remedies under regulation 2 (3) of Government Notice No. 2885 of 1951.

An objection has been lodged to the hearing of the appeal on the grounds that the judgment or order of the Native Commissioner's Court which is appealed against is not one against which an appeal lies in terms of rule 81 (2) of the rules published under Government Notice No. 2886, dated 9th November, 1951, in that—

(*a*) it is not a judgment of the nature described in rule 54 of the said rules; and

(*b*) it is not a rule or order having the effect of a final judgment.

Regulations for Chiefs' and Headmens' Civil Courts were promulgated by Government Notice No. 2885 of the 9th November, 1951. Section 2 of these regulations provides for the hearing or judgment in the absence of parties. The Chief has the power to give judgment against a defendant if there is no appearance by him or on his behalf. A party to an action in which a default judgment is given may within 60 days after such judgment has come to his knowledge apply to the Chief who is given power to rescind such judgment.

Section 9 (1) of the regulations reads as follows:—

> "Any party dissatisfied with any judgment or order of a Chief's Court may, within forty days from the date of the pronouncement thereof appeal against such judgment or order to the Court of the Native Commissioner having jurisdiction by notifying the Clerk of the said Court either in person or through a legal representative."

Section 12 (4) of the regulations provides that upon the day fixed for the appearance of the parties the Court of the Native Commissioner shall proceed to re-hear and re-try the case as if it were of first instance in that Court and may give such judgment or order thereon as justice may require.

A Chief's Court is a creature of statute and is bound by the stature which created it.

The Rules for Chiefs' and Headmens' Civil Courts do not provide for the lodging of objection or exceptions to the hearing of appeals in the Court of the Native Commissioner. A party to a suit in a Chief's Court may appeal against any judgment or order of such Court and the case must then be re-heard and re-tried in the Court of the Native Commissioner as if it were one of first instance in that Court.

In the case of an appeal from a Native Commissioner's Court to this Court, however, the position is different because section 81 of Government Notice No. 2886 of 1951 has prescribed the judgments or orders against which an appeal may be lodged. Sub-section (2) of this section allows a party to appeal against—

(*a*) any judgment of the nature described in rule 54; and

(*b*) any rule or order made in such suit or proceeding and having the effect of a final judgment including any order as to costs.

In the present case, the order dismissing the exception is not a judgment of the nature described in rule 54 so the only question to be decided is whether it is a rule or order having the effect of a final judgment.

The wording of section 81 (2) (*b*) of the Rules of Courts of Native Commissioner is practically identical with that of section *eighty-three* (*b*) of the Magistrates' Courts Act, No. 32 of 1944. In dealing with an appeal against an order of a Magistrate's Court Murray J. stated on page 248 in the case of Pretoria Garrison Institutes *v.* Danish Variety Products (Pty.), Ltd. [1947 (1), S.A. (T.P.D.), 245]: The finality of the order renders it appealable only if the matter on which the order is granted is one which forms a definite part of the first issue between the parties so that its decision disposes once and for all of that part of the suit and directly affects the final issue." He also stated: "It is clear that the concluding words of section *eighty-three* (*5*)—'including any order as to costs'—do not create the position that merely because a rule or order carries an ancillary order for costs the rule or order is itself consequently appealable."

In applying the tests laid down in the case quoted above, we hold that the order of the Native Commissioner dismissing the exception does not have the effect of a final judgment and is therefore not appealable.

The award of costs has not been specifically stated as a ground of appeal in terms of the Native Appeal Court Rules and, following the ruling in the case of Nkwenkwana *v.* Lizo [1947, N.A.C. (C. & O.), 115] cannot be considered.

The objection is sustained, with costs and the appeal is struck off the roll.

Nel and Van Zyl (Members), concur.

For Appellant: Mr. Matanzirna, Engcobo.

For Respondent: Mr. Muggleston, Umtata.

SOUTHERN NATIVE APPEAL COURT.

SIYUNGUMA *v.* SIYUNGUMA.

CASE NO. 37/52.

UMTATA: 24th October, 1952: Before Warner, Acting President; Nel and Van Zyl, Members of the Court.

TEMBU CUSTOM.

Marriage by Native Custom—Competent to marry a seed bearer to a great house when there is a son in qadi house.

Appellant, son of the qadi to the great house, sued respondent in the court below for a debate of account in the estate of the late Siyunguma Kama's great house, and delivery thereof to appellant. Deceased had four wives. There was no male issue of the great house. After the wife of the great house had passed child-bearing age, deceased married a fifth wive as seed bearer to the great wife. Respondent is the son of the seed bearer. Judgment in the Court below was given in favour of respondent.

The appeal is against the judgment on the grounds that appellant was already born when deceased married his fifth wife and therefore deceased had no power to nominate Nombewu (5th wife) as seed bearer, and further that as the seed bearer was not related to the woman she replaced, the deceased did not follow true Tembu custom.

Held: That it is competent for a husband to marry a seed bearer to a principal house even if there is already a son in the qadi to such house.

Appeal fails.

Cases referred to:
Moni *v.* Msongelwa, 5, N.A.C., 151.
Kwaza *v.* Kwaza, 5, N.A.C., 376.
Yoywana *v.* Yoywana, 3, N.A.C., 301.

Works referred to: South African Native Law, 2nd edition, page 251 (Whitfield).

Appeal from the Court of the Native Commissioner, Mqanduli.

Warner (Acting President):

Plaintiff sued defendant for a debate of account of the estate of the late Siyunguma Kama's great house and delivery thereof to plaintiff.

In his plea defendant stated that he was the heir to the great house, but should plaintiff be declared the heir to the great house of the late Siyunguma, he (defendant) was agreeable to a debate of accounts.

After hearing evidence, the Assistant Native Commissioner gave judgment for defendant as prayed with costs and plaintiff has appealed on the following grounds:—

1. That the Court wrongly interpreted the Native Law and Custom applicable in this case more particularly in that—
   (*a*) the plaintiff having been born before the marriage of defendant's mother to the late Siyunguma the latter had no power to nominate Nobuwe as seedbearer to his great wife;
   (*b*) the late Siyunguma failed to follow Tembu Custom in drawing a prospective seedbearer from a family not related to that of the woman for whom she was to be seedbearer;
   (*c*) any variation of the customs set out in (*a*) and (*b*) required overwhelming proof which is lacking in this case.
2. That the judgment is against the weight of evidence and probabilities of the case.

From the record, we are satisfied that the following facts have been established:—

1. The parties are Tembus practising Tembu custom.
2. At one time the late Siyunguma had four wives.
3. The great wife had not borne a son.
4. The qadi wife to the great house had a son, plaintiff.
5. Siyunguma then married a fifth wife by native custom, the great wife then being past child-bearing age.
6. When Siyunguma asked for his fifth wife, Nobuwa, he told her people that his wife in the great house had no male children and he wanted her as seed bearer in that house.
7. When the duli party took Nobuwa to Siyunguma's kraal he announced publicly that he was placing her in the great house as seed bearer.
8. Nobuwa lived in the great house of Siyunguma and gave birth to a son, defendant.
9. Shortly before his death, Siyunguma called a meeting at which he allocated the stock of his various houses and declared that defendant was the heir to his great house.
10. After Siyunguma's death, as his sons were still minors, Mabulana was in charge of all the estate property.
11. Mabulana died and plaintiff and others allocated the stock, allocating the stock of the great house to defendant.
12. All the members of the family accepted defendant as heir of the great house and when plaintiff gave evidence in a case on 16.1.1951, he stated that he was from the right hand house and did not claim to be the heir in the great house.

13. Nobuwa the alleged seed bearer to the great house was not of the same family as the wife in the great house.

It has been argued that, if Siyunguma did place his fifth wife Nobuwa as seed bearer in the great house, his action was not in accordance with native custom because there was already an heir in the qadi to the great house, so that defendant would not oust plaintiff from his position as heir to the great house. This argument is based on the statements in the cases of Moni *v.* Msongelwa (5, N.A.C., 151) and Kwaza *v.* Kwaza (5, N.A.C., 376) to the effect 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 woman married to replace the dead wife is generally taken from the family of the deceased wife. We have been asked to hold that this statement also means that it is most unusual for a wife to be married into a house where there is already an heir to the qadi of that house, because under Native Custom, the heir to a qadi house, is also heir to the house to which the qadi is affiliated if there is no heir in such principal house.

The matter was put to the Native assessors who stated that it is not in accordance with Native Custom to place a seed bearer in a house while he wife of that house is still alive even if she has passed child-bearing age, as a seed bearer is placed in a house only after the wife of that house has died. This expression of custom was not unanimous and we are unable to accept it in view of the statement in the case of Yoywana *v.* Yoywana (3, N.A.C., 301) that it is quite in accordance with custom for a man to marry a seed bearer for either of his two principal wives who owing to either death or barrenness produces no heir.

The Native assessors are unanimous however in stating that where a seed bearer has been placed in a principal house, a son borne by this seed bearer would become the heir to this house and would oust the eldest son in the qadi house from his position as heir to the principal house. This expression of opinion is accepted as being consistent with previous decisions. In Yoywana's case (*supra*) it was stated that it is quite in accordance with custom for a man to marry a seed bearer for either of his two principal wives and this statement was not qualified by the words "unless there is an heir to the qadi to such principal house". The object aimed at in placing a woman in a particular house is to ensure that that house should have an heir (see page 251 of Whitfield's *South African Native Law* (Second Edition) and cases quoted thereon].

We are satisfied that the late Siyunguma placed defendant's mother Nobuwa in the great house as seed bearer in accordance with Native Custom so that defendant is the heir to the great house.

The appeal is dismissed with costs.

Nel and Van Zyl (Members) concur.

For Appellant: Mr. Hughes, Umtata.

For Respondent: Mr. Muggleston, Umtata.

SOUTHERN NATIVE APPEAL COURT.

MACUBENI *v.* MACUBENI.

N.A.C. CASE No. 38/52.

UMTATA: 24th October, 1952. Before Warner, Acting President; Nel and van Zyl, Members of the Court.

TEMBU CUSTOM.

Native Estates—Ownership of Estate Stock does not vest in Widow of any House—Widow's Rights to support after Husband's Death.

Appellant sued defendant unsuccessfully to have the stock belonging to the Great House and the Qadi to the Great House at her kraal for her maintenance and support. She also sued for the return of 40 sheep and 3 horses (the property of the Great and Qadi Houses of her late husband).

The appeal is against the judgment in favour of defendant:

Held:

(1) That as plaintiff had 25 head of cattle, including 5 cows at her kraal for the support of herself and one child and as she had the use of 3 lands (which defendant's children assisted in ploughing) it is clear from her own evidence that she received adequate support.

(2) That it is established native law that if the heir does not adequately support a widow she has an action against him to compel him to do so and may even be granted an order by the Court to have certain of the estate cattle placed at the kraal where she resides for her support.

(3) That she has in no sense any dominium in such cattle and cannot dispose of them without consulting the heir.

The Appeal fails.

References:

Whitfield, South African Native Law, page 254. Second Edition.

Appeal from the Court of the Native Commissioner, Umtata.

Warner (Acting President):

Plaintiff is the widow of the late Macubeni Kaba in the Qadi to the Great House and resides at her late husband's kraal. Defendant is the son and heir of the late Macubeni Kaba in his Right Hand House and by virtue of the fact that the heir to the Great House is dead and there is no son in the Qadi to the Great House, is also the heir to these houses.

Plaintiff claimed 40 sheep and 3 horses alleging that defendant had wrongly and unlawfully removed this stock from the plaintiff's kraal.

Defendant denied that his possession of the stock claimed was unlawful.

After hearing evidence the Acting Native Commissioner gave judgment for defendant and plaintiff has appealed on the following grounds:

1. That the judgment was against the weight of evidence and the probabilities of the case.
2. That the judgment is contrary to Native Custom in that the defendant is by Native Custom entitled to have the stock belonging to the Great House and the Qadi to the Great House of her late husband at her kraal for maintenance and support.

In her evidence, plaintiff admitted that she has 25 head of cattle, including 5 cows at her kraal for the support of herself and one child; that she has the use of three lands and that defendant's children assist in ploughing these lands. It is clear from her own evidence that she received adequate support from defendant.

We have not been furnished with any authority for the statement of Native Law contained in the second ground of appeal.

It is established native law that if the heir does not adequately support a widow, she has an action against him to compel him to do so and may even be granted an order by the Court to have certain of the estate cattle placed at the kraal where she resides for her support, but she has in no sense any dominium in those cattle and cannot dispose of them without consulting the heir (see page 254 of Whitfield's South African Native Law and the cases quoted therein).

Before plaintiff can succeed in her action she must show that she is not being adequately supported and this she has failed to do.

The appeal is dismissed with costs.

Nel and Van Zyl (Members), concur.

For Appellant: Mr. Muggleston, Umtata.

For Respondent: Mr. Knopf, Umtata.

NORTH-EASTERN NATIVE APPEAL COURT.

DUMA d.a. *v.* SWALES N.O.

N.A.C. CASE No. 62/52.

DURBAN: 27th October, 1952. Before Steenkamp, President; Balk and Thompson, Members of the Court.

ZULU CUSTOM.

Appeal: Amendment of grounds of appeal refused as application not filed at least twenty-four hours prior to commencement of session.

Native Estate: Community of property excluded from marriage: Estate to be administered under Native Law and Custom. Widow entitled to be maintained from the property of the estate: Administrator of estate, although not himself a Native, may sue or be sued in his representative capacity. Property acquired by wife in civil marriage where community of property is excluded, becomes her property and does not form part of her deceased husband's estate. Widow requires the consent of the heir for disposal of estate assets.

Summary: The administrator of the estate of the late Amos Duma, duly appointed by a Native Commissioner, sued, in his representative capacity, the widow of the late Amos for delivery of certain movable cottages and for her ejectment therefrom.

Held: That as the application for amendment of the grounds of appeal were not filed at least twenty-four hours prior to the commencement of the session, the application could not be allowed.

Held further: That the estate had to be administered under Native Law and Custom as community of property was excluded from the civil marriage of the deceased.

Held further: That the widow was entitled to be maintained by the estate, and although the heir becomes owner of the property left by the deceased he cannot dispossess the widow of the right to be supported out of that property.

Held further: That the estate had to be administered under a representative capacity, which means that the Native estate and not the administrator of the estate is the actual plaintiff.

Held further: That, as community of property and of profit and loss were excluded from deceased's marriage with defendant, defendant was entitled to such property as she herself acquired as her own during the marriage and such did not form part of the deceased's estate.

Held further: That the widow requires the consent of the heir for the disposal of the estate assets.

Cases referred:
Xulu *v.* Xulu, 1938, N.A.C. (T. & N.), 46.
Mpungose *v.* Mpungose, 1946, N.A.C. (T. & N.), 37.
Mvelase *v.* Mbhele, 1946, N.A.C. (T. & N.), 94.
Butelezi *v.* Tango, 1947, N.A.C. (T. & N.), 98.
Simelane *v.* Simelane, 1 N.A.C. (N.E.), 291.
Qolo *v.* Ntshini, 1 N.A.C. (S), 234.
Ex parte Minister of Native Affairs *in re* Molefe *v.* Molefe, 1946, A.D., 315.
Mokhesi N.O. *v.* Demas, 1951 (2), S.A. 502 (T.P.D.).

Statutes referred to:
Section *twenty-two* (6) of Act No. 38 of 1927.
Native Appeal Court Rule No. 14.
Sections 2 (*d*), 2 (*e*) and 4 of Government Notice No. 1664 of 1929, as amended.

Appeal from the Court of the Native Commissioner, Durban.

Steenkamp (President):

Before commencing his argument Counsel for appellant handed in amended grounds of appeal. The Court refused to allow these as in accordance with rule 14 applications of this nature must be filed at least twenty-four hours prior to the commencement of the session.

Mr. H. A. C. Swales was appointed by the Native Commissioner of Bergville as administrator of the estate of the late Amos Duma, who was married by civil rites, community of property being excluded in terms of section *twenty-two* (6) of Act No. 38 of 1927, to Bettina Duma (the appellant) on 17th March, 1948.

Amos Duma died on 13th June, 1949, but during his lifetime he and his wife Bettina lived together at Cato Manor Road, Durban, where he owned two movable cottages. There is a dispute as to whether he was owner of both cottages.

After Amos' death the widow continued living in the one cottage and the other was leased out to monthly tenants.

The heir to Amos' estate is his brother by the name of Josiah Duma.

In the Native Commissioner's Court Mr. Swales, in his capacity as administrator of the estate of the late Amos Duma (hereinafter referred to as "the respondent"), sued Bettina Duma, the widow (hereinafter referred to as "the appellant"), as follows:—

(*a*) For delivery of two movable cottages erected by deceased on property leased by him in Cato Manor Road, Durban, one of which is rented and the other occupied by the defendant (appellant).
(*b*) For delivery of furniture and effects. These are specified in the summons, but for the purposes of this case it is not necessary to repeat this.
(*c*) For an order for ejectment of defendant and all other persons occupying through her, from the movable cottages.
(*d*) Costs of suit.

Appellant is cited as being duly assisted by Josiah Duma, her guardian under Native Law and Custom, who is virtually the plaintiff in the action.

Defendant's plea reads as follows:—

"I say there is only one cottage. This cottage and its contents are my property. I resist the claim."

The Native Commissioner gave judgment for plaintiff as prayed and against that judgment an appeal has been noted to this Court on the following grounds:—

"1. The Native Commissioner erred in holding that he had jurisdiction as one of the parties was a European.
2. The learned Native Commissioner erred in permitting Josiah Duma to assist defendant when Josiah Duma was an interested party hostile to the defendant.

3. The learned Native Commissioner erred in accepting the evidence of Josiah Duma.
4. The learned Native Commissioner erred in ordering defendant, who was lawfully married to her late husband, to hand over all the effects and premises to the Estate.
5. The learned Native Commissioner erred in holding that both cottages belonged to the Estate of the late Amos Duma. The learned Native Commissioner erred in holding that the cottage belonging to appellant should also be delivered to plaintiff.
6. The learned Native Commissioner erred in depriving the widow of the right of living in the late husband's cottage, which right defendant has always enjoyed.
7. The judgment of the Native Commissioner is against the law and weight of evidence."

It is only necessary to deal with grounds 4 and 6, and if these are decided in appellant's favour, then I think this Court should not unduly concern itself with the other grounds.

The only witness called by respondent is Josiah Duma, the heir to the late Amos Duma.

It is common cause that the deceased Amos and the appellant had one daughter, age about 8 years, and that Josiah is deceased's heir.

After Josiah has described the property, which form assets in the estate and that they are in the possession of the appellant, he states that if he is given possession of the property he is prepared to pay appellant £2 a month maintenance.

Appellant's evidence is to the effect that the one cottage belongs to her. She admits the other property, i.e. furniture and effects are in her possession, except the suits and overcoat, which she had sold to provide maintenance for herself. She also admits that she was offered £2 a month maintenance when possession of the assets is given to the heir, and that she declined this offer.

It is not necessary to decide whether the one cottage belonged to appellant or to Josiah, as the legal issues as set out hereunder will dispose of the case in favour of appellant.

Community of property having been excluded when appellant got married to Amos, the estate of the deceased falls to be administered under Native Law and Custom. This is clear from section 2 (*e*) of Government Notice No. 1664 of 1929, as substituted by Government Notice No. 939 of 9th May, 1947. This section reads as follows:—

> "(*e*) If the deceased does not fall under any of the classes described in paragraphs (*a*), (*b*), (*c*) and (*d*) the property shall be distributed according to Native Law and Custom."

Paragraphs (*a*) to (*d*) have no application in marriages contracted where community of property is excluded, except if the Minister of Native Affairs should so direct in terms of paragraph (*d*) III.

In the record there is no indication that the Minister has so directed and on that aspect of the case it would appear to me that this is a suitable case in which it might have been desirable for the Native Commissioner to have taken steps to obtain a directive from the Minister.

The next question is what are the legal rights of a widow concerning the estate of her late husband and which has to be administered according to Native Law and Custom and what are the obligations of the heir towards the widow and children of the deceased Native.

I can do no better than quote the remarks of McLoughlin (P) in the case of Mpungose *v.* Mpungose, 1946, N.A.C. (T. & N.), 37 at page 40:—

> "The Native social system regards the family as a whole and all members of the family participate in his possessions.

> The head of a family is virtually a trustee or director of the possessions of the family, and not, as in Common Law, the owner."

After the death of Amos his brother Josiah became the head of the former's family and therefore in slipping into his shoes, he took over the responsibilities of the family and as mentioned by Whitfield in his book "South African Native Law", page 50 (2nd Edition): "Widows have no claim on the property of the estate of their deceased husbands, but as long as they submit to the authority of the heir, they are entitled to support from such estate".

Here we have a case in which the heir wants to deprive the widow of the possessions which form the assets in the estate, and it is difficult to see how she could be supported from such estate if the heir wants to render that estate non-existant. An offer of £2 a month with no guarantee except criminal sanctions prescribed under section *one hundred and sixty-eight* of the Code, seems very poor compensation and may well be not enforced if the heir has squandered the proceeds of the assets and has no other means to meet his obligations to support the widow and her child.

There is also the case of Xulu *v.* Xulu, 1938, N.A.C. (T. & N.), 46, where on page 48 the following remark occurs:—

> "We are of opinion that plaintiff, though heir, must allow the widow to continue to use the stock at that kraal (meaning the kraal of her late husband) under his supervision."

Stafford in his book "Principles of Native Law and the Natal Code" (2nd Edition) on page 63, also mentions that widows are entitled to support from the estate.

All these authorities quoted postulate that although the heir becomes the owner of the property left by the deceased, he cannot dispossess the widow of the right to be supported out of that property. In other words he must keep the property intact and may only dispose of so much to enable him to meet his obligations of support of the widow and child.

The property left by deceased in this case would appear to be sufficient for the widow to support herself out of the fruits. She may not dispose of the property without the consent of the heir.

I wish to reiterate that this case would appear to be a suitable one to be brought to the notice of the Minister with a view to consideration being given in terms of section 2 (*d*) III of the regulations published under Government Notice No. 1664 of 1929, as amended.

In my opinion the appeal should be allowed with costs and the Native Commissioner's judgment altered to read:—

> "Claims dismissed with costs."

Balk (Permanent Member):

The pleadings and judgment in the Court *a quo* and the grounds of appeal are set out in the learned President's judgment.

To my mind the first and second grounds of appeal are not well founded, the first because Attorney Swales sued in a representative capacity, viz. as administrator of the estate of the late Amos Duma, a Native, which means that the Native estate and not Attorney Swales is the actual plaintiff, see Mokhesi, N.O. *v.* Demas, 1951 (2), S.A., 502 (T.P.D.); and the second because although Josiah Duma is the heir to the estate of the defendant's late husband and as such has an interest in the present action inimical to that of the defendant, he is her guardian according to Native Law and she did not object to being assisted by him and, in any event, she does not appear to have suffered prejudice thereby.

The evidence for the plaintiff does not cover all the items claimed by him so that the judgment of the Court *a quo* "For plaintiff as prayed" is defective to that extent. Apart therefrom it seems to me that the testimony of the defendant and her witnesses, particularising how she acquired as her own property the cottage, presently leased by her to others, has not been controverted by the bald statement of the only witness for plaintiff that the cottage in question belonged to the defendant's late husband (hereinafter referred to as "the deceased"), particularly as that witness was an interested party being the heir of the deceased according to Native Law. That being so, and as it is clear from the certificate of the defendant's marriage to the deceased that community of property and of profit and loss were excluded by virtue of the provisions of section *twenty-two* (6) of the Native Administration Act, 1927, the Court *a quo* should have found that that cottage was the property of the defendant, that it therefore did not form part of the deceased's estate and that the plaintiff was accordingly not entitled thereto, see *ex parte* Minister of Native Affairs *in re* Molefe *v.* Molefe, 1946, A.D., 315, Mvelase *v.* Mbhele, 1946, N.A.C. (T. & N.), 94, Butelezi *v.* Tango, 1947, N.A.C. (T. & N.), 98, and Simelane *v.* Simelane, 1, N.A.C. (N.E.), 291.

As regards the remaining cottage, i.e. the one occupied by the defendant and the several items of furniture and effects in her possession which are claimed by the plaintiff and all of which, including that cottage, form assets in the deceased's estate, I share the view set out in the learned President's judgment that the defendant cannot be deprived thereof as she is entitled to be maintained by that estate, see Simelane's case (*supra*) and Qolo *v.* Ntshini, 1, N.A.C. (S), 234.

In this connection Counsel for appellant contended that the plaintiff was entitled to obtain delivery from the defendant of the assets in the deceased's estate under the certificate issued in terms of section *four* of the Regulations for the Administration and Distribution of Native Estates, published under Government Notice No. 1664 of 1929, as amended, as that certificate authorised the plaintiff to collect the assets in question. But the direction to collect those assets is subject to the defendant's right to reside at the deceased's kraal and to be maintained by his estate; and here there is no evidence that it was necessary to realise on any of the assets in the deceased's estate to pay the debts thereof. On the contrary it is manifest from the evidence for the plaintiff that, the heir has already been paid £112. 8s. 2d. out of the deceased's estate. It follows that the contention fails.

It is observed from the defendant's evidence that she sold certain of the deceased's clothing for her maintenance. It is not clear in what circumstances those articles were sold by her as this aspect was not fully canvassed in the Court *a quo* so that the question of whether or not she was justified in doing so must be left an open one; in this connection it must, however, be added that in general widows require the consent of the heir for the disposal of the estate assets, see *Qolo's case* (*supra*).

I also share the learned President's view that the instant case appears to be a proper one for the Minister to be approached with a view to the provisions of sub-regulation 2 (*d*) of Government Notice No. 1664 of 1929, as substituted by Government Notice No. 939 of 1947 being invoked.

In the result I am also of opinion that the appeal should be allowed with costs and that the judgment of the Court *a quo* should be altered to one dismissing the claims with costs.

Thompson (Member): I agree with the judgments of the learned President and my brother Balk.

For Appellant: Adv. C. Cowley instructed by Messrs. Cowley & Cowley.

For Respondent: Adv. S. T. Pretorius instructed by Messrs. Swales and Francis.

NORTH-EASTERN NATIVE APPEAL COURT.

HLOMUKA *v.* WOSIYANA.

N.A.C. CASE No. 71/52.

DURBAN: 28th October, 1952. Before Steenkamp, President; Balk and Thompson, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Notice of Appeal—Requirements—Native Appeal Court Rule 7 (a)—Counterclaim—Plea to.

Summary: Plaintiff sued defendant for damages sustained in an assult by defendant on plaintiff. Defendant counterclaimed for damages sustained by him during the scuffle. No plea to the counterclaim was recorded or filed.

Defendant noted an appeal on the grounds that Plaintiff failed to discharge the onus of proof cast upon him, and, that the judgment was against the weight of evidence.

Held: That one of the objects to be served by a notice of appeal is to enable the Court of Appeal to know beforehand what points are to be raised.

Held further: That the notice of appeal shall state whether the whole or part only of the judgment or order is appealed against; and if part only then what part, and that the requirements of Native Appeal Court Rule 7 (*a*) are peremptory.

Held further: That in the instant case the defect in the notice of appeal could not be cured by allowing the insertion of the words " whole of " as the counterclaim was also affected by the judgment.

Cases referred to:

Smit *v.* Greylingstad Village Council, 1951 (4), S.A., 608 (T.P.D.).

Kajee *v.* Electrocol (Pty.), Ltd., 1952 (2), S.A., 167 (N.P.D.).

Statutes, etc. referred to:

Native Appeal Court Rule 7.

Magistrates' Courts Rule 47 (6).

Appeal from the Court of the Native Commissioner, Durban.

Steenkamp (President):

The late noting of the appeal is condoned.

In the Native Commissioners Court the plaintiff (now respondent) sued the defendant (now appellant) for £3. 7s. being 17s. for the repair of two pairs of shoes and £2. 10s. being in respect of a pair of spectacles which defendant broke while assaulting the plaintiff and which amount plaintiff had to pay for the replacement of those spectacles.

In his plea defendant admitted he is liable to plaintiff for 4s., being the repairs of one pair of shoes and £2. 10s. for the spectacles. He further pleads that the agreed price for repair of the shoes was 8s. for the two pairs and that he had paid 4s.

Defendant also counterclaimed for payment of £2, being the cost of a shirt which plaintiff tore during the scuffle.

There was no plea to the counterclaim and this certainly calls for comment.

The Native Commissioner gave judgment for plaintiff for £3. 7s. and costs on the claim in convention and on the counterclaim he entered judgment for plaintiff, i.e. for defendant in reconvention.

An appeal has now been noted to this Court. The ground of appeal is that the plaintiff failed to discharge the onus of proof cast upon him, and the judgment was against the weight of evidence

The ground of appeal leaves much to be desired and in my opinion both this Court and the respondent are entitled to know beforehand what onus is referred to. Apart from this the notice of appeal does not state whether the whole or part of the judgment is appealed against. All that is stated in the notice is:—

> "Defendant hereby notes an appeal against the judgment of the learned Native Commissioner."

Where appellant uses the words that plaintiff failed to discharge the onus of proof cast upon him, these can only mean the onus on the claim in convention as surely the onus to prove that plaintiff tore defendant's shirt, which is the basis of the counterclaim, must fall on the defendant, i.e. plaintiff in reconvention.

In the case of Smit *v.* Greylingstad Village Council, 1951 (4), S.A., 608 (T.P.D.), Dowling (J), in dealing with a notice of appeal is reported to have stated there were four objects to be served by a notice of appeal; one of these is to enable the Judges (meaning the Court of Appeal), who are to decide the appeal, to know beforehand what points are to be raised.

In that case the main point to be decided was whether the requirements of rule 47 (6) of the Magistrates' Courts Act had been complied with. Now rule 47 (6) of the Magistrates' Courts Act reads differently from Rule 7 of the Native Appeal Courts Rules in as much as paragraph (*b*) of the last-mentioned rule provides that the notice of appeal should state the grounds of appeal clearly and specifically whereas in Magistrates' Courts Rule 47 (6) II the words "specifying the findings of fact or rulings of law appealed against" are used.

Rule 7 (*a*) of the Native Appeal Court Rules and rule 47 (6) I of the Magistrates' Courts Rules are worded exactly the same, viz. that the notice of appeal shall state whether the whole or part only of the judgment or order is appealed against and if part only then what part.

It follows that the remarks made in Smit *v.* Greylingstad Village Council (*supra*) apply in the instand case, and this Court is entitled to know beforehand whether the whole or part only of the judgment is appealed against and if part only, then what part. There is also the case of Kajee *v.* Electrocol (Pty.), Ltd., 1952 (2), S.A., 167 (N.P.D.), in which De Wet (J) after referring to other decided cases, held that rule 47 (6) I of the Magistrates' Courts Rules is peremptory. The Court in that case, however, granted leave to amend the notice of appeal by the insertion of the words "whole of" meaning that an appeal is noted against the whole of the judgment.

In the instant case such an amendment, which was applied for by counsel for appellant, would not cure the defect since the grounds of appeal, as pointed out above, indicate that the only part of the judgment appealed against, is that on the claim in convention.

In my view therefore the notice of appeal not having been drawn up in accordance with the rules, the appeal should be struck off the roll with costs.

Balk (Permanent Member): I concur.

Thompson (Member): I concur.

For Appellant: Mr. C. Cornish of Messrs. C. Cornish & Co.
Respondent in Person.

NORTH-EASTERN NATIVE APPEAL COURT.

MAHAYE *v.* LUTULI.

N.A.C. CASE No. 64/52.

DURBAN: 29th October, 1952. Before Steenkamp, President; Balk and Thompson, Members of the Court.

(1) LAW OF PROCEDURE. (2) ZULU CUSTOM.

Appeal—Late noting—Application for condonation of—Reasons for late noting not acceptable, but merits of case also to be considered.

Native Customary Union—Dissolution of—Factors to be considered in determining number of lobolo cattle refundable.

Summary: Plaintiff sued his wife for divorce and cited the guardian of his wife as a party. The divorce was granted and the Native Commissioner made an order for the return of fourteen head of cattle to plaintiff. Against this order an appeal was noted.

Held: That as the reasons for late noting of the appeal are not acceptable, the Appeal Court would ordinarily not entertain an application for condonation of the late noting.

Held further: That as there are certain factors in the case which indicate that the appellant has a reasonable prospect of success on appeal, condonation should be granted.

Held further: That the following considerations should guide the Court in arriving at a decision as to the number of cattle to be returned on a dissolution of the customary union:—

(i) The number of cattle delivered;

(ii) the number of children born to the union;

(iii) the blame attachable to each party;

(iv) whether the woman is likely to enter into another customary union and, if so, the number of cattle which her father or guardian is likely to obtain as lobolo for her; and

(v) the period the parties have lived together.

Held further: That if the Native Commissioner had taken into consideration all the relevant factors he would not have ordered the return of so large a number as fourteen.

Appeal from the Court of the Native Commissioner, Durban.

Steenkamp (President):

Judgment in this case was given on the 28th February, 1952. On the 1st March, 1952, appellant (who was defendant No. 2 in the Court below) applied through his attorney for a written judgment. The written judgment was filed on the 17th April, 1952, but appellant did not note his appeal till the 8th July, 1952. Application is now made for the condonation of the late noting of the appeal.

The reasons for late noting briefly would appear to be that the appellant did not keep in touch with his attorney who, after he had received the written reasons for judgment, had to communicate with appellant before an appeal could be noted. A letter was written to the appellant, but it was returned to the attorney by the post office. The reasons for the late noting of appeal are not acceptable and this Court would not normally entertain the application, but as there are certain factors in the case which indicate that the appellant has a reasonable prospect of success on appeal, the late noting of the appeal is condoned.

The plaintiff (now the respondent) sued his wife, duly assisted, for a divorce on the grounds of adultery. Defendant No. 2, that is the guardian of defendant No. 1, was cited as a party. The Native Commissioner granted the divorce and also ordered the second defendant, that is the appellant, to return fourteen head of cattle to the plaintiff.

The woman has not noted an appeal against the divorce, but the second defendant (now appellant) has appealed against the judgment in so far as that judgment affects the number of cattle returnable. The grounds of appeal are:—

1. The judgment is against the weight of evidence and against law.
2. The learned Native Commissioner failed to take into consideration all relevant facts in determining the number of cattle to be refunded to respondent by appellant (second defendant in Court below).
3. The learned Native Commissioner erred in holding that because there was one child there would be a probability of an early marriage, especially as the plaintiff had been living with the first defendant for ten years.
4. The learned Native Commissioner failed to take into consideration the time during which the parties had been married as one of the determining factors for the return of the cattle, and judgment should have been for not more than eight head of cattle.

It is common cause that the parties were married during the year 1942 and that fifteen head of cattle were paid as *lobolo* plus the *ngqutu* beast. The parties lived together for about seven years and during that time one child was born of this union. The Native Commissioner in fixing the number of cattle to be returned only took into consideration that there was one child and there was every probability of the early remarriage of the woman.

According to Stafford's Principles of Native Law and the Natal Code (second edition at pages 140/141), the following considerations should guide the Court in arriving at a decision as to the number of cattle to be returned on a dissolution of the customary union:—

1. The number of cattle delivered.
2. Number of children born to the union.
3. The blame attachable to each party.
4. Whether the woman is likely to enter into another customary union (age being an important factor) and, if so, the number of cattle which her father or guardian is likely to obtain for her.
5. The period the parties have lived together.

Various cases are quoted by Stafford as authority for these five considerations.

It is manifest from the Native Commissioner's reasons for judgment that he has not considered the fact that the parties lived together for seven years nor the probable *lobolo* that would be payable for the first defendant on her entering into another customary union and that he has not made any allowance on account of these factors as he should have done in fixing the number of cattle returnable to the plaintiff.

In the notice of appeal it is suggested that the Native Commissioner should have ordered the return of only eight head of cattle, but in my opinion this number is not sufficient and it seems to me that if the Native Commissioner had taken into consideration all the relevant factors he would not have ordered the return of so large a number as fourteen.

To my mind if all the relevant circumstances are taken into account, the return of twelve head of cattle would be reasonable in the instant case, and I am therefore of the opinion that the appeal should be allowed with costs and that paragraph 4 of the Native Commissioner's judgment should be altered to read:

"Second defendant to return twelve head of cattle to the plaintiff or pay him their value at the rate of £5 per head."

Balk (Permanent Member): I concur.

Thompson (Member): I concur.

For Appellant: Adv. R. W. Cowley (instructed by Messrs. Cowley & Cowley).

For Respondent: Mr. G. S. Naidu.

NORTH-EASTERN NATIVE APPEAL COURT.

NGUBANE *v.* NGUBANE.

N.A.C. CASE No. 75/52.

DURBAN: 29th October, 1952. Before Steenkamp, President; Balk and Pretorius, Members of the Court.

LAW OF PROCEDURE.

Practice and Procedure—Native Commissioner's Court—Bill of Costs between party and party—Travelling expenses of Attorney from place where he practises to seat of Court if no local Attorneys available at latter centre included in composite fee for attending Court under Table "A".

Summary: The appellant claimed in a Bill of Costs as between party and party an amount of £2. 6s. being travelling expenses incurred by his attorney for the journey between the town where he practises and the town where the case was being tried and where no local attorney was available.

The Clerk of the Court disallowed the item and after the Native Commissioner, on review, had confirmed the Clerk of the Court's action in disallowing it, the appellant noted an appeal to the Native Appeal Court.

Held: That on a proper construction of rule 75 (5) of Native Commissioners' Courts Rules the composite fee prescribed in Table "A" for an attorney's appearance is intended to include his travelling expenses, if any, and that no relaxation of the rule is justified.

Cases referred to:

Zulu *v.* Zulu, 1934, N.A.C. (T. & N.), 48.

Maguili & Ors. *v.* Readman, 1913, S.R. 123.

Wynberg Municipality *v.* Bersein & An. 1920, C.P.D., 100.

Statutes, etc. referred to:

Sub-rule 75 (5) and Table "A" of the Rules for Native Commissioners' Courts published under Government Notice No. 2886 of 1951.

Sub-rules 49 (5) and (8) of the Magistrates' Courts Rules.

Appeal from the Court of the Native Commissioner, Mapumulo.

Steenkamp (President):

The appellant obtained a judgment in his favour in the Native Commissioner's Court, where he was the defendant, and when he submitted his Bill of Costs to be taxed as between party and party, the Clerk of the Court disallowed £2. 6s., being travelling expenses incurred by appellant's attorney for the journey from Kranskop to Mapumulo where the case was being tried and where no local attorney was available.

Appellant requested the Native Commissioner to review the Bill of Costs and in his application for review he referred to rule 75 (5) of the Native Commissioners' Courts Rules and submitted

that the words "in addition to necessary expenses" convey the meaning that an attorney may in a Bill of Costs claim his travelling expenses from the place where he practises to the seat of the Court if no local attorneys are available at the latter centre.

The Native Commissioner confirmed the action of the Clerk of the Court in disallowing the item of £2. 6s. and the appellant has now appealed to the Court on the following grounds:—

"1. That the charge for Attorney's travelling expenses is in accordance with rule 75 (5) of the rules in Native Commissioners' Courts published under Government Notice No. 2886/1951.

2. That the learned Native Commissioner erred in holding that the charge is not a "necessary expense" in addition to the tariff of fees laid down in Table A of the Rules.

3. That the learned Native Commissioner erred in holding that if the legislature intended that a travelling allowance should be paid to attorneys it should have appeared as an item in Table A, overlooking the fact that Table A applies only to fees, and that rule 75 (5) specially provides for necessary expenses to be taken by practitioners in addition to the fees under Table A."

It becomes necessary to quote in full rule 75 (5) of the Native Commissioners' Courts Rules published under Government Notice No. 2886, dated 9th November, 1951 (*Government Gazette Extraordinary* No. 4726, dated 9th November, 1951).

This rule reads as follows:—

"The scale of fees to be taken by practitioners as between party and party shall be that set out in Table A of the second annexure to these rules in addition to necessary expenses."

The wording of this sub-rule and of rule 49 (5) of the Magistrates' Courts Rules is the same in so far as is relevant here, but there is a sub-rule (8) in the Magistrates' Courts Rule 49 which is to the effect that an attorney may under circumstances similar to those in the instant case claim reasonable travelling expenses. It is rather significant that such a sub-rule was omitted from the Native Commissioners' Courts Rules and this Court must attach some importance to that omission.

The mere fact that in the Magistrates' Courts Rules it was deemed expedient to make special provision for attorneys' travelling expenses indicates that the words "in addition to necessary expenses" do not include such travelling expenses.

The Clerk of the Court in disallowing the item of £2. 6s. referred to the case of Zulu *v.* Zulu, 1934, N.A.C. (T. & N.), 48, which was decided under the old rules which did not contain the words "in addition to necessary expenses" and therefore the ruling in that case has no application in the present appeal.

Under the existing rules a tariff appears as Table A to the second annexure and in my view the words "in addition to necessary expenses" in rule 75 (5) obviously refer to items not covered by Table "A", see page 422 of Jones and Buckles Civil Practice of Magistrates' Courts (5th Edition). That table sets out the fees recoverable by attorneys for attending Court—without differentiating in regard to distances which attorneys may have to travel to reach Court, so that those fees are obviously intended to include travelling expenses. This view gains support from the significant fact already referred to, viz. that there is no corresponding rule in the Native Commissioners' Courts Rules to rule 49 (8) of the Magistrates' Courts Rules which deals with travelling and other allowances to attorneys in certain circumstances.

I have given due consideration to the judgments in Wynberg Municipality *v.* Bersin & An., 1920, C.P.D., 400 and Maguili Ors. *v.* Readman, 1913, S.R. 123, quoted by counsel for appellant in the course of his argument.

The first-mentioned case has no application in the present instance as in that case a claim was made for qualifying expenses incurred prior to the hearing of the case, i.e., to enable experts to give evidence which they could only give after experiments had been carried out.

As regards the last-mentioned case it is my opinion, for the reasons given above, that on a proper construction of the rule in question the composite fee prescribed in Table "A" for an attorney's appearance is intended to include also his travelling expenses, if any, and that no relaxation of that rule is justified since one of the objects in establishing Native Commissioners' Courts and in prescribing their procedure was economy in litigation, see *Zulu's case* (supra) *at page* 50.

Accordingly I am of opinion that the appeal should be dismissed with costs.

Balk (Permanent Member): I concur.

Pretorius (Member): I concur.

For Appellant: Adv. F. P. Behrman (i/b L. T. Buss).
Respondent in Person.

SOUTHERN NATIVE APPEAL COURT.

GWATYU *v.* GWATYU.

N.A.C. CASE No. 39 OF 1952.

KING WILLIAM'S TOWN: 24th November, 1952: Before Sleigh, President; Pike and Schaffer, Members.

COMMON LAW.

Native land enquiry—Evidence—Legitimacy, presumption of—Onus of proof—Evidence of general reputation admissible having regard to the circumstances of the case.

Enquiry held in terms of section 3 of Government Notice No. 1664 of 1929 to determine the heir of the late "G" who had four wives of whom "N", the mother of respondent's father "M", was the great wife, and the mother of appellant the qadi to the great house. Appellant contended in the court below that "M" (respondent's father) was in fact not "G's" son as when the latter married "N", "M" was already born and was the son of one "X".

The Assistant Native Commissioner held that there was a presumption of law in favour of "M's" legitimacy, that the onus was on appellant to adduce convincing evidence in rebuttal of that presumption and that he had failed to do so.

Against this finding an appeal has been lodged *inter alia* on the following ground, viz., that the judicial officer erred in finding that there was a presumption of legitimacy in favour of "M" and that there was an onus on appellant to rebut that presumption.

Held:

(2) That the presumption *pater est quem nuptiae demonstrant* arises only if there is proof that the child was born after the marriage of his mother to her husband.

(2) That in view of the inference to be drawn from the facts which are common cause and in the absence of any facts beyond these, there is no doubt that respondent is the heir. The onus consequently rests upon the appellant to prove that "M" was illegitimate.

(3) That evidence of general reputation prevailing in a family and not of mere rumour is in the circumstances of this case admissible as secondary evidence.

Works of Reference:
"Law of Evidence in South Africa"—2nd Edition, pp. 174-175; Scoble.

Appeal from the Court of the Native Commissioner, Lady Frere.

Pike (Member):

This is an enquiry held in terms of sub-section (3) of section 3 of Government Notice No. 1664 of 1929 to determine the heir of the late Jan Gwatyu.

This matter came before this Court on 19th November, 1951, when the finding in favour of the present appellant was set aside because the present respondent had not been given the opportunity of examining appellant's witnesses who testified to the fact that Jan's estate was administered by appellant, or of adducing evidence in rebuttal. At the present hearing of the appeal appellant's Counsel urged that the case was remitted solely for that purpose. This is, however, not correct. The Court emphasised the lack of opportunity afforded respondent of adducing evidence relating to the administration of the estate, but returned the record to the Court below "for such further evidence as either party may wish to adduce".

The following facts are common cause:—

(i) The late Jan Gwatyu had four wives, of whom the mother of respondent's father was the great wife and the mother of appellant the qadi to the great house.

(ii) Respondent's father, Mangaliso, grew up at the late Jan Gwatyu's kraal, was circumcised there and had at all times borne the name of Gwatyu, and

(iii) Mangaliso is deceased and respondent is his eldest son.

The appellant contended in the Court below that Mangaliso, although the son of Nolentyi (the great wife), was in fact not the son of Jan Gwatyu in that he was already born to Nolentyi before Jan married her and was the son of one Xalanto. It is admitted that Mangaliso was the only son born to Nolentyi and that, if he was illegitimate, the appellant would be the heir.

The Assistant Native Commissioner held that there was a presumption of law in favour of Mangaliso's legitimacy, that the onus was on the appellant to adduce convincing evidence in rebuttal of that presumption and that he had failed to do so. Respondent was therefore declared the heir.

Against that finding an appeal has been lodged on the following grounds:—

(1) That the judgment is against the weight of evidence and is not supported thereby.

(2) That the presiding judicial officer erred in finding that there was a presumption of legitimacy in favour of Mangaliso and that there was an onus on appellant to rebut that presumption.

Alternatively and only in the event of the above Honourable Court holding that there was such presumption of legitimacy, the presiding judicial officer erred in finding that the appellant had failed to discharge the onus resting on him.

It will be more convenient to deal with these grounds of appeal in reverse order.

Where a woman who is legally married gives birth to a child a presumption of law arises that her husband is the father of the child. Before this presumption can arise there must be proof that the child was born after the marriage of his mother to her husband. In the present case respondent has produced no such proof, due, no doubt, to the fact that Jan Gwatyu and his wife

Nolentyi were married so long ago that he can find no living person who can testify as to the date of the marriage and the date of birth of Mangaliso. The Assistant Native Commissioner, therefore, erred in finding that a presumption of law arose in regard to Mangaliso's legitimacy. However, the facts which are common cause raise an inference that Mangaliso was the son of Jan Gwatyu.

I now propose to deal with the first ground of appeal. To do so it is essential to decide upon whom the onus lies. In view of the inference to be drawn from the facts which are common cause and, in the absence of evidence of any facts beyond those, there can be no doubt that respondent must be declared the heir. The onus consequently rests upon the appellant to prove that Mangaliso was illegitimate and, if he has failed to discharge that onus, the finding in favour of the respondent is correct.

The only witness who can testify in regard to Mangaliso's illegitimacy is one Ralisa. He states that Nolentyi had no son by Jan, but that she gave birth to Mangaliso 6-8 years before her marriage to Jan and that his father was one Xalanto. This witness gives no evidence to indicate that he testifies to facts within his knowledge and was not repeating rumour as so many of the other witnesses did. The respondent's witness Nowayiti Hilana states that she is older than Ralisa, that she married a nephew of Jan and that Mangaliso was then as old as her husband. The witness Archibald Mzazi, aged 72 years, who gave evidence in favour of the appellant, states that Ralisa is much older than he is and that Mangaliso, had he lived, would also have been much older than he is. Jan Sali, ex-headman of the location in which the parties reside, states that Ralisa is not older than he is and that he and Mangaliso were at school together. From these facts it can be deduced that Mangaliso and Ralisa were contemporaries Viewed in the light most favourable to the appellant, Ralisa could thus have been no more than 6-8 years old when Nolentyi married Jan. These factors throw considerable doubt on the very important point as to whether Ralisa was testifying to facts within his knowledge and it was the duty of appellant to have made this clear.

The remaining evidence concerning Mangaliso's legitimacy is all hearsay. Evidence of reputation is, in the circumstances of this case, admissible as secondary evidence but it must be of general reputation proper prevailing in a family and not of mere rumour.

Archibald Mzazi, a member of the board of the location concerned, testified to the death of Jan Gwatyu in 1919 and states that after the funeral members of the family, in the presence of Mangaliso, declared appellant, then a very young boy, to be Jan's heir. He states, further, that Jan had never told him that Mangaliso was not his son and that this was the first occasion on which he heard that Mangaliso was illegitimate. In addition, he stated that appellant was placed in the care of Mangaliso and Rungutwana who is also now deceased. Under cross-examination he admits that he left the location in 1917 and remained in Johannesburg until 1928 but says he was at home on leave in 1919 when Jan died. He states most emphatically that Tamanini Penxa was not present at the funeral of Jan but he cannot remember whether any member of the Yana family was there. He first became actively interested in this dispute in 1950. He states he was present at the enquiry held by his brother P. Mzazi (another board member) in 1937 in connection with the land of the late Jan Gwatyu and that at this meeting it was stated that Mangaliso was illegitimate. P. Mzazi in his evidence states that in 1937, the respondent claimed to be the heir to Jan's land and desired transfer into his name. He called the members of the family (including appellant and his mother) together. He states that nobody disputed that respondent was Jan's heir, that the question of his illegitimacy was not discussed

and that there was every opportunity for appellant to have done sa had he so wished. His decision was that respondent could not obtain transfer while one of Jan's widows , Notawule was still living. The Assistant Native Commissioner believed this evidence in preference to that of A. Mzazi.

Dumba Gwatyu, who gave evidence on behalf of appellant, says that Jan died before 1918 when A. Mzazi on his own showing was in Johannesburg. This witness also states that Jan told him "that Nolentyi had a son by another man". This testimony is inadmissible since it is a repetition of a statement made by a particular individual and is not testimony of general repute (Scoble, 2nd Ed. pp. 174-175).

The remaining evidence on behalf of the appellant consist of mere rumour and not of general reputation.

In so far as the control of Jan's estate is concerned there is a confict of evidence between the two claimants. Respondent and his witnesses say Mangaliso took charge of it whereas appellant and his witnesses state that Mangaliso had nothing to do with its administration and received no benefit from it. It must be remembered, however, that A. Mzazi states the young heir was placed in the joint care of Mangaliso and another man. If that were so, Mangaliso must have exercised a considerable measure of control over the assets in the estate.

In rebuttal of the evidence of repute by the appellant, respondent has the evidence of Tamanini Penxa who married a daughter of the late Jan Gwatyu. He says that his wife was allotted to Mangaliso by her father and that he paid dowry for her to Mangaliso who then had his own kraal, that the negotiations all took place at that kraal and that his wife was handed over to him from that kraal.

It is conceded by both Counsel that the late Jan Gwatyu was a man of substance. I find myself unable to accept as a fact that Jan would have allotted a daughter to a stranger (which would have been the position had Mangaliso been the son of Xalanto born to Nolentyi before her marriage). I find it difficult to believe that Jan would have married as his first wife a woman who was a dikazi. It is also highly improbable that the male members of the family would have placed the minor heir in the care of a stranger, viz., Mangaliso as A. Mzazi would have the Court believe. Furthermore, the Assistant Native Commissioner believed the evidence of P. Mzazi and rejected that of A. Mzazi and in my opinion he was justified in doing so. Having stated why I am unable to accept the evidence of Ralisa, I come to the conclusion that the appellant has failed to discharge the onus of proving that Mangaliso was illegitimate and the appeal is consequently dismissed with costs.

Sleigh, President and Schaffer, Member, concurred.

For Appellant: Mr. Tsotsi, Lady Frere.

For Respondent: Mr. Kelly, Lady Frere.

NORTH-EASTERN NATIVE APPEAL COURT.

NHLANHLA *v.* MOKWENO.

N.A.C. CASE No. 86/52.

PRETORIA: 4th December, 1952. Before Stenkamp, President; Balk and Garcia, Members.

COMMON LAW.

Locus standi in judicio—*Native woman—Widow of customary union—Capacity of parties dictated by system of law to be applied.*

Sale of land—Unknown to Native law in Transvaal.

Summary: Plaintiff, the widow of a Native customary union, sued for an order compelling the defendant to transfer to her all his rights to a certain plot of ground. She alleged that she had entered into an oral agreement with defendant whereby the latter would purchase on her behalf a certain plot of ground with money provided by her.

The Native Commissioner, after the close of plaintiff's case, and on the application of the defendant's attorney,

decreed absolution.

Held: That as the transaction, consisting as it does of an agreement between the parties for the purchase of immovable property, is one unknown to Native Law in the Transvaal Province, the issues in the instant action fall to be determinded according to Common Law.

Held further: That the capacity of the plaintiff to bring the instant action falls to be determined according to common law since here the system of law applied dictates the capacity of the parties.

Cases referred to:

Caro *v.* Tulley, 1910, T.P.D., 1026.

Mattheus *v.* Stratford & Ano, 1946, T.P.D., 498.

Ex Parte Minister of Native Affairs in re Yako *v.* Beyi, 1948 (1), S.A., 388, A.D.

Muguboya *v.* Mutato, 1929, N.A.C. (T. & N.), 73.

Qolo *v.* Ntshini, 1 N.A.C. (S), 234.

Nzimande *v.* Phungula, 1 N.A.C. (N.E.), 386.

Ledwaba *v.* Ledwaba, 1 N.A.C. (N.E.), 398.

Statutes, etc. referred to:

Section 30 of Proclamation No. 8 of 1902 (Tvl.).

Sections 2 (*e*), 3 (1) and 4 of Government Notice No. 1664/29.

Sections *eleven* (1) and (3) of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Premier Mine.

For Appellant: Adv. Curlewis (i/b MacRobert, de Villiers & Hitge).

For Respondent: Adv. Badenhorst (i/b W. L. van Eck).

Balk (Permanent Member):

This is an appeal from the judgment of a Native Commissioner's Court decreeing absolution from the instance with costs in an action in which the plaintiff (present appellant), who is a widow, sued for an order compelling the defendant (now respondent) to transfer to her all his rights to a certain plot of land (hereinafter referred to as " the plot ").

The plaintiff in her particulars of claim averred that she had entered into an oral agreement with the defendant in terms of which he had undertaken to purchase the plot for her as her agent and she to give him £120 wherewith to do so, that she had given him that sum, that he had wrongfully, unlawfully and in breach of that agreement purchased the plot for himself and denied the plaintiff's rights thereto.

The plaintiff averred alternatively that she had concluded an oral agreement with the defendant in terms of which he had undertaken to purchase the plot and she to give him £120 to do

so on the understanding that immediately he had purchased it he would transfer all his rights thereto to her, that she had given him that sum, that he had purchased the plot therewith and that he wrongfully, unlawfully and in breach of the said agreement denied the plaintiff's rights thereto.

The plaintiff also made a claim for "alternative relief", i.e. a claim known as the "salutary clause", and added an alternative claim for the refund to her of the £120, averring that notwithstanding demand the defendant had wrongfully and unlawfully refused to perform the said mandate an undertaking by him, that she had lawfully cancelled that mandate; alternatively, that he had wrongfully and unlawfully repudiated it, that demand had been made to the defendant to refund the said £120 to the plaintiff and that he had refused to do so.

The decree of absolution in question was granted by the Court *a quo* on the application of the defendant's attorney at the close of the plaintiff's case and after she had been recalled for further cross-examination.

The defendant's attorney based that application on the ground that the plaintiff had no *locus standi in judicio* as the action should have been brought by her elder son, a minor, duly assisted by his guardian.

The Court *a quo* granted that application as in its opinion the plaintiff had no *locus standi in judicio* in that according to her evidence she used the assets of her late husband's estate to raise the money to purchase the plot and, seeing that estate fell to be administered according to Native Law and Custom, the correct person to sue was the heir thereto i.e. the plaintiff's elder son. Those reasons are endorsed in the body of the record immediately preceding the entry of the decree in question. In his subsequent reasons for judgment the Assistant Native Commissioner *a quo* states:

> "The plaintiff in this action is a Native woman subject to Native Law and Custom. She was married by Native Law and Custom and her late husband's estate falls to be dealt by Native Law and Custom as her late husband left no will. She thus has no *locus standi* to bring an action in her own name, but must be assisted by her guardian. She used the assets in the estate wrongfully, by not proceeding according to Native Law and Custom. In view of the above the defendant's request for absolution was granted."

and later

> "The Notice of Appeal (paragraph 2) states that the Court erred in holding that there were any question of customs followed by Natives relevant to the issues raised in the action and paragraph 4 in holding that the plaintiff had no *locus standi in judicio*. The whole question centres round the point of *locus standi*. In the opinion of the Court the plaintiff is subject to Native Law and Custom and thus has no *locus standi*. Had the plaintiff follows Native Law and Custom, the issues raised by the summons, could not have occurred as she would not have been in a position to use the assets of the estate.
>
> As the woman was in the opinion of the Court subject to Native Law and Custom the discretion to apply native Law and Custom (paragraph 3 of the Notice of Appeal) is derived from section *eleven* (1) of Act No. 38 of 1927."

The grounds of appeal are "that the said judgment is against the evidence and the weight of the evidence and bad in law in that the Assistant Native Commissioner erred—

(1) in holding that any of the 'facts found to be proved' set out in his reasons for judgment were in any way relevant to the issues between the parties to the present dispute;

(2) in holding that there were any questions of customs followed by Natives relevant to the issues raised in the action which required to be decided or investigated by him;

(3) in holding that he had any discretion to apply Native Law and Custom in the circumstances of this case.

(4) in holding that the plaintiff had no *locus standi in judicio.*

The Assistant Native Commissioner should have—

(i) decided the action and the various issues relating thereto under the ordinary law of the country;

(ii) held that the plaintiff had *locus standi in judicio;*

(iii) dismissed the application for absolution from the instance with costs."

It is clear from the summons that the plaintiff brought the action in her personal capacity. It is equally clear from the summons and to my mind also from the evidence that the plaintiff's case is that after the death of her husband she entered into a verbal agreement with the defendant for the purchase by him of the plot from a third person on her behalf in her personal capacity and not for her late husband's estate or the heir thereto, and that the defendant purchased the plot with the £120 she gave him for that purpose.

It is true that the plaintiff in the course of her further cross-examination stated "It is the custom that the eldest son should get everything. In this case my son of 12. This son of mine would be entitled to transfer of the plot. I am claiming this plot on behalf of my son so that I can bring him up there". But it seems to me that the probability is that all the plaintiff intended to convey thereby was that in her opinion her elder son would ultimately be entitled to receive transfer of the plot from her, viz. after he had attained his majority, seeing that she had realised on assets in her late husband's estate to raise the £120 wherewith to purchase the plot and her elder son was the heir to that estate. This view gains support from the fact that it is in keeping with ingrained Native custom for a parent to purchase on his own behalf and not on behalf of a minor child property required for family use notwithstanding that such child's earnings or other of his means are utilized for that purpose. In view thereof and as there is no evidence that the plaintiff communicated to the defendant any intention of acquiring the plot on behalf of her elder son, it cannot, in my opinion, be properly inferred from the plaintiff's evidence quoted above, that she arranged with the defendant to acquire the plot on her elder son's behalf. To my mind therefore that evidence does not detract from the testimony of the plaintiff and that of her witnesses that her agreement with the defendant was that he was to purchase the plot for her i.e. on her behalf in her personal capacity. Here it may conveniently be mentioned that the plaintiff could not have acted as the agent of her late husband's estate in her alleged agreement with the defendant since she had no authority to represent that estate and she must therefore in so far as this aspect is concerned be taken to have entered into that agreement on her own behalf. That this is the legal position is manifest from the following factors:—

(1) The plaintiff's evidence that the union between her and her late husband was a customary one, that he died intestate, that his estate was not reported and that his heir is their elder son, a minor.

(2) That in the light of that evidence the said estate fell to be administered and the property therein distributed according to Native Law in terms of sections 2 (*e*), 3 (1) and 4 of the regulations for the administration and distribution of Native estates, published under Government Notice No. 1664 of 1929, as amended.

(3) That as the said estate was not reported no one could have been appointed to represent it in terms of section 4 of those regulations, with the result that the guardian, according to Native Law, of the minor heir to that estate was the only person who was enitled to represent it.

(4) That under Native Law the nearest major male kin of the plaintiff's late husband and not the plaintiff, is the guardian of the minor heir of the said estate.

Turning to the question as to whether the issues in the instant case are affected by the plaintiff's having, as is evident from the record, without authority realised on certain assets in the estate of her late husband to raise the £120 wherewith to purchase the plot, it seems to me that this question falls to be answered in the negative as that estate did not become the owner of that £120 and the unauthorised disposal by the plaintiff of certain assets therein, viz. maize, corn and cattle, is a matter entirely between her and the guardian, according to Native Law, of the minor heir to the said estate or any representative that may be appointed in terms of section 4 of the above-mentioned regulations or between such guardian or representative and the persons who acquired the assets sold by the plaintiff to raise the £120, see Qolo *v.* Ntshini, 1 N.A.C. (S), 234.

The transaction in question,consisting as it does of an agreement between the parties for the purchase of immovable property by the defendant on behalf of the plaintiff, is one unknown to Native Law in the Province concerned (Transvaal), being peculiar to Common Law, and the defendant appears to have no good defence under Native Law. The issues in the instant case therefore fall to a determined according to Common Law, see Ex parte Minister of Native Affairs in re Yako *v.* Beyi, 1948 (1), S.A., 388 (A.D.), at pages 397, 399, 400 and 401 and Muguboya *v.* Mutatto, 1929, N.A.C. (T & N.), 73, at pages 76, 77 and 78. It follows that the capacity of the plaintiff to bring the instant action also falls to be determined according to Common Law since here the system of law applied dictates the capacity of the parties, see Nzimande *v.* Phungula, 1 N.A.C. (N.E.), 386, at page 387 and Ledwaba *v.* Ledwaba, 1 N.A.C. (N.E.), 398, at page 400. Here it may be added that, as in those cases so in the instant case, the exceptions to the rule that the system of law applied dictates the capacity of the parties have no application. The exceptions to which I refer arise from the use of the words "subject to any statutory provision affecting any such capacity of a Native" in sub-section (3) of section *eleven* of the Native Administration Act, 1927, as amended, and from proviso (*b*) to that sub-section. the lastmentioned exception is dealt with at pages 402 and 403 of the report of *Yako's case, supra.* These exceptions have no application in the cases concerned since no statutory provision of the nature in question is involved and none of the parties concerned is a Native woman who is a partner in a customary union and who is living with her husband, the plaintiff in the instant case being a widow.

As under Common Law a widow is a major and does thus not need to be assisted to bring a civil action and as for the reasons given above it seems to me that the plaintiff in the instant action entered into the alleged agreement with the defendant on her own behalf and not on behalf of her late husband's estate or the minor heir thereto, she has *locus standi in judicio.*

Counsel for respondent took the point that as the alleged agreement between the parties was an oral one and as there is no evidence that the plaintiff authorised the defendant *in writing* to sign a contract for the purchase of the plot, that oral agreement was void in view of the provisions of section *thirty* of the Transvaal Transfer Duty Proclamation, 1902, that "no contract of sale of fixed property shall be of any force or effect unless it be in writing and signed by the parties thereto or by their agents duly authorised in writing". That this point was taken in the Court *a quo* appears to be borne out by a note, in the record, which reads "Mr. Ferreira (defendant's attorney) submits that if Common Law applies (page 349 Wille and Millin, 12th Edition) no proper contract of agency was constituted which should have been by way of power of attorney. There was no legal contract. No case for defendant to meet."

Counsel for appellant contended that the section in question had no application in the instant case as the plaintiff was suing the defendant under an agreement of agency and not the seller of the plot under an agreement of sale. But even assuming that

this contention is well founded, it seems to me that the plaintiff is not under the alleged agreement of agency entitled to claim from the defendant any greater rights than he has received thereunder, except of course for damages which are not in issue in the instant action, and as, to my mind, neither the pleadings nor the evidence establish that the defendant entered into a written contract with the seller of the plot in respect of its purchase or that the defendant received transfer thereof, I do not see how the plaintiff can at this stage succeed in her claim for specific performance.

But this does not conclude the matter as there still remains the plaintiff's alternative claim for the refund to her of the £120.

Counsel for respondent submitted that this claim had been abandoned, relying on a note in the record as follows:—

> "Mr. Human (plaintiff's attorney) addresses Court. Will not proceed with first alternative claim. Will ask for an order to direct defendant to transfer all his right and title to the property of the plaintiff. Alternative facts to stand."

Counsel for appellant contended that the alternative claim mentioned in that note referred to the one based on the plaintiff's first alternative averment, i.e. the averment set out in third paragraph of this judgment.

The correctness of the note in question has not been challenged so that it must be accepted as setting out the true position.

It seems to me that it cannot be determined from that note with any degree of certainty which alternative claim the plaintiff's attorney intimated he was not proceeding with and that it would therefore not be proper at this stage to hold against the plaintiff that the alternative claim she did not wish to proceed with was the one for the refund to her of the £120.

I feel constrained to add that it is a matter for regret that the Court *a quo* lent itself to this confusion.

Counsel for respondent further contended that the plaintiff could not succeed on the last-mentioned claim as she had not tendered possession of the plot to the defendant, relying on Mattheus *v.* Stratford and Another, 1946, T.P.D., 498.

But this contention does not appeal to me firstly because the plaintiff's address given in the summons in the instant action indicates that she was not residing on the plot and it is not clear from the evidence that she resided thereon when she instituted the present proceedings; secondly because Mattheus' case does not appear to be an authority for that contention as the only averment it lays down as being essential in the respect in question is a declaration that the seller is unwilling to transfer the land whilst retaining the purchase price paid, and there is such an averment in the particulars of claim in the instant case; thirdly because it is manifest from the plaintiff's evidence that she has effected improvements on the plot and she is therefore entitled to a right of retention pending an action by the defendant for possession of the plot, see Mattheus' case (*supra*) at page 505. It should be added that the point in question does not appear to have been taken in the Court *a quo*.

In the result I am of opinion that the appeal should be allowed with costs, that the judgment of the Court *a quo* should be set aside and in lieu thereof an entry made in the record that the application for absolution is refused, and that the case should be remitted to the Assistant Native Commissioner concerned for trial to a conclusion.

Steenkamp (President):

In my opinion the Assistant Native Commissioned had erred in granting an absolution judgment at the close of plaintiff's case.

I agree with my brother Balk that plaintiff had *locus standi in judicio* to bring the action.

The defendant at the close of plaintiff's case applied for an absolution judgment and that application was based on the allegation that she could not bring an action in her own name. After plaintiff's attorney had replied to the argument, defendant's attorney raised the further question that the agreement between plaintiff and defendant to purchase certain fixed property on her behalf was not in writing and therefore of no legal effect. Plaintiff replied to this but the Assistant Native Commissioner clearly did not consider giving a finding on this aspect of the case and limited his judgment on the *locus standi in judicio* issue.

If the illegality issue was the only one on which the Assistant Native Commissioner was called upon to give a decision, he might well have refused an absolution judgment in which case his finding was not appealable *vide* the case of Caro *v.* Tulley, 1910, T.P.D., 1026.

Counsel for plaintiff has strongly argued that a mandate of the nature apparent in this case need not be in writing. On the other hand Counsel for defendant has argued just as strongly that such a mandate must be in writing. Neither produced any authorities in support of their respective submissions. In my opinion these arguments are irrelevant as the absolution judgment was not based on this issue.

However, I am not so certain that the agreement between a principal and agent to purchase land on behalf of the principal must be in writing. In fact the contrary is postulated by Nathan, in his Common Law of South Africa, Vol. 2, page 968, where he states that there is no rule that an agent should in all cases be constituted by deed or written document. The requirements of section *thirty* of Transvaal Proclamation No. 8 of 1902, are limited to deed of sale signed by the principal, or if signed by the agent then that agent must have been authorised in writing to do so.

A distinction must be drawn between negotiating for the purchase of land and the actual signing of a deed of sale. In my opinion, as already mentioned, the law does not appear to prohibit an agent from entering into negotiations for the sale of land without a written authority from his principal to do so.

Bowstead on Agency, 6th Edition, page 138, Article 49, states that where an agent who is employed to purchase property on behalf of his principal, purchases it in his own name or on his own behalf and it is conveyed or transferred or otherwise made over to him, he becomes a trustee thereof for the principal.

In Article 43 on page 107 of the Law of Agency in South Africa by De Villiers and MacIntosh (1933 Edition) under the heading " Duty to deliver Property " it is mentioned that this i.e. duty to deliver property, applies to all property received for the principal or acquired by the agent *ex causa mandati.* If the agent, in breach of his duty, has bought property for himself with his principal's money, he must account for it to his principal; but the actual *dominium* is in him, so that he can give a good title to an innocent third party.

The plaintiff in the instant appeal has in my opinion made out a *prima facie* case that the property was to be purchased on her behalf and therefore an onus rests on the defendant to refute her allegations.

In my view the appeal should be allowed with costs, the judgment of the Court *a quo* should be set aside and in lieu thereof an entry made in the record that the application for absolution is refused, and that the case should be remitted to the Assistant Native Commissioner concerned for trial to a conclusion.

Garcia (Member): I concur in the judgment of the learned President.

For Appellant: Adv. Curlewis instructed by Messrs. McRobert, de Villiers and Hitge.

For Respondent: Adv. Badenhorst instructed by Mr. W. L. van Eck.

NORTH-EASTERN NATIVE APPEAL COURT.

MDHLULI *v.* KUMALO.

N.A.C. Case No. 93/52.

Pretoria: 4th December 1952: Before Steenkamp, President; Balk and Garcia, Members of the Court.

COMMON LAW.

Children: Custody of adulterine children born during subsistence of a civil marriage.

Summary: Plaintiff, who had formerly been married by Christian rites to Tryfina, the present Native customary wife of the defendant, sued defendant for custody of two illegitimate children born to Tryfina during the subsistence of the marriage between plaintive and Tryfina.

Held: That the type of union between the mother of an adulterine child and the man who was her husband at the time she bore it, where there has been no subsequent civil marriage between such mother and the natural father of the illegitimate child, dictates the question of its custody.

Held further: That as it is clear that the adulterine children in the instant action were born to their mother during the subsistence of a marriage according to civil rites between her and the plaintiff, the custody of those children falls to be determined according to Common Law.

Cases referred to:

Zwana *v.* Dhlamini, 1, N.A.C. (N.E.), 353.

Mdina *v.* Panlane, 1917, N.A.C., 56.

Statutes referred to:

Section *twelve* of Law No. 46 of 1887 (Natal).

Section *ten* of Act No. 7 of 1934.

Appeal from the Court of the Native Commissioner, Piet Retief.

Steenkamp (President):

In the Native Commissioner's Court the plaintiff (now respondent) sued the defendent (now appellant) for the delivery and custody of two minor children.

In his summons the plaintiff avers that he and Tryfina Kumalo (born Ntsele) were married by civil rites and that that marriage was dissolved by the Native Divorce Court on the 24th February, 1949, in an action for divorce brought by him on the ground that Tryfina had committed adultery with the present defendant. He further alleges that as a result of that adultery two girls—twins—were born, namely Ntongolozi and Ntomizodwa. These are the two children whose custody the plaintiff claims and whom he alleges are with the defendant.

The Native Commissioner awarded the two children to the plaintiff. A note appears on the record that he applied Common Law. An appeal has now been noted to this Court on the following grounds:—

"1. That the judgment of the Court is opposed to the principles of public policy and natural justice, in that, The judgment tends to rob a mother of the custody of her children and to give such custody to a man, who is not the father of the children and who is practically a total stranger to the children.

2. That the Court should not give the custody of the children to the plaintiff on the grounds:—

(*a*) The plaintiff in his request for the custody of the children is not moved by a feeling of love or affection for the children.

(*b*) That the plaintiff's request is actuated by avarice and in the hope of obtaining lobolo that may in future, be paid for the two children.

3. That it is not in the interest of the children that they should be taken away from their mother and given to a man who is a total stranger to them."

It is common cause that the plaintiff and Tryfina were married by civil rites, that during the subsistence of that marriage she committed adultery with the defendant and that as a result of that adultery the two children concerned were born. The plaintiff testified that Tryfina and the defendant are living together as man and wife, but there is the uncontroverted evidence for the defendant, which was properly accepted by the Native Commissioner, that the defendant and Tryfina have contracted a customary union.

This case calls for a crisp decision whether the plaintiff is entitled to claim the custody of these two adulterine children. If he and Tryfina had been married by Native Law and Custom then, on the authority of the case of Zwane *v.* Dhlamini, 1, N.A.C. (N.E.), 353, he would have been entitled to their custody, as it is trite Native law that where a man enters into a customary union with a woman the cattle he pays as lobolo begets any children born of that woman whether her husband is the farther or not. The Native Commissioner in his reasons for judgment has quoted Zwane's case and that of Mdinda *v.* Pahlane, 1917, N.A.C., 56, in support of his judgment awarding the custody of the children to the plaintiff but neither of these cases is in point here as in both of them the union between the mother of the adulterine children and the man who was her husband at the time she bore them, was a customary one whereas in the instant action that union is a marriage according to civil rites. Although the union in question was referred to as marriage in Mdinda's case, it is obvious that it was in fact a customary union as the divorce was granted by a Magistrate's Court, see section *twelve* of Natal Law No. 46 of 1887. Moreover in Mdinda's case the claim was in respect of the property rights in the adulterine child, which is a totally different matter from a claim for the custody of the adulterine child which is the issue in the instant case.

A sharp distinction must be drawn between civil marriages and customary unions. In a civil marriage where it is proved, as in this case, that the ex-husband of Tryfina is not the father of those children, then their custody and guardianship belong to the woman. If the order made by the Native Commissioner is carried to its logical conclusion then the provisions of section *ten* of Act No. 7 of 1934 could not be applied to the present case as under the provisions of that Act the defendant and Tryfina may at any time enter into a civil marriage and thereby legitimise the two children in question. Defendant would then become the guardian of those children.

As the type of union between the mother of an adulterine child and the man who was her husband at the time she bore it, dictates the question of its custody, and as in the instant action it is clear that the adulterine children were born to their mother during the subsistence of a marriage according to civil rites between her and the plaintiff, the custody of those children falls to be determined according to common law.

It should be added that although the Native Commissioner noted in the record of the proceedings in the instant case that common law was to be applied, it is clear from his reasons for judgment that he in fact erroneously applied Native law in arriving at his decision awarding the custody of the children to the plaintiff.

In the result I am of the opinion that the appeal should be allowed with costs and that the Native Commissioner's judgment should be altered to one dismissing the summons with costs.

Garcia (Member): I concur.

Balk (Permanent Member):

I concur in the learned President's judgment on the understanding that what has been stated in the third last paragraph thereof regarding the type of union dictating the question of custody, is not to be regarded as the sole criterion except in cases in which there has been no subsequent civil marriage between the mother of the adulterine child and its natural father, as is the position in the instant case.

For appellant: Adv. V. d. Byl (i/b Messrs .Stegmann, Oosthuizen and Jackson).

Respondent in default.

CENTRAL NATIVE APPEAL COURT.

KHABANE *v.* KHABANE.

N.A.C. Case No. 23/51.

Kroonstad: 9th December, 1952. Before Warner, Acting President, Coertze and Alfers, Members of the Court.

Succession and Inheritance—Marriage by Civil Rights with Communtiy excluded following on customary union.

Deceased contracted a customary union with a woman named Mina and paid *lobolo* in respect of her. Afterwards deceased went to live at Kroonstad leaving Mina at Senekal. While at Kroonstad deceased contracted a marriage with a woman named Mapuleng, community of property being excluded in terms of section *twenty-two* (6) of Act No. 38 of 1927. In an enquiry held in terms of section 3 of Government Notice No. 1664 of 1929 a Native Commissioner declared the eldest son of Mina to be sole heir and entitled to the property in the estate. In an appeal it was contended that Mapuleng was entitled to the estate by virtue of the civil marriage.

Held: That as the customary union was still subsisting when the marriage was contracted, the widow of the marriage had no greater rights in respect of the deceased than she would have if the marriage had been a customary union.

Held further: That the eldest son of the customary union was heir of deceased according to Native Custom and was, therefore, entitled to the estate.

Cases referred to:
Bobotyane *v.* Jack [1944, N.A.C. (C & O), 9].

Statutes, etc., referred to:
Sections *twenty-two* (3) and *twenty-two* (7) of Act No. 38 of 1927.

Appeal from the Court of the Native Commissioner, Kroonstad.
Warner, Acting President, delivering judgment of the Court:—

This is an appeal against the finding of the Native Commissioner, Kroonstad, in an inquiry held in terms of section *three* of Government Notice No. 1664 of 1929.

The following facts are not in dispute:—

1. In 1916 the late Sello Khabane contracted a customary union with a woman named Mina and paid 10 cattle and a horse as *lobolo.*
2. Sello and Mina lived together at Senekal for some years as man and wife and three children were born, including a male named Klaas.

3. Afterwards Sello went to live at Kroonstad, leaving Mina at Senekal.
4. On the 16th November, 1935, Sello contracted a marriage with a woman named Mapuleng at Kroonstad.
5. Community of property was excluded from this marriage in terms of section *twenty-two* (6) of Act No. 38 of 1927 and, in contracting the marriage, Sello described himself as a bachelor.
6. Sello Khabane died on 28th December, 1950, leaving an intestate estate consisting of a house on Stand No. 171A in the Kroonstad Municipal location, and two cows and their calves.

Klaas Khabane (respondent), assisted by his guardian Ent Khabane, claimed to be the heir to the estate on the ground that he was the eldest son of deceased by his customary union with Mina, while Mapuleng Khabane (appellant) claimed the estate as being the widow of the late Sello Khabane as a result of his marriage by civil rites.

After hearing evidence the Native Commissioner gave the following finding:—

> "Klaas Khabane declared as sole heir, Ent Khabane declared guardian. Guardian appointed as executor to transfer Erf No 171A Location to Klaas Khabane, also to take possession of two cows and calves. It follows that only transfer in terms of letter of authority dated 12/2/51 issued by Native Commissioner, Kroonstad, is set aside, Ent Khabane as guardian entitled to cost of application."

Appellant has appealed on the following grounds:—

(1) The Native Commissioner erred in finding that the customary union between Sello Khabane and Mina Khabane, born Rangkate, still subsisted when the civil marriage between Sello Khabane and Mapuleng Khabane was contracted.

(2) The Native Commissioner irregularly and in breach of his duties, although he was requested to do so, failed to take the necessary steps to have the statutory declaration made by the late Sello Khabane in terms of section *twenty-two* (3), Act No. 38 of 1927, produced at the enquriy.

(3) That even if the finding of the Native Commissioner is correct, that the Native customary union between Sello Khabane and Mina Khabane still subsisted at the time of the civil marriage between Sello Khabane and Mapuleng Khabane, then the Native Commissioner erred in declaring Klaas Khabane sole heir, for the following reasons:—

   (*a*) In that event only such of the movables owned by the late Sello Khabane at the time of his civil marriage could be awarded to Klaas Khabane.

   (*b*) Movables acquired by the late Sello Khabane after his civil marriage should be dealt with as if the said Sello was a European.

This case came before this Court at its Session in January, 1952, when it was returned in order that it might be decided whether the customary union between Mina and Sello was subsisting at the time when the civil marriage between Sello and Mapuleng was contracted.

In his reasons for judgment, the Native Commissioner has stated: "I am of opinion that Klaas Khabane being the eldest son of the customary marriage is entitled to inherit." We take this to mean that he found as a fact that the customary union had not been dissolved but was still subsisting when the marriage was contracted.

The evidence that the customary union had been contracted was not contradicted and no attempt was made to show that it

had been dissolved when the marriage was contracted. Appellant called a witness named Robert Sello who stated that he was friendly with deceased who discussed his family affairs with him. This witness stated: "He told me that he had a wife at Senekal but that he was going to leave her because his wife was pregnant to his brother and he told her she could remain with his brother as his wife." Mina stated that deceased never told her that he was leaving her or that he was not the father of her children Matsewa and Klaas.

Section *twenty-two* (3) of Act No. 38 of 1927 reads as follows:—

> "No minister of the Christian religion authorized under any law to solemnize marriage, nor any marriage officer, shall solemnize the marriage of any Native male person unless he has first taken from such person a declaration as to whether there is subsisting at the time any customary union between such person and any woman other than the woman to whom he is to be married and, in the event of any such union subsisting, unless there is produced to him by such person a certificate under the hand of a magistrate or Native Commissioner that the provisions of this Section hereinbefore set out have been duly complied with."

When deceased Sello Khabane contracted a marriage with Mapuleng, he described himself as a bachelor. The declaration required of him in terms of section *twenty-two* (3) of Act No. 38 of 1927 was not produced but this, in our opinion, does not affect the issue because a declaration by him that there was no customary union subsisting between him and any woman other than Mapuleng would not necessarily be correct. Deceased may have been under the mistaken impression that his customary union with Mina had been dissolved but the question as to whether it had been dissolved is a question of law.

The following passages occur in the judgment in the case of Bobotyane *v.* Jack [1944, N.A.C. (C. & O.), 9] quoted on page 139 of *Whitfield's South African Native Law* (Second Edition):—

> "The keystone of the union is *lobolo,* and while the *lobolo* is retained by the wife's group the union continues to subsist. During the husband's lifetime all the children borne by the wife belong to him. No other man can contract a valid union with her even by a payment of *lobolo* while the first *lobolo* remains with her father or his heir, unless he, the husband, has publicly repudiated her and forfeited the *lobolo* . . . . Native Law does not recognise a dissolution of a union by mere desertion of the wife or husband, by abandonment or even by bare repudiation, for these are all eventualities provided for by the *lobolo* cattle . . . Native Law requires something more than mere unilateral act or repudiation to terminate the union. On the part of the husband, he has the right to repudiate his wife, with forfeiture of his *lobolo* if the act be unjustified in Native law, but before the wife can act on such repudiation and remarry it is necessary either to return all or some of the lobolo, or to take the matter before the headman or chief and obtain a public repudiation by the husband."

In the present case, we have the uncontradicted evidence that deceased contracted a customary union with Mina and there is no evidence that this union was dissolved by return of *lobolo* or public repudiation. It follows, therefore, that the customary union was still subsisting when deceased contracted a marriage with Mapuleng.

As the marriage was contracted after the commencement of Act No. 38 of 1927 and during the subsistence of the customary union, the provisions of section *twenty-two* (7) of the Act are applicable, in terms of which the material rights of the partner of the customary union or any issue thereof are not affected, and the widow of the marriage has no greater rights in respect of the estate of deceased than she would have had if the marriage had been a customary union.

If Mapuleng, the widow of the marriage, had contracted a customary union, she would have been the right hand wife of deceased. After the death of the latter, she would be entitled to be properly maintained by the heir but the estate would devolve upon such heir [see pages 253 and 254 Whitfield's South African Native Law (Second Edition) and the cases quoted thereon]. In view of the provisions of section *twenty-two* (7) of Act No. 38 of 1927, her rights in respect of the estate are no greater than these in spite of the fact that she contracted a marriage with deceased.

Klaas Khabane, as eldest son of deceased, is heir and entitled to succeed to the estate.

The appeal is dismissed with costs.

Coertze and Alfers (Members) concurred.

For Appellant: Mr. J. R. D. van Renen, Kroonstad.
For Respondent: Mr. J. N. Dreyer, Kroonstad.

SOUTHERN NATIVE APPEAL COURT.

Magqabi *vs.* **Magqabi.**

N.A.C. Case No. 31/52.

Butterworth 17 September, 1952. Before Warner, Acting President; Bowen and Whitfield, members of the court.

LAW OF SUCCESSION.

Enquiry in terms of section three (3) *of Government Notice No.* 1664 *of* 1929—*Succession to quitrent allotment by son of Christian Marriage contracted after death of wife married according to Native Custom—Interpretation of section* nine (1) *of Proclamation No.* 142 *of* 1910.

Respondent, a son of the deceased registered holder (of the quitrent allotment) by a Christian marriage contracted after the death of his first wife to whom he was married by Native Custom, was awarded a certain garden lot held under the provisions of Proclamation No. 227 of 1898. Appellant was the third son of the first wife (principal house) and in the absence of his two elder brothers (and their issue) claimed that he was entitled to succeed to the allotment in terms of the tables of succession published under Government Notice No. 142 of 1910 and read with section 23 (2) of Act No. 38 of 1927.

The appeal is lodged on the grounds that the Court erred in disregarding the fact that the late Ncanywa was in occupation of the Garden Lot in question prior to his second marriage and that it should have awarded the said lot to the son of the marriage by Native Custom.

Held:

1. That it was only after the application of Proclamation No. 227 of 1898 to the District of Nqamakwe (by Proclamation No. 41 of 1902) and only after certain conditions has been fulfilled (*vide* section *four* of Proclamation No. 227 of 1898) that the allotments which natives previously had the right to occupy, became their property.

Held:

2. That as the late Ncanywa married his second wife by Christian Rites in 1903 and received title only in 1906, the "wife" within the meaning of section *nine* (1) of Proclamation No. 142 of 1910 must be held to be the "wife" who was such when title to the land was acquired by the deceased, and such land must devolve on such "wife's" son.

Held:

3. That despite the definition of "house" in section *thirty-five* of Act No. 38 of 1927 (Native Administration Act, 1927), a son of a Christian marriage, can inherit a quitrent allotment, as to hold otherwise would lead to a manifest contradiction of the apparent purpose of the enactment.

Cases referred to:

(*a*) Dlalo *v.* Ndwe (4 N.A.C. 189).

(*b*) Tonjeni *v.* Tonjeni [1947 N.A.C. (C. & O.) 8].

(c) Shata v. Shata [1942 N.A.C. (C. & O.) 42].

Statutes referred to:

(*a*) Government Notice No. 1664 of 1929.

(*b*) Proclamation No. 110 of 1879 (section 43).

(*c*) Proclamation No. 227 of 1898.

(*d*) Proclamation No. 41 of 1902.

(*e*) Act No. 38 of 1927 [sections *twenty-three* (2) and *thirty-five*].

Appeal from the Court of the Native Commissioner, Nqamakwe.

Warner (Acting President):

This is an enquiry in terms of section *three* (3) of Government Notice No. 1664 of 1929 to determine the person entitled to succeed to Garden Lot No. 9 in Location No. 10 called Ncisininde, Nqamakwe district, registered in the name of Ncanywa Magqabi.

The facts are not in dispute. The late Ncanywa married a woman by native custom. She bore him four sons namely (1) Mangaliso (deceased) who had a son named Ndabayitetwa who is the registered owner of Garden Lot No. 10, and a son named Johannes who resides in the district of Komgha; (2) Maci who was adopted by Lahlani; (3) Magade (appellant); and (4) Griffiths who died without male issue. This wife died and subsequently on the 11th August, 1903, Ncanywa married a woman named Julia by Christian rites. This woman bore four sons, the eldest of whom is Solomon (respondent), a landless married adult. Ncanywa had been in occupation of an arable allotment and on the 23rd April, 1906, title deed was issued in his favour in respect of Garden Lot No. 9 which corresponded approximately with the arable allotment previously held by him. Ncanywa died in 1916 and his widow Julia used the Garden Lot until her death in 1950.

Magade claimed the land on the ground that, the eldest son of the first wife being dead and his sons not being eligible and the second son having been adopted by another family, he (Magade) was the eldest eligible son of the first wife who, he submitted, was the great wife while Julia, the wife married by Christian rites, was the Right Hand wife.

Solomon claimed the land on the ground that Ncanywa had acquired it after his marriage to Julia by Christian rites and he (Solomon) was the eldest son of this marriage.

The Assistant Native Commissioner declared that Solomon Magqabi was the person entitled to succeed to the lot in question and Magade has appealed against this finding on the ground that it is against the law in that—

(*a*) The Assistant Native Commissioner did not summon before him all the parties concerned, viz.: the sons of the late Mangaliso, viz.: Ndabayitetwa and Johannes as he is required to do by section *three* (3) of Government Notice No. 1664 of 1929;

(*b*) the Assistant Native Commissioner erred in disregarding the fact that the late Ncanywa was in occupation of Garden Lot No. 9 prior to his second marriage and should have awarded the said lot to son of the marriage by native law and custom; and

(*c*) the Assistant Native Commissioner erred in his finding that the claimant Solomon Magqabi was the son of a "house" in view of the fact that the said Solomon is a son of a Christian marriage.

Paragraphs (*a*) and (*c*) were abandoned in this Court so that we are concerned with paragraph (*b*) only.

Section *forty-three* of Proclamation No. 110 of 1879, which was in force in the District of Nqamakwe, reas as follows:—

> "Each such Headman shall, as soon as practicable, submit to the Chief Magistrate a list of the members of the tribes resident within, or belonging to, his subdivision, to whom he proposes that a tract of land should be allotted for occupation; and such allotment, subject to such alteration and amendment as may be found necessary by the said Chief Magistrate, shall be made accordingly and lists of all such allotments shall be thereupon made and kept on record in the said office."

Proclamation No. 41 of 1902 provided that the provisions of Proclamation No. 227 of 1898, as amended, should apply to the district of Nqamakwe and the final sentence of section *four* of the latter Proclamation reads as follows:—

> "The Locations shall be surveyed, and the available extent of arable land therein, after due allowance has been made for commonage and for dwelling sites, and after allotments to claimants specially recommended, as hereinbefore provided, shall be divided into allotments of four morgen each, more or less, which shall be granted to such persons named in the list hereinbefore mentioned, as the Governor shall approve."

It is clear from the foregoing that, prior to the application of Proclamation No. 227 of 1898, land in the district of Nqamakwe could be allotted to natives for occupation and after such application these allotments could be granted to them with the approval of the Governor. In other words, it was only after the application of this Proclamation and after certain conditions had been fulfilled, that the allotments which, previously, they had the right to occupy, became their property.

The late Ncanywa married Julia by Christian rites on the 11th August, 1903. Government letter in respect of the Garden Lot in question was dated 10th September, 1904, and the title deed was dated 23rd April, 1906. In the case of Dlalo *v.* Ndwe (4 N.A.C. 189) it was stated:— "The wife within the meaning of section *nine* (1) of the Proclamation must be held to be the wife who was such when title to the land was acquired by the deceased."

In the case of Tonjeni v. Tonjeni [1947 N.A.C. (C. & O.) 8] in dealing with the rights of a woman married by Christian rites, it was stated: "Property acquired by her husband after her marriage would devolve on her son."

In the present case there is no doubt that deceased Ncanywa acquired the land, the property in dispute, after his marriage to Julia by Christian rites.

In terms of section *twenty-three* (2) of Act No 38 of 1927, the land devolves upon one male person in accordance with tables of succession which, for the Transkeian Territories, are laid down in the Third Schedule to Proclamation No. 142 of 1910. The relative clause is No. 1 and it reads as follows:—"(1) His eldest son of the principal house or such eldest son's senior male descendant."

It has been argued that the son of the Christian marriage cannot inherit in terms of this clause in view of the definition of "house" in section *thirty-five* of Act No. 38 of 1927. If we follow this argument to its logical conclusion it would mean that if a man had only one wife, whom he married by Christian rites, a son of this wife would not be able to inherit his land.

In the case of Shata *v.* Shata, 1942 N.A.C. (C. & O.) 42 it was stated:—

> "When the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience and absurdity, hardship or injustice, presumably not intended, a construction may be put on it which modifies the meaning of the words, and even the structure of the sentence, by, amongst other things, interpolating other words, under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning (see Maxwell at page 198). A sense of the possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations (*ibid.* page 174)."

In the case of Tonjeni *v.* Tonjeni *supra* it was stated that a woman married by Christian rites is in the eyes of the law her husband's only wife and her status is independent of any of her husband's houses.

For these reasons, we are of opinion that the eldest son of the woman who was married to deceased by Christian rites is entitled to succeed to the land which was acquired by deceased after such marriage.

The appeal is dismissed with costs.

Bowen (Member): I concur.

Whitfield (Member): I concur.

For Appellant: Mr. S. Mahoud, Butterworth.

For Respondent: Mr. A. J. C. Kockott, Nqamakwe.