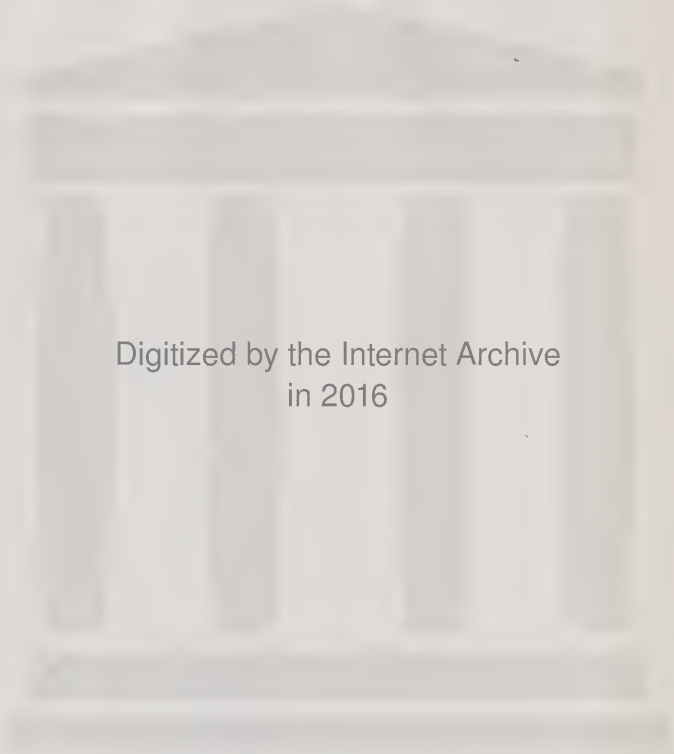

DECISI

OF TH

NATIVE APPEAL COURT

(Southern Division)
1948.

Volume I

(Parts 1 to 4) Index.

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1949
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OF THE

NATIVE APPEAL COURT

(SOUTHERN DIVISION)
1948

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(PART 1)

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G.P.-S.7232—1948-9—500.

CASE No. 1.

SIKADE NGESI *v.* NOMADINI MCUTA AND ANO.

UMTATA: 26th January, 16th and 18th June, 1948. Before J. W. Sleigh, Esq. (President), Messrs. E. E. W. Lancaster and R. A. Midgley, Members of the Court (Southern Division).

Native Appeal Cases—Adultery—Damages—Death of wrongdoer after litis contestatio—*Maxim* actio personalis moritur cum persona *not applicable—Native Custom—Kraalhead's liability for torts of deceased inmate—Tembu Custom—Death of seducer or adulterer after customary report does not affect kraalhead's liability—If kraalhead is heir he is also liable as heir—If not, liability depends upon judgment being obtained against wrongdoer—Practice and Procedure—A A male major does not require assistance—Exception to citation must be taken timeously—Leave to appeal to the Appellate Division refused—Grounds* (1) *question of procesure not arguable,* (2) *question of law premature.*

Appeal from he Court of the Native Commissioner, Umtata.

Sleigh (President):

This is an action for damages for adultery. Nomadini Mcuta is cited as first defendant, assisted by Bungana Maxanti, second defendant, both male adults of Mpeko Location, District Umtata.

The particulars of claim are as follows:—

1. The parties hereto are Natives as defined by the Act.
2. First defendant is an inmate of the kraal of second defendant.
3. That by reason of the allegation contained in paragraph 2 hereof second defendant is liable for the torts of first defendant according to Native Law and Custom.
4. Plaintiff is married to Notshimbili by customary union. That during or about August or September, 1945 and at Mpeko Location in the District of Umtata the first defendant did wrongfully and unlawfully commit adultery with the said Notshimbili as a result whereof she became pregnant and gave birth to a child at the end of April, 1946.
5. By reason of the aforesaid adultery and pregnancy plantiff has suffered damages to the extent of five head of cattle or their value £25.
6. Notwithstanding demand defendants have failed or refused to pay the said five head of cattle or their value £25.

Wherefore plaintiff prays for judgment against the defendants for the said five head of cattle or payment of their value being £25.

The summons was served on second defendant and appearance was entered by an attorney on behalf of "defendant"—it is not stated which defendant. A plea was filed by first defendant in which the allegations in paragraphs 1, 2 and 3 of the summons and plaintiff's marriage to Notshimbili are admitted. The allegation of adultery is denied.

The case was set down for hearing. On the appointed day both defendants were in default and their attorney reported that first defendant was ill. On application the hearing was postponed to the 12th August, 1947. On this date plaintiff's attorney was not available and the case was further postponed to the 19th August, 1947. At the resumed hearing it was reported that first defendant had died and plaintiff's attorney applied for leave to proceed with the case against second defendant only. I have set out the history of the case in the Court below fairly fully, because it will be necessary to refer to it again later.

The Additional Native Commissioner, after hearing argument on plaintiff's application, upheld the contention of defendant's attorney that the action died with the death of the adulterer and dismissed plaintiff's summons. He relies for his decision on the Common Law maxim *actio personalis moritur cum persona* as applied in Mqangabode *v.* Ntshentshe (4 N.A.C. 13) and in Mgadlwa *v.* Makupula [1947 N.A.C. (C. & O.) 22].

Against this decision plaintiff has appealed purely on the question of law.

The first case is not in point. There it was sought to hold the son liable for the tort of his father, who had died before the action was instituted, and it was held that the maximum applied. But, apart from this, the parties in that case, as well as those in Mgadlwa's case, were Pondos and it was made clear in the latter case that, according to Pondo custom, the death of a party to an action for damages for adultery or seduction not merely barred the action, but extinguished the liability, even to the extent of a judgment debt.

The extinction of actions by death is dealt with by Nathan in the third volume of his work on the Common Law of South Africa (p. 1594). He refers to the decision in Mayer's Executors *v.* Gericke (Foord 14) in which *DeVilliers, C. J.*, held that the rule *actio personalis moritur cum persona* is not applicable to the full extent in Roman-Dutch Law. The rule, as laid down by the learned Chief Justice, is that an *actio injuriarum* (i.e. for defamation or other personal injury) cannot be proceeded with after the death of either party to it, unless the case has reached a stage of *litis contestatio* (joinder of issue) before such death. It was further held in that case that this stage is reached at the close of the pleadings, or, if the defendant is in default, as soon as he is debarred by law from defending the action. The learned author himself puts the rule thus: "No action on tort for personal injury or damage will lie after the death of either the party committing or the party injured by the wrongful act, unless (*a*) in the case of death of either plaintiff or defendant there was litis contestatio before the death of the deceased, or (*b*) in the case of actions under the *Lex Aquilia* or *actiones furti* or *actiones doli*, the estate or heirs of the deceased have derived benefit from the tort of the deceased."

McKerron, in his "Law of Delicts" (3rd Ed., p. 194), in dealing with adultery as an actionable wrong, carries Nathan's rule somewhat further. He points out that damages for adultery are awarded on two grounds, namely, for loss of *consortium* and for *contumelia* inflicted upon the injured spouse, and expresses the opinion that (if issue has not been joined) the death of the injured spouse will extinguish the right of action because it causes both grounds of damages to fall away, but that the death of the adulterer does not bar the injured spouse from claiming compensation from the adulterer's estate for actual pecuniary loss sustained by him through having been deprived of his wife's services in consequence of the adultery, that the death of the guilty spouse clearly extinguishes the right to compensation for loss of *consortium* but does not affect the right to compensation for the injury or *contumelia*.

In the present case the pleadings had been closed and issue had been joined. The Additional Native Commissioner, therefore, erred in holding that the maxim applied. The action is, however, brought under Native Law and that system of law must be applied, and particularly Tembu Law since the parties are Tembus.

It is established Native Law that the right of action for damages for seduction and pregnancy is extinguished by the death of the seducer if the pregnancy is not reported in the customary manner to the seducer before his death (Sonjica *v.* Simakude, 4 N.A.C. 326). According to Pondo custom the liability is entirely extinguished by the death of either party before the judgment is satisfied. The Tembu custom on the point was referred to the Native assessors in the present case. A record of their opinion is appended. They state that the right of action (damages for adultery) is extinguished by the death of the adulterer before judgment. This opinion is in conflict with the opinion expressed in the two Tembu cases, Mayekiso *v.* Sifuba & Ano. (3 N.A.C. 247) and Kawu *v.* Meji (5 N.A.C. 85). Should we now accept the opinion of the assessors in the present case in preference to the opinions expressed in those cases? It is doubtful whether the Assessors in the present case are more competent to state their law on the point, and I think, therefore, that we should accept their opinion only if we are certain that the opinions expressed in the previous cases are wrong.

Reference to the copies of the records of those cases filed in this office shows that in Mayekiso's case the pregnancy was reported to the defendants and the case was taken to the Headman's Court before the seducer died; the Native assessors agreed with the Court's ruling that in the circumstances the kraalhead, who was also the heir of the seducer, was liable both as heir and as kraalhead. In Kawu's case no report of the pregnancy was made before the death of Cekana, the alleged seducer, and defendant was not his heir; but defendant admitted that Cekana, an inmate of his kraal, was responsible for the girl's pregnancy. The Native assessors stated "that where the seduction is proved, either by the admission of the kraalhead or by the customary report of the seduction, the kraalhead is liable even after the death of the seducer and even if he left no property."

It is obvious that the seduction cannot be proved by the mere customary report. It is also clear that if no admission had been made by the kraalhead, he would not have been held liable. One can only assume that the Court did not question the assessors further on the point, because it had before it the opinions in Mayekiso's case and it was only concerned with what effect the admission had on the case. In my opinion the assessors intended to convey that if the kraalhead admits that an inmate of his kraal is responsible for the woman's pregnancy, or if the pregnancy was reported in the usual manner before the death of the seducer, the kraalhead would be liable. This construction is in accord with the opinion expressed in Mayekiso's case and with the well established rule that when once action has been taken for damages for seduction and pregnancy by taking the charge to the seducer's kraal, the guardian's right of action is not extinguished by the death of the girl after the report [see Matolo & Ano. *v.* Mhlapo, 1947 N.A.C. (C. & O.) 32] where the authorities were collected, nor by giving the girl in marriage to another man (see Mtyana & Ano. *v.* Ntika, 5 N.A.C. 155). In my opinion, Mayekiso's case was correctly decided and it therefore follows that the opinion of the assessors in the present case must be repected. It is clear that they are confusing the question of proof with the question of the limitation of the action, because, when they were asked what the position would be if there were for instance, a letter admittedly written by the adulterer in which the adultery is admitted, they replied that they did not know whether the kraalhead would be liable because he had not been tried. If the action is barred by the death of the adulterer before judgment, it follows that evidence of the adultery, however conclusive, would be irrelevant. The fact that they agree that the kraalhead would be liable if he admitted the adultery shows that the decision depends on the evidence and not on the death of the adulterer.

The Tembu Law on the question may therefore be summarised as follows: The liability of the kraalhead is not affected by the death of the seducer or adulterer after the customary report has been made. If the kraalhead is also the heir, he is liable both as heir (see Mdala *v.* Dunya, 3 N.A.C. 243) and as kraalhead. If he is not the heir, his liability is subject to the case being proved and a judgment being obtained against the heir of the deceased. This is so because the kraalhead is not a joint tort-feasor; his legal position resembles that of a surety who is not a co-principal debtor (Nteteni *v.* Nkohla, 1 N.A.C. 172 and Fosi *v.* Stanford & Ano, 3 N.A.C. 249). It seems that in giving judgment against defendant in Kawu's case the Court overlooked the decision in Fosi's case.

In my opinion the Additional Native Commissioner erred in ruling, without hearing evidence, that the action was barred by the death of first defendant. The probabilities are that the customary report of the pregnancy was made in this case, but this is by no means certain. Moreover, we are in the dark as to whether second defendant is the heir to first defendant. If he is, a judgment against him alone would be competent; if not, then, in the absence of an application to substitute the heir as a defendant in the action, a judgment against second defendant would be incompetent.

In this Court it is strongly urged on behalf of respondent (second defendant) that plaintiff sued first defendant only. In support of this contention counsel for respondent points to the facts that first defendant is sued " assisted " by second defendant, that there is no allegation that the defendants are jointly and severally liable for the debt and it is stated that second defendant did not enter appearance and filed no plea. It is contended that he was therefore not properly before the Court and, that if he were, plaintiff should have taken default judgment against him.

These contentions have no substance. First defendant is an adult and requires no assistance to appear in Court. It was unnecessary to cite him as being assisted. The inclusion of these words must be regarded as overcautiousness. If plaintiff intended to sue first defendant only, he would not have described respondent as the second defendant and the allegation in paragraph 3 of the particulars of claim would be meaningless. Further, paragraph 6 and his claim at the end of the particulars make it sufficiently clear that he is claiming the customary fine for adultery and pregnancy from the defendants jointly and severally. A printed form was used for the notice of appearance to defend and although the notice merely states that " defendant " enters appearance, it is clear from the heading that appearance was entered on behalf of both defendants. Moreover, according to the record the defendants were represented by an attorney and second defendant cannot now maintain that he was not a party to the case.

The failure of his attorney to make this point clear in the notice of appearance or in Court, and second defendant's failure to deliver a plea, are matters for which plaintiff cannot be blamed. Undoubtedly the summons was clumsily drawn, but if second defendant was embarrassed, he should have taken exception in terms of the rules and cannot now raise the point for the first time.

Plaintiff could not have taken default judgment against second defendant, because, as I have already pointed out, a judgment against him is dependent upon the liability of the first defendant being established.

In my opinion the appeal succeeds.

Lancaster (Member): I concur.

Midgley (Member):

Plaintiff claimed from defendants £25 as and for damages for adultery committed by first defendant, Nomadini Mcuta, with his wife, Notshimbili, in about August or September, 1945. As a result of such act of adultery plaintiff alleged that his wife became pregnant and gave birth to a child in April, 1946.

The first defendant pleaded to the summons and denied the adultery. No separate plea was filed by second defendant.

The adulterer, first defendant, died after the close of the pleadings, but before the action actually went to trial.

When, after several postponements, the matter finally came before the Court for decision on the 19th August, 1947, the Court appears to have been informed that first defendant had died since the postponement on the 27th March, 1947. The actual date of his death is not mentioned. The record then reads " Mr. Airey contends that action does not die with tort-feasor and begs leave that action be proceeded with ". The exact meaning and import of this entry is not clear. Did Mr. Airey wish to proceed against second defendant alone, or was it his intention to have first defendant's heir substituted for him? From what happened subsequently I think one can only infer that Mr. Airey's wish was to proceed against second defendant alone. The importance of this question will appear later in my reasons.

Mr. Airey having then contended that he should be permitted to proceed with the action against second defendant and Mr. Alison having challenged his right to do so with the contention that the right of action dies with the tort-feasor, the Court seems to have proceeded to decide this issue purely on a question of law, no evidence being led, and found for defendant, the summons being dismissed.

Against this judgment plaintiff has appealed on the following grounds:—

> " The appeal is against the decision of the Native Commissioner that the death of the tort-feasor disentitled the plaintiff to proceed against the kraalhead on the grounds that such decision is contrary to Native custom."

At the hearing of the appeal counsel for respondent sought to rely on the defence that second defendant, Bungana Maxanti, was not properly cited in the Court below, he did not enter appearance to defend and did not plead to the summons and was not therefore before the Court. This point was not taken in the Court below and the question is whether the defendant should be permitted to raise it now.

Now, I concede that the summons was very clumsily drawn and that the second defendant was by no means properly cited. It is trite custom that in order to succeed against a kraalhead for torts of an inmate the kraalhead must be sued with the tort-feasor. There can be no separate action against the kraalhead after the tort-feasor has been sued (vide Nteteni *v.* Nkohla, 1 N.A.C. 172, Macebo *v.* Mbam, 3 N.A.C. 139 and Ngcongco *v.* Dayimani & Ano., 4 N.A.C. 179). This being so, plaintiff should have stated clearly in unequivocal language that his claim was against first and second defendants jointly and severally. He did not do so, but there is still sufficient information in the particulars of claim to make it clear that that was his intention, for at the close of the particulars of claim in the summons he prays for judgment against the defendants for five head of cattle or their value, £25. There can be no doubt, however, that second defendant intended to take advantage of the defect in the summons and refrained from pleading, and since he has not pleaded he is not properly before the Court and plaintiff should have had recourse to the procedure provided in rule 3, Order IX, Proclamation No. 145 of 1923, as amended.

Second defendant did not raise this defence in the Court *a quo* which, had he done so, would conceivably not have dismissed the summons against him but rather have allowed plaintiff to rectify the omission on such terms as to costs or otherwise, as the Court may have judged reasonable (*vide* section 99 of Proclamation No. 145 of 1923).

The matter is one entirely of procedure and, however vexatious the omission may be, it would, in my opinion be wrong to allow respondent to succeed on this point. The most this Court could do would be to set aside the judgment of the Additional Native Commissioner and return the record to him to deal with this defence. Plaintiff would then, no doubt, meet the position by amending the summons and nothing would be gained by the defendant.

I turn now to the question on which the appeal was brought. I have had the advantage of reading the judgment of the learned President and I agree that the Additional Native Commissioner erred in holding that the maxim *actio personalis moritur cum persona* applied in this case. Kraalhead liability is something peculiar to Native custom and there is no parallel in Common Law. We must therefore look to Native custom for the solution.

In this case the parties are resident in a Tembu location in the District of Umtata and Tembu custom must be applied. The case of Mgadlwa *v.* Makupula [1947 N.A.C. (C. & O.) 22], on which the Additional Native Commissioner relied, is one emanating from a Pondo area and purports to decide only what the Pondo custom is.

In the case of Mayekiso *v.* Sifuba & Ano. (3 N.A.C. 247) the Court held that defendant, who was both heir to the tort-feasor and kraalhead, was liable for the whole amount of the claim. In that case the pregnancy was reported to the defendants and the case was taken before the headman before the death of the tort-feasor.

In the case of Kawu v. Meji (5 N.A.C. 85), the decision purported to follow that in Mayekiso's case and the following passage occurs in the judgment of the learned President, " On the question being referred to the Native assessors they express the opinion that where the seduction is proved either by the admission of the kraalhead or the customary report of the seduction the kraalhead is liable even after the death of the seducer and even if he left no property. This opinion is in agreement with that given by the Assessors in the case above quoted and is accepted by this Court."

In my view the significant part of the opinion of the assessors is to be found in this passage " where the seduction is proved either by admission of the kraalhead or by the customary report of the seduction ", thus clearly showing that the liability of the kraalhead would depend on the customary procedure of a report of the tortious act or an admission thereof before the death of the tort-feasor.

Likewise, in the case before us the opinion of the assessors, John Ngcwabe, " the kraalhead would not be liable if judgment has not been given in the case " seems to go even further to protect the kraalhead from liability if there had been no proof of the adultery before the death of the adulterer.

It seems to me then that the underlying principle of law is that there should be some customary proof of the tortious act before the death of the tort-feasor. Now the question arises, if the death of the adulterer is made a bar to the action, how is the proof to be adduced? In our present day judicial system it must of necessity be adduced in a Court of competent jurisdiction.

It would therefore be incorrect to hold that the death of the tort-feasor is a bar to the action and the correct, and in fact, only construction to be placed on the expression of opinion by the assessors is, in my opinion, that the action is not barred by the death of the tort-feasor after " action has been taken ", but plaintiff's success would depend very largely on there being proof of a report of the adultery or an extra-judicial admission thereof.

That being so, the Additional Native Commissioner was wrong in holding that the kraalhead's liability lapsed with the death of the adulterer. If the heir of the adulterer is joined in the action with the kraalhead, or if the kraalhead be also the heir, there is no reason why the action should not proceed to a conclusion.

I agree that the appeal should succeed.

Sleigh (President):

The appeal is allowed with costs, the judgment of the Addtional Native Commissioner is set aside and the record of proceedings is returned to the Court below for further hearing and a fresh judgment.

For Appellant: Mr. F. Airey, Umtata.

For Respondent: Mr. D. Alison, Umtata.

Opinion of Native Assessors.

(E. C. Bam, Tsolo; George Jwara, Mqanduli; Whalaza Qotoyi, Engcobo; John Ngcwabe, Cofimvaba; Ntabezulu Mtirara, Umtata.)

Question 1: A man, who is related to the kraalhead, commits adultery while he is an inmate of a kraal. The adultery is denied. After the adultery and the resulting pregnancy has been reported the adulterer dies. Is the kraalhead liable?

Answer (per John Ngcwaba): The kraalhead is not liable because the son denies it and he is dead.

Whalaza Qotoyi: We want to discuss the question among ourselves.
After discussion—

John Ngcwabe: The kraalhead would not be liable if judgment has not been given in the case. We have had cases in our Courts on the point.

Question 2: In a case in this Court an adulterer was not related to the kraalhead and he died before the report of the pregnancy. An action was brought against the kraalhead, who denied liability, although he admitted the pregnancy. The Assessors said the kraalhead was liable.

Answer (per John Ngcwabe): The distinction is that in that case the kraalhead admitted the pregnancy, so that no proof was required. In this case the adulterer died while he was still denying the pregnancy.

Question 3: Supposing that the kraalhead or father admits that there is evidence (e.g. a letter) of the adultery?

Answer: (per John Ngcwabe): The case has not been tried and there is no decision on the question of the adultery, so we cannot say whether there is liability.

There is a custom in our Courts that if one renders a girl pregnant and goes away and the case of pregnancy is brought to the father he says he must wait for his son. If the child of the pregnancy dies before the son returns, the matter is finished and there is no case.
Postea, 18th June.

Application for leave to appeal to the Appellate Division of South Africa.

Before J. W. Sleigh, Esq., President, Messrs. J. A. Kelly and C. C. Elston, Members of the Court (Southern Division).

Sleigh (President) delivering the judgment of the Court:

This is an application in terms of section 18 (1) of the Native Administration Act (No. 38 of 1927) for leave to appeal to the Appellate Division of the Supreme Court. The points applicant desires to take on appeal are—

(1) that the Court erred in holding that the said Bungana Maxanti was before the Court as a party to the action, as the said Bungana Maxanti had not been properly cited jointly with the defendant, Nomadini Mcuta, and had not in any manner figured as a party to the action.

(2) that, apart from the ground stated in clause (1) above, the Court erred in applying the doctrine of kraalhead liability to Bungana Maxanti, i.e. liability for the torts of an inmate of his kraal, in that not only had the said inmate, Nomadini Mcuta, died before the date of trial but had, whilst alive, pleaded to plaintiff's summons denying the alleged tort (adultery).

As will appear from the original record of the case and for the reasons which are fully set out in the judgment delivered on 16th instant, applicant was in fact properly cited and was represented right through the trial by an attorney. The first point is, therefore, not arguable.

As to the second point, this Court as now constituted, would have been prepared to consent to an appeal to the Appellate Division on the question whether in Tembu Law a kraalhead is liable for the torts of an inmate where such inmate dies after the stage of *litis contestatio* has been reached but before judgment has been given. But in this case the judgment of the lower Court was set aside and the matter has been remitted to that Court for further hearing and a fresh judgment. There is therefore no justification for putting the parties to the expense of fighting the question of law in the Appellate Division before a final decision on the merits has been given.

The application is consequently refused.

For Applicant: Mr. Alison, Umtata.

For Respondent: Mr. Airey, Umtata.

CASE No. 2.

ELLIOT DUMALISILE *v.* WILSON DUMALISILE.

BUTTERWORTH: 19th May, 1948. Before J. W. Sleigh, Esq. (President), Messrs. A. W. Leppan and E. N. D. Wilkins, Members of the Court (Southern Division).

Native Appeal Cases—Native custom—Seedbearer—Custom described—Practice and Procedure—Variation of custom must be conclusively proved.

Appeal from the Court of the Native Commissioner, Willowvale.

Sleigh (President) delivering the judgment of the Court:

The parties in this case are the descendants of the late Chief Dumalisile who was the eldest son in the great house of the Gcaleka Chief Ncapayi.

Dumalisile had eight wives. The first to be married was Nohakise the grandmother of plaintiff. Thereafter he married amongst others the daughter of a Tembu Chief, who was the mother of Dwayi and Thomas, witnesses in this case, and Novali, a daughter of another Tembu Chief. Prior to 1904 Dumalisile declared the status of his various wives. Dwayi's mother was nominated great wife, Novali was nominated right-hand wife and Nokhakisi the 1st *qadi* to the right-hand wife. At this time the whole family lived in Shixini location, in the district of Willowvale. Between 1904 and 1910 a kraal was established for Novali and Nohakisi in Ngodla location which adjoins Shixini location. About the time of the East Coast Fever (1910-11) Dumalisile married Nobunga, the mother of defendant as his eighth wife and placed her at Novali's kraal. Novali had at least four sons, namely Malunda and Mlanjeni who were born while she was living in Shixini location, and Mgqwangele and Konono who were born after the marriage of Nobunga. The witnesses for plaintiff state that there was a fifth son, Mpunzana, who was born after Mlanjeni. When Dumalisile died in 1938 all Novali's sons, except Konono, had died without leaving male issue. Konono was then a minor, and was single when he died in 1940. Both parties now claim to be heir to Dumalisile's right-hand house, in which there is some property of which details are given in the summons and which property is in the possession of defendant. Plaintiff claims the property on the ground that as heir to the first *qadi* of Novali (his father having died) he, upon the death of Konono, also became heir of Novali's house. Defendant, on the other hand, contends that his mother, Nobunga, was married as seedbearer to Novali and therefore he is regarded, according to native custom, as the younger son of Novali.

At the commencement of the trial it was agreed that the question whether Nobunga was married as seedbearer or as second *qadi* to Novali be decided first, and that the quantity of property in Dumalisile's right-hand house, about which the parties also disagree, be decided later.

The Assistant Native Commissioner correctly placed the onus on defendant to prove that his mother was married as seedbearer, and after hearing evidence on this issue from both sides he upheld defendant's contention and entered judgment for him with costs. Against this judgment plaintiff has appealed on a number of grounds. It is unnecessary to set out these because it is clear from the Assistant Native Commissioner's reasons that he held that Dumalisile married Nobunga as seedbearer to Novali and consequently Nobunga's son would succeed to the property in the right-hand house of Dumalisile in the absence of surviving male issue by Novali.

Before referring to the evidence it will be convenient to state the custom relating to the marriage of seed-bearers. The custom is of great antiquity and fairly well established, there being a number of decided cases on the point.

A seed-bearer is a woman who is married into an existing house in which there is no heir. It must be noted that a seed-bearer can only be married into the two principal houses, that is, the house of the great wife or of the right-hand wife. It is not competent to marry a seed-bearer for a *qadi* wife (Kwaza *v.* Nofesi, 2 N.A.C. 17). Moreover, it is not competent to change the status of an existing wife (except perhaps a wife of a Tembu Chief) by placing her as seed-bearer in a principal house (Maliwa *v.* Maliwa, 2 N.A.C. 193). The husband must *lobola* another wife and formally announce her status at the wedding ceremony. The primary, if not the only, object of marrying a seed-bearer is to

raise up seed in a principal house in which there is no heir. The seed-bearer is said to be the " thighs ", the " bladder " (womb) or the " body " of the woman whose place she takes. Her children are regarded as being that woman's children. She has no independent status as in the case of a *qadi* wife; she usually occupies the hut of the principal wife, and must be given that wife's cooking utensils. In its pure form the custom of marrying a seed-bearer could be resorted to only when the principal wife has died without leaving male issue, or is barren, or whose male children have died and she is past child-bearing. Any variation of this custom must be legally competent, and where such variation is alleged conclusive proof thereof must be adduced (Tshemese *v.* Tshemese, 4 N.A.C. 143). A variation of this custom is observed by some tribes. Thus the Pondo assessors in Maliwa's case *supra* stated that it is competent to marry a seed-bearer (1) in place of a woman who has died, even if such woman left male issue, (2) if the wife leaves her husband and refuses to return to him and the marriage is dissolved, and (3) if the husband himself dissolves the marriage by driving his wife away. In Hloboyiya *v.* Kulakade (3 N.A.C. 269), the opinion of the Pondo assessors that a seed-bearer could be placed in the second house (even if there was an heir in the first house) was accepted,but in Makoba *v.* Mntopayo (5 N.A.C. 152), a Pondo case, it was held that a Native with an heir in the second house may not marry a seed-bearer to raise an heir to the first house. Among the Tembus, however, it is clear [see Hahe *v.* Nokayiloti, 1941 N.A.C. (C. & O.) 115, and the case there cited], that a man does not usually marry a seed-bearer to a wife who is survived by male issue, and when it is done the seed-bearer is invariably taken from the same family as the woman she replaces. But according to the decision in Ntlangweni *v.* Mkwabane (4 N.A.C. 381), and the opinion of the Native assessors in the present case it would appear that among the Pondomisi and the Gcalekas a woman married as seed-bearer need not be related to the principal wife. The majority of the Native assessors in the present case are of the opinion that it is not competent for a man to marry a seed-bearer in the place of a wife who has died but has left male issue, and in Nomandi *v.* Ntlangeni [1936 N.A.C. (C. & O.) 112] two Pondomisi and one Tembu assessor stated that a woman so married is not really a seed-bearer, she is merely placed in the hut of the deceased wife to look after the children of that house, and when a *qadi* is married to that house her responsibility ends and the *qadi* wife then cares for the children. Although this latter opinion was not accepted by the Court, being in conflict with a previous opinion expressed by Pondomisi assessors, it does explain the anomaly of marrying a seed-bearer to raise an heir in a house in which there is already an heir. It has, however, been clearly established as far as the Pondos are concerned (see Maliwa's case *supra*) and among the Vealekas (see the opinion expressed by the majority of Gcaleka assessors in the present case), that it is not competent for a man to marry a seed-bearer for a wife who is alive and has a son living. Further I have been unable to find any authority for the proposition that it is competent to marry a seed-bearer for a wife who is still capable of bearing children. This point was, therefore, put to the Native assessors in the present case. As will be seen from their opinion, which is annexed, it is not competent for a man to marry a seed-bearer in the place of woman who is alive and not past child-bearing. M. Mlata states that a Chief could do it. Since a Chief may nominate his wives, Mlata's statement is probably correct, but the marriage of a seed-bearer in such circumstances must be conclusively proved, being as it is a variation of the basic custom.

I come now to the merits of the case. The only witness to give direct evidence of Nobunga's appointment as seed-bearer to Novali is Dwayi. He says that when the people had gathered for the wedding the day after Nobunga had arrived, Dumalisile called his family and councillors and announced " I have married this woman so she should bear for the other one (Novali) whose children died." Now, there can be no doubt that according to him the announcement was made on the wedding day. He states that he is the only one alive who was present at the family meeting, but he admits that Dumalisile's brother announced the family's decision to the wedding guests. Plaintiff has called one of these. He is Mquta Xhosana, an old man, who must be close on 90 years of age. He states he was present on the first day of the wedding and remained until the ceremony was over. He denies that such an announcement was made. If it had been made all the guests would have known about it as it is an important matter affecting the status of the Chief's wife. Mquta supported Dwayi in a previous action against the plaintiff, and it is not likely that a man of his age would demean himself by falsely contradicting his Chief and headman. He must therefore be regarded as an entirely impartial witness, and in my opinion his evidence must be accepted in preference to that of Dwayi, whose partiality is suspected in view of his previous case against plaintiff.

Defendant adduced evidence that Nobunga occupied the same hut as Novali, and was the latter's seed-bearer by repute. Plaintiff and his witnesses, however, deny this. They state that Nobunga lived in Novali's kitchen hut until her own hut was completed.

In my opinion defendant has failed to discharge the onus which was upon him. On the contrary, the weight of evidence goes to show that Nobunga was not married as seed-bearer.

Apart from this there is strong and reliable evidence that Mlanjeni attended school and died some years after Nobunga's marriage when he was in the third standard. He could not, therefore, have been five years of age at the time of his death, as contended by the defendant and his witnesses. Nobunga, who is alive and available, could have been called by the defence to settle this point, for nobody ought to know better than she whether Novali had male children alive at the time of her marriage. Defendant's failure to call her leads to the inference that he feared that she would expose facts unfavourable to him [see Elgin Fireclays, Ltd. v. Webb, 1947 (4) S.A.L.R. 749]. I accept the evidence for plaintiff that Mlanjeni was alive when Nohunga was married, and consequently it was not competent for Dumalisile to marry a seed-bearer into Novali's house.

The appeal is consequently allowed with costs and the judgment of the Court below is altered to read " Plaintiff is declared to be the heir of the late Konono, and as such is entitled to the property in the Right Hand House of the late Chief Dumalisile. Defendant to pay costs."

The record of proceedings is returned to the Court below for further hearing.

Leppan (member): I concur.

Wilkins (member): I concur.

For Appellant: Mr. Wigley, Willowvale.

For Respondent: Mr. Dold, Willowvale.

Opion of Assessors.

Assessors: Phillip Mgidi (Nqamakwe), Geoffrey Reve (Kentani), Mrazuli Mlata (Willowvale), John K. Finca (Idutywa), and Henry Bikitsha (Butterworth).

Question: A right-hand wife dies leaving sons in her own house. Has the husband the right to marry a seed-bearer into that house?

Reply: Mlata—I know that he has a right to do so in his great house, but I do not know about the right-hand house.

Reve: This may be done but the woman is not a seed-bearer. She is there only to care for the deceased's children.

Finca: This can be done but she cannot bear children for that house.

Bikitsha: Fingoes do not practise this custom to any extent. The husband has the right to marry a woman in these circumstances and her children are taken as younger children in that house.

Mgidi: We Fingoes in Nqamakwe do not practise this custom. It is far from us.

Question: Must a woman married as seed-bearer be of the same family as the deceased wife?

Reply:

Reve: No. She can come from a different family.

All agree.

Question: Right-hand wife has borne sons who have died but she is still of child-bearing age. Can the husband marry a seed-bearer for her?

Reply:

Reve: No. This reply also replies to Chiefs.

Finca: I agree with Reve.

Mlata: A Chief has the right to do so but not a commoner.

Question: Right-hand wife is past child-bearing age. Can her husband marry a seed-bearer for her if the *qadi* to the right-hand house has a son?

Reply:

Mlata: A Chief may do so but it is unusual amongst commoners.

Reve and Finca: We agree with Mlata.

Mgidi and Bikitsha: We, Fingoes, do not practise this.

CASE No. 3.

KANI FUBESI *v.* MANDLAKA AND ANO.

PORT ST. JOHNS: 26th May, 1948. Before J. W. Sleigh, Esq. (President), Messrs. H. O. Wilbraham and D. S. Grant, Members of the Court (Southern Division).

Native Appeal Cases—Native custom—Child—Illegitimate child of widow not legitimised by widow's marriage by Native custom to natural father—Practice and Procedure—Costs—Substantially party entitled to his costs—Specific performance—Delivery of child should not be decreed where enforcement of order impossible.

Appeal from the Court of the Native Commissioner, Ngqeleni.

Sleigh (President) delivering the judgment of the Court:

It is common cause that Maxoba was the widow of Duna Ziwemi, the father of first defendant. After the death of Duna she had three children by plaintiff, namely, Mabopani, Tshefu and Nomaratshiya. The dispute in this case concerns these children. Plaintiff alleges that he married Maxoba according to Native custom after the death of Duna and that the three children are the issue of this union; whereas the defence is that plaintiff contracted an *ngena* union with Maxoba and married her according to Native custom when she was pregnant with the youngest child, Nomaratshiya, and that consequently the children belong to first defendant. Maxoba has deserted plaintiff taking the three children with her; the eldest is now living with one Mazinyane and the two younger children are at the kraal of 2nd defendant at whose kraal first defendant also resides. Plaintiff prays for (1) an order declaring him to be the father and guardian of the three children and (2) an order against defendants for the delivery of the two children under their control.

The Assistant Native Commissioner after hearing evidence from both sides entered the following judgment:—

> " For plaintiff for the second and third children claimed in the summons together with costs up to date of set down of trial. Costs after set down of case to be shared equally by the parties."

Plaintiff has appealed against the Court's refusal to declare plaintiff to be the guardian of Mabopani, and against the order of costs.

In Native Law the illegitimate child of a widow is not legitimised by her subsequent marriage by Native custom to the natural father of the child (see Koteni *v.* Griffiths Davis, 4 N.A.C. 41). The onus is therefore on plaintiff to prove that the eldest child, Mabopani, was born during the subsistence of the customary union between him and Maxoba.

The District Surgeon who examined Mabopani on 1st May, 1948, estimates her age at between 13 and 14 years and not less than 12 years. His estimate is based on the physical development of the girl, but this estimate cannot prevail against the positive evidence of Maxoba, who gave evidence for the defence, that the girl was born during the spring before Headman Mofly died. It is common cause that this event took place on 16th May, 1938, consequently the girl could not have been born earlier than August, 1937. She is said to be about two years older than Tshefu who, according to convincing and reliable evidence, was born towards the end of 1939 or the beginning of 1940. It is probable therefore that Mabopani was born after August, 1937.

The next point for decision is whether plaintiff was married to Maxoba prior to the birth of Mabopani. The Assistant Native Commissioner found on the evidence that the marriage took place towards the end of 1938 or early in 1939. He bases his conclusion firstly, on the evidence of Maxoba's brother, Jodana, who states that the marriage took place not more than a year before certain cattle were attached on 20th January, 1940; secondly on the fact that a red heifer, paid as dowry by plaintiff and attached in January, 1940, is described in an interpleader claim brought by Maxoba's father as a " young " heifer, and it could not therefore have been young if it had been paid as dowry five years previously, and finally on the fact that Maxoba was registered for local tax in 1940.

Plaintiff was not a party to the interpleader claim and the statement therein that the heifer was young is hearsay and inadmissible. But even if it were admissible it is unreliable and inconclusive because the same beast is described in the warrant of attachment as a red cow.

The fact that Maxoba was registered for local tax in 1942 (The Native Commissioner's statement that it was in 1940 is wrong) does not carry the case any further, because the tax clerk states in his evidence that it often happens that a man is married for some years before his wife is registered for taxes.

Plaintiff states that he married Maxoba when the locusts were being destroyed with poison and about two years before the marriage of Douglas Ndamase which event apparently took place in January, 1936. According to his evidence therefore he married her in 1934, the first year when locusts were being destroyed with poison. His witness, Jodana states that Maxoba returned to his father's kraal soon after Duna's death and when the army locusts were on the move, that about two years later she was given in marriage to plaintiff and that Mabopani was born thereafter. According to this witness therefore Maxoba was married to plaintiff about the year 1936, and this date is probably correct since plaintiff states that Mabopani was born during the first year of their marriage. Jodana, however, contradicts himself by stating that the marriage took place a year before the attachment in January, 1940. It is abundantly clear that he is mistaken because he goes on to say that his sister was married to plaintiff and Mabopani had already been born when Mofly was murdered in May, 1938. The Native Commissioner was impressed with the evidence and demeanour of this witness. He should therefore not have fixed the date of the marriage in relation to the date of the attachment, and at the same time rejected the other evidence of this witness. The estimate of the period which had elapsed between the marriage and the attachment is, at the most, pure conjecture and unreliable. On the other hand the statement that Maxoba was married and Mabopani was born before the death of Mofly is one on which the Court was entitled to rely.

From the evidence of Jodana we are satisfied that plaintiff married Maxoba not later than 1936 and consequently he is the lawful guardian of his daughter, Mabopani.

Having come to this conclusion it follows that the appeal must also succeed on the question of costs, but it would have succeeded in any case since plaintiff was substantially successful in his claim which is indivisible, whereas defendants completely failed to establish their plea of an *ngena* union.

Plaintiff claims delivery of Tshefu and Nomaratshiya. We do not think that this is a case in which specific performance should be decreed. Apart from the fact that the children are small and it is therefore undesirable to take them away from their mother, they cannot be attached and it will be impossible to enforce delivery if failure to deliver is due to obstruction by Maxoba.

The appeal is allowed with costs and the judgment of the Court below is altered to read, " Plaintiff is declared to be the natural father and lawful guardian of the children Mabopani, Tshefu and Nomaratshiya and is entitled to their custody. Defendants to pay costs."

For Appellant: Mr. C. Stanford, Lusikisiki.

For Respondent: Mr. Miller, Ngqeleni.

CASE No. 4.

GABULELA QWAYIMANA *v.* **MFIHLO MANZIZI.**

PORT ST. JOHNS: 26th May, 1948. Before J. W. Sleigh, Esq. (President), Messrs. H. O. Wilbraham and D. S. Grant, Members of the Court (Southern Division).

Native Appeal Cases—Child—Born in wedlock—Allegation of illegitimacy must be proved.

Appeal from the Court of the Native Commissioner, Port St. Johns.

Sleigh (President) delivering the judgment of the Court:

The dispute in this case concerns a girl Totyiwe. She is the daughter of Mamsitwa who was the wife of plaintiff. It is common cause that the girl was born during the subsistence of that marriage, but the defence is that Mamsitwa was three months pregnant by Ndzingo when she eloped with plaintiff, and that at the marriage negotiations it was agreed that the child, when born, would belong to defendant.

In the Court below plaintiff was declared to be the legal guardian of Totyiwe and this judgment is attacked on appeal on its merits.

It is of course most improbable that plaintiff would have consented to the alleged agreement if Totyiwe was his legitimate offspring. As the child was born in wedlock there is thus a heavy onus on defendant to prove not only the alleged illegitimacy but also the alleged agreement. Without the proof of illegitimacy the agreement would be void as *contra bonos mores* and no Court would enforce it. The Native Commissioner came to the conclusion that this onus had not been discharged and we are satisfied that this conclusion is correct.

There are a number of discrepancies in defendant's case. It is not proposed to refer to them all. Two will suffice.

Mamsitwa, who gave evidence for the defence, states that she lived with plaintiff for more than five years before the union was dissolved, that she left him in winter and that Totyiwe was delivered to defendant the previous autumn. If the child was born six months after the marriage as the defence witnesses aver, it must have been five years of age when it was delivered to defendant. But defendant and his witness, Kunjuswa, state that the child was delivered to defendant when it was just beginning to crawl. There is convincing evidence to show that the child was about 10 years of age when it disappeared from plaintiff's kraal after the dowry paid for Mamsitwa had been *ketaed.*

The evidence of the alleged agreement that the child would, when born, belong to defendant is of vital importance, and one would expect that the defence witnesses would agree on this point. Defendant states that at the marriage negotiations he did all the talking and that Msitwa, his brother, asked plaintiff whether he knew that Mamsitwa was pregnant. Msitwa denies this and states that Mqwaba did all the talking. The contradiction supports plaintiff's evidence that Msitwa and Mqwaba were not present at all. He states that defendant's brother Mhletwa was present. It is significant that neither Mhletwa nor Ndzingo, who is alleged to have paid £5 as fine, was called to support the case for the defence, although both witnesses were available.

The evidence adduced on behalf of defendant does not rebut the presumption of legitimacy, nor does it establish the special agreement. The appeal is therefore dismissed with costs.

For Appellant: Mr. C. Stanford, Lusikisiki.

For Respondent: Mr. H. H. Birkett, Port St. Johns.

CASE No. 5.

MAGOQWANA NOTSHILA *v.* **MLAHLWA NOTSHILA.**

PORT ST. JOMNS: 26th May, 1948. Before J. W. Sleigh, Esq. (President), Messrs. H. O. Wilbraham and D. S. Grant, Members of the Court (Southern Division).

Native Appeal Cases—Native custom—Dowry—The dowry provided by a senior house for a junior wife is refundable out of dowry of daughter of such wife—The daughter does not become the property of the senior house.

Appeal from the Court of the Native Commissioner, Ngqeleni.

Sleigh (President) delivering the judgment of the Court:

It is common cause that appellant is heir in the great house of the late Notshila and that respondent is the heir in his second house. The eldest daughter in the latter house is Nonginga who has been married three times. Her first dowry was received by Notshila himself. The second dowry (four cattle) was received by appellant who used three of these cattle. The third dowry namely seven cattle, was received by appellant's agent but respondent took possession of them and also the fourth beast of the second dowry.

In an action by appellant for the delivery of the eight head of cattle, he contends that since the dowry for Nonginga's mother was provided by Notshila's great house, Nonginga belonged, according to native custom, to the great house, and that appellant as heir of that house was entitled to all dowries received for her. On the other hand respondent contends that the dowry provided for his mother by the great house was refunded by the payment to that house of Nonginga's first dowry and the three head of cattle of her second dowry. The question for decision is therefore whether appellant is entitled to a refund only of the dowry provided by the great house for the second wife, or whether he is entitled to the eldest daughter of the second house and consequently to all fines and dowries which may be paid in respect of or for her.

The Assistant Native Commissioner ruled that he was entitled to a refund of dowry only and entered judgment for defendant (respondent) with costs. Against this judgment appellant has appealed on the following grounds:—

"That on a true construction of Native Law and Custom dealing with the subject:—

Where a senior house pays dowry for the wife of a junior house, then the senior house, is without any special agreement or allotment.

'A' Entitled to be declared the owner of the eldest daughter of the minor house, born to the wife for whom dowry was paid by the senior House, and is therefore entitled to any cattle paid for such daughter whether by way of damages or dowry.

OR

'B' Entitled to all cattle paid for such eldest daughter of the said minor house by way of damages or dowry, whether the said girl be married one or more times.

AND

In either A or B above the said senior house is entitled to any illegitimate children born to such eldest daughter of the said minor house, while she be in an unmarried state as understood by native custom, especially Pondo custom, provided such rights are not overridden by payment of damages and maintenance by the natural father of such illegitimate children.

'C' That the said minor house can only ask the senior house for some gift or apportionment out of the dowry of such eldest girl of the minor house, or out of damages received in respect of such girl.

That therefore the Judicial Officer erred in ruling that the senior house paying the dowry is only entitled to receive from the cattle derived by the said minor house from the eldest daughter of such minor house, just so many cattle as the senior house paid in respect of the dowry for the wife of the said minor house."

This matter has been before the Court on numerous occations, *vide* the following cases:—

Manyosine *v.* Nonkanyezi, 1 N.A.C. 114.
Tsweleni *v.* Nyila, 1 N.A.C. 256.
Ndlovuzane *v.* David & Ano., 2 N.A.C. 124.
Boko *v.* Majovu, 3 N.A.C. 112.
Nhlongo *v.* Jakede, 4 N.A.C. 69.
Tungana *v.* Tungana, 4 N.A.C. 70.
Bomela *v.* Bomela, 4 N.A.C. 71.
Mbuncase *v.* Neke, 4 N.A.C. 72.
Debeza *v.* Debeza, 4 N.A.C. 73.
Nofidela *v.* Kekisana, 4 N.A.C. 117.
Ngwenduna *v.* Dubula, 4 N.A.C. 142.
Gwanduntutu *v.* Nota-Ka-Dlikitela, 4 N.A.C. 146.
Sigwece *v.* Jani, 5 N.A.C. 36.
Sicwebu *v.* Sicwebu, 6 N.A.C. 9.
Notsete *v.* Notsete, 6 N.A.C. 11.
Tyoba *v.* Vuta, 6 N.A.C. 42.
Mdontsane *v.* Mdontsane, 1939 N.A.C. (C. & O.) 155.
Zamela v. Zamela, 1944 N.A.C. (C. & O.) 20.
Mayekiso v. Mayekiso, 1944 N.A.C. (C. & O.) 81.
Mayekiso *v.* Mapitsha, 1945 N.A.C. (C. & O.) 55.

Unfortunately the decisions have not always been consistent, but in Mapitsha's case *supra* the Fingo assessors stated that if dowry for a junior wife is paid out of stock belonging to a senior house, the heir of the latter is entitled to a refund of the dowry so paid, out of the dowry of the eldest daughter of the junior wife and if the dowry of such daughter is insufficient to repay the debt due to the

senior house the balance of the debt is paid out of the dowries or fines paid in respect of other daughters of the junior wife. The majority of the decisions to which we have referred are in accord with the opinion of the assessors in Mapitsha's case, but since the parties in the present case are Pondos the matter was referred to the Pondo assessors whose opinion is appended. According to them the dowry provided for the junior wife is not refundable if such junior wife is the right-hand (*kohlo*) wife, unless the dowry paid for her comes form the dowries of daughters of the great wife, and in that case the refund consists of a cow and a calf only and not the full dowry paid for the right-hand wife. When, however, the junior wife is a *qadi* (*isitembu*) wife her eldest daughter is regarded in law as beloning to the senior house which provided the dowry, and such daughter's dowry, irrespective of the number of cattle paid, would belong to the senior house.

This opinion throws an entirely different light on the question and although it is in conflict with the opinion expressed in Mapitsha's case, it may well explain the conflicting decisions on this vexed question.

It is unnecessary for the purpose of the present case to decide whether the assessors' opinion should be accepted in its entirety. It is admitted that Nonginga's mother was the right-hand wife of Notshila and consequently, even if her dowry came from the dowries of daughters of the great house, that house has already been fully reimbursed. Nonginga does not, in law, belong to Notshila's great house and appellant is not entitled to all the dowry paid for her.

The appeal is dismissed with costs.

For Appellant: Mr. Stanford, Lusikisiki.

For Respondent: Mr. Miller, Ngqeleni.

Opinions of Native assessors Tolikana Mangala, Mdabuka Cetywayo, Gobo Notobela, Ben Ndabeni.

Question: The Great House provides nine head of cattle for the dowry of the right-hand wife. The eldest daughter of the right-hand house is married, and twelve head of cattle are received as dowry for her. Is the heir of the Great House entitled to all twelve cattle, or only a refund of the nine originally paid?

Per B. Ndabeni: The custom is that the right-hand house does not return cattle to the Great House, unless the dowry paid for the right-hand wife was taken form cattle received for daughters of the Great House.

Question: When does the right-hand house return these cattle?

Per B. Ndabeni: When the dowry for a daughter of the right-hand house is received. Ordinarily, the cattle from the Great House are not returnable.

Question: A married man has a sister. The dowry for his first wife was provided by his father. After his father dies, his sister is married and with the dowry he receives for her he establishes his right-hand house. Must the right-hand house return these cattle?

Per B. Ndabeni: No. Others agree.

Per T. Mangala: Only a cow and calf are returned. Others agree.

Question: In other words, the daughter of the right-hand house is not the property of the Great House?

Per T. Mangala: No. Others agree.

Question: Where a man dies leaving two houses and leaves heirs in both: The first daughter of the right-hand house is married three times, the first dowry was taken by the man before his death: Now, there is a dispute between the two heirs over the cattle received for the second and third dowries?

Per B. Ndabeni: None of these cattle go to the Great House.

Question: Where a *qadi* house to the Great House has been established, does the dowry of the first daughter of the former house go to the Great House?

Per B. Ndabeni: The daughter of the *qadi* belongs to its senior house—I mean all her dowry up to the date of her death.

Question.—What happens if the dowry received for the daughter of the Qadi House is not sufficient to repay the cattle advanced?

Per B. Ndabeni: Nothing is done as there are no more cattle.

Question: If the dowry received for the daughter of the *qadi* house is more than that paid for her mother?

Per B. Ndabeni. They all go to the senior house, even fines received for her—everything. Other agree.

Question: Who gives the daughter of the qadi house in marriage, who performs her *tombisa* ceremony and who provides her wedding outfit?

Per B. Ndabeni: The heir of the senior house gives her in marriage, but it is customary for him to give some of the dowry to the *qadi* house.

Per T. Mangala: The heir of the senior house performs the *tombisa* and the heir of the *qadi* house also slaughters for her. The heir of the senior house provides the wedding outfit. Others agree.

CASE No. 6.

MARAOHELA KHEMANE *v.* MAKO NED.

KOKSTAD: 7th June, 1948. Before J. W. Sleigh, Esq. (President), Messrs. W. H. Warner and N. G. Cockcroft, Members of the Court (Southern Division).

Native Appeal Cases—Native Custom—Dowry—Basuto Custom—Father is liable for the dowry of his son's first wife—unless there are circumstances limiting his liability—Evidence—Allegations contrary to custom must be conclusively proved.

Appeal from the Court of the Native Commissioner, Mount Fletcher.

Sleigh (President) delivering the judgment of the Court:

In order to avoid confusion I shall refer to appellant as plaintiff and to respondent as defendant.

In the duly constituted Court of Chief Scanlan Lehana, plaintiff claimed from defendant and his son Tseko ten head of cattle, ten small stock and a *mqobo* beast, being the balance of a fixed Basuto dowry for his sister who is married to Tseko.

The Chief gave judgment for plaintiff. On appeal to the Native Commissioner's Court this judgment was altered to one for defendant with costs, the Native Commissioner holding that a father is not liable for the dowry of his son unless he specially undertook to pay the full dowry. The matter now comes on appeal to this Court.

At the outset Counsel for appellant was granted leave to argue an additional ground of appeal, namely " that in any event the evidence does not justify a final judgment in favour of respondent and that the correct judgment should have been one of absolution."

The Native Commissioner's ruling on the question of law would be correct if the woman was Tseko's second wife, but there is no doubt that she is his first wife. In Jeliza *v.* Nyamende and Ano. [1945 N.A.C. (C. & O.) 34] it was stated that according to Hlubi custom a girl's guardian can maintain an action against the father of the girl's husband for the dowry payable by the latter, but that the liability of the father or of his heir is limited to the dowry of the son's first wife, and then only if the father approved of the marriage. If he were not consulted, or did not approve of the girl, or if there are other circumstances which indicate that he refused to be bound, he incurs no legal liability. The parties in that case were Hlubis, but, if there were any doubt, it is clear from the opinion of the Native assessors in the present case that the Basuto Law on the point is the same.

According to defendant's evidence he was present when the marriage negotiations took place, approved of the marriage and paid the equivalent of ten cattle as dowry. He is therefore in law liable for the balance unless he can show that there are circumstances which limit his liability. Now, he states that his liability was so limited by a special agreement with plaintiff at the time of the marriage negotiations, that Tseko himself would be responsible for the balance of the dowry.

The question for decision is, therefore, whether the special agreement has been proved, the onus being on defendant. Now, in the Chief's Court his refusal to pay the balance of the dowry was based on an allegation that plaintiff was keeping Tseko and his wife at his (plaintiff's) kraal, but in the Native Commissioner's Court the special agreement was advanced as the ground for limiting defendant's liability. Plaintiff denies that there was any such agreement.

The alleged agreement is contrary to custom and it must therefore be proved by convincing evidence. The evidence before the Court is singularly unconvincing. Headman Borifi and Kolqana, who were present when the dowry was paid, were not called by defendant, and there is no explanation for this omission.

Moreover, at the trial, a document prepared by defendant was put in. This document is no more than a record of the dowry which had been paid, and a statement of what was still due, but if it were intended that Tseko himself would be liable for the balance, one would expect some statement to that effect in the document.

In our opinion defendant has failed to establish his defence. The appeal consequently succeeds and is allowed with costs.

The Chief, however, has erred in placing an alternative value of £10 on the *mqobo* beast, instead of the standard value of £5. It is therefore necessary to amend his judgment.

The Native Commissioner's judgment is altered to read: "The appeal is dismissed with costs and subject to the deletion of the words 'and £10 *mqobo* beast', the Chief's judgment is confirmed."

For Appellant: Mr. Zietsman, Kokstad.

For Respondent: Mr. Gordon, Mount Fletcher.

Assessors' Opinion.

Names of Assessors: Khorong Lebenya, George Zibi, Frank Nkomo, Dodo Sipika and Mkali Masepe.

Question: A father negotiates a marriage for his son and pays part of the dowry. Is he liable for payment of the balance under Basuto custom? The father and the son are still living.

Answer (per Khorong Lebenya): According to Basuto custom a father is liable for payment of the dowry of his son's first wife. All assessors agree that this is correct.

Question (per Mr. Gordon): Can the father agree with the son that the father will not be liable for payment of the dowry?

Answer (per Khorong Lebenya): No.

Question: If a young man marries a girl without the knowledge of his father, is the latter liable for payment of the dowry?

Answer (per Dodo Sipika): Even in that case, according to Basuto custom, if it the young man's first wife, the father can be compelled to pay the dowry.

All assessors agree that this is correct.

CASE No. 7.

WILLIAM MOTSEOA *v.* STANFORD QUNGANE.

KOKSTAD: 8th June, 1948. Before J. W. Sleigh, Esq. (President), Messrs. W. H. Warner and N. G. Cockcroft, Members of the Court (Southern Division).

Native Appeal Cases—Native custom—Seduction—Basuto custom—Kraalhead responsible for tort committed by unrelated inmate.

Appeal from the Court of the Native Commissioner, Matatiele.

Sleigh (President) delivering the judgment of the Court:

In this action respondent sued Moseane Motseoa and appellant, the latter in his capacity as kraalhead, for three head of cattle or their value, £15, as damages for seduction of his daughter Annie. Moseane consented to judgment and the case proceeded against second defendant alone.

The admitted facts in this case are as follows: Some twenty years ago appellant met a woman from Bechuanaland in Johannesburg. He brought her to Matatiele and lived with her as man and wife and paid local tax in respect of her until 1945 when she returned to her home. When appellant met her she had a small boy of about four years of age. This boy is Moseane (first defendant in this case). He grew up at appellant's kraal, assumed the latter's surname and looked upon him as his natural father; and appellant paid for the boys education, had him circumcised and treated him as his son. Moseane who is now about 27 years of age, has been to work on the Rand and in Natal on a number of occasions and handed all his earnings to appellant. In 1946 Moseane returned from work in Natal and a few days after his arrival *twalaed* respondent's daughter and took her to appellant's kraal where he seduced her. He desired appellant to pay dowry for the girl but appellant refused, and, when Moseane declined to take her back to her people, appellant drove them both away. The girl thereafter returned to respondent's kraal.

In the Court below it was contended that according to Basuto custom a kraalhead is not liable for the torts of an inmate of his kraal who is not related to him.

The Assistant Native Commissioner ruled against this contention and entered judgment for respondent as follows: " Against defendant No. 2: Judgment for plaintiff for three head of cattle or their value, £15, with costs of suit. Plaintiff declared a necessary witness." Against this ruling appellant has appealed on the following ground: " That the Judicial Officer's judgment is bad in law in as much as according to Basuto Law and custom as practised in East Griqualand, the second defendant is not liable for the tort committed by the first defendant, whether or not the first defendant was an inmate of the second defendant's kraal at the time he committed the tort, in view of the relationship of the first and second defendants."

At the trial three expert witnesses were called. The evidence of two of them is to the effect that a kraalhead would be liable for the torts of an inmate only if the latter belongs, according to Basuto custom, to the head of the kraal. They state that the head would not be liable for the torts of his own illegitimate son who has grown up at his kraal. The other witness disagrees and states that the kraalhead is responsible for the torts of all the inmates of his kraal whether they are related to the head or not.

We had no doubt that the third witness stated the law correctly, but as the Basuto Law on the point has, as far as we are able to ascertain, never been decided, and as the expert witnesses are divided, the matter was referred, at the request of Council for appellant, to the Native assessors. Their opinion is appended. They are unanimous that the appellant is liable because he used Moseane's earnings for his own purpose.

No doubt the opinion of the assessors was largely influenced by the fact that appellant had received and appropriated the earnings of Moseane, but in my opinion the result is the same if Maseane's earnings were not handed to appellant, because when a wrong has been committed Native Law demands to know, not who received the wrongdoer's earnings, but who is the head of the kraal where he resides. If his earnings were handed to his natural father that is a matter between the father and the kraalhead and does not concern the person who suffered the injury.

The obligation of the head to answer for those under his control is a fundamental principle which has its roots deep in the legal system of the Bantu. Thus, it is well established Native Law that the kraalhead is liable for the actionable wrongs of the inmates of his kraal. Among most tribes a father is liable for the torts of his sons, whether married or not, committed while living at his kraal. Among the Xosa speaking tribes of the Cape the kraalhead is also liable for the wrongs of unrelated inmates of his kraal. Among some tribes there are limitations to these rules. Thus among the Pondos the kraalhead can evade liability for the tort of an inmate who is not his son by giving the latter a *mgqabo* beast and instructing him to go to his own people (see Matika *v.* Norati and Lukalweni, 4 N.A.C. 179); and in Vonyela *v.* Sinxoto (2 N.A.C. 69) it was held that among the Basuto a father is not liable for the torts of his married sons. Subject to these limitations I am not aware of any decision restricting the liability of the kraalhead. At any rate in Gunyani *v.* Modesane (1 N.A.C. 255) the Native assessors stated that the kraalhead is liable for the torts of a younger brother living with him.

The absence of any decisions restricting the liability of the kraalhead to the wrongs of related inmates seems to indicate that the general principle of kraalhead responsibility has never been questioned. Naturally if the inmate has his own property he himself must satisfy the claim of the injured. But in Native Law an inmate of a kraal under tribal conditions does not generally own property in an individual capacity. The people living at a kraal form a collective unit with joint responsibilities and assets. All property and earnings accruing to members of the kraal go into a common pool and are administered by the kraalhead, for the general benefit of the permanent household. If an inmate by his labour contributes to the general support of the kraal, the kraalhead cannot escape liability on the ground that the inmate is unrelated. It would be illogical and inequitable to hold otherwise.

For these reasons the appeal is dismissed with costs, but in order to make it clear that the judgment is against the defendants jointly and severally the Native Commissioner's judgment will be amended by inserting the words " jointly and severally with first defendant, the one paying the other to be absolved " after the words " defendant No. 2."

For Appellant: Mr. Zietsman, Kokstad.

For Respondent: Mr. Walker, Kokstad.

Native Assessors' Opinions.

Names of Assessors:

Khorong Lebenya, George Zibi, Frank Nkomo, Dodo Sipika and Mkali Masepe.

The facts of the case are put to the Assessors and they are asked to state the Basuto custom.

Replies:—

Dodo Sipika (*Hlubi*): Under Hlubi custom second defendant would be liable because he used first defendant's earnings. I do not know the Basuto custom.

Khorong Lebenya (*Basuto*): The Basuto custom is the same. If second defendant wished to disclaim liability for the first defendant's torts, he should have put his earnings aside to meet such a contingency and not have used them for his own purposes.

George Zibi (Hlubi): I agree.

Frank Nkomo (*Hlubi living among Bacas*): The kraalhead is liable for the torts of the inmates of his kraal.

Mkali Masepe (*Basuto*): Second defendant is liable. First defendant must be regarded as his child because he has worked for him.

CASE No. 8.

MANGXABANI NOFEMELA *v.* **GRABILE MASETI.**

UMTATA: 16th June, 1948. Before J. W. Sleigh, Esq. (President), Messrs. J. A. Kelly and C. C. Elston, Members of the Court (Southern Division).

Native Appeal Cases—Judgment—Mandament van Spolie *is a summary procedure for recovery of lost possession—If facts disputed rule* nisi *should not be made final.*

Appeal from the Court of the Native Commissioner, Qumbu.

Sleigh (President) delivering the judgment of the Court:

On application made *ex parte* applicant obtained a rule *nisi* calling upon respondent to show cause on 2nd March, 1948, why she should not be ordered to return to applicant certain 28 goats alleged to have been spoliated by her on or about 14th February, 1948, and why she should not be ordered to pay the costs of the application. In the supporting affidavit applicant declares that he was in lawful and peaceful possession of the said goats, that on or about 14th February, 1948, and in Folosi's location in the district of Qumbu, respondent wrongfully, unlawfully and without applicant's consent spoliated and took possession of the said goats and that respondent refused to return the goats although called upon to do so.

Respondent filed a replying affidavit which is to the following effect, viz.: That she is a widow and applicant a widower, that in 1936 applicant abandoned his own kraal and took up permanent residence at her kraal where they lived together as man and wife until 12th February, 1948, that from the proceeds of respondent's land certain goats were bought which increased to about 60 of which 28 belong to her having the earmark of her late husband, the remainder belonging to applicant, that as a result of a quarrel applicant left respondent's kraal on 12th February, 1948, and undertook to transfer the 28 goats from his name to respondent's name, that on 13th February, 1948, while repondent was at the lands the whole flock disappeared from the grazing where the goats had been left in the morning, that on 14th February, 1948, respondent found the flock on the commonage, separated the goats she claimed and drove them to her own kraal without interference from anyone, that respondent was unaware that the goats had been taken from her possession by applicant the previous day, that the goats were not in applicant's possession on 14th February, 1948 and " that applicant thereafter did not interview her in this respect."

Applicant filed a further affidavit in which he declares that he had removed from respondent's kraal with his stock and that respondent spoliated the goats after she had brought an unsuccessful action for them before the sub-headman.

The Assistant Native Commissioner on these affidavits made the rule *nisi* final with costs. Against this judgment respondent has appealed.

Now, it seems to me that there are a number of facts in dispute. In the first place applicant declares that he removed from respondent's kraal (presumably on 12th February, 1948), taking the goats with him. While respondent declares that applicant left leaving the whole flock in her possession, presumably until such time as the 28 goats could be transferred into her name. If this were so then respondent was holding for herself and was in possession of the 28 goats and applicant himself was guilty of an act of spoliation by removing these goats from respondet's kraal.

Moreover it is by no means clear that applicant was in possession of the goats in dispute on 12th February, 1948. The fact that they were registered in his name is *prima facie* evidence that they were under his control, but an applicant for a *mandement van spolie* must make out more than a *prima facie* case [see Mandelkoorn *v.* Strauss and Others, 1942 C.P.D. 493). The facts, which are not disputed that the goats in question ran at respondent's kraal and bore the earmark of her late husband are very strong proof that the goats belong to her, and as owner she had the right to exercise over them all the rights of an owner including that of possession. The fact that the veterinary officer regarded applicant as the person in control of the goats does not, in my opinion, prove that respondent had relinquished possession in favour of applicant, and even if she did, he merely exercised control in her name. One cannot infer that she authorised him to remove the goats from the kraal. The decision in Gcwabe *v.* Mafuya (5 N.A.C. 160) on which the Native Commissioner relies is thus clearly distinguishable. For these reasons alone the Native Commissioner should have refused to make the rule absolute.

Even if applicant's possession is conceded it is not clear that respondent had deprived him of that possession wrongfully against his consent. According to her affidavit the goats were left in her charge temporarily. She was under the impression that they had strayed and she had therefore the right to take them back to her kraal. If this is true it cannot be said that she had taken the law into her own hands see Miller *v.* Marris, 1912 C.P.D. 203). Applicant's statement that he demanded the return of the goats is denied by respondent.

Without further inquiry it is not possible to state on which side the truth lies in all these conflicting statements.

The *Mandament van Spolie* is a summary procedure for the recovery of lost possession. The applicant must satisfy the Court that he was in peaceful and undisturbed possession and that he has been wrongfully dispossessed. If on the return day these facts are disputed in the replying affidavit the Court should not make the rule *nisi* final (see Swart *v.* Mousal, 1944 C.P.D. 502). It should call upon the deponents to submit themselves to cross-examination, and if the Court is thereafter not able to decide on which side the truth lies the rule should be discharged.

In the present case the main and ultimate dispute is whether the goats belong to applicant or respondent, and since it is not disputed that these goats bear the earmark of respondent's late husband no useful purpose would be served by remitting the case to the Court below so that the parties could be examined on the questions of possession and wrongful dispossession. It is in the best interests of the parties that the question of ownership should be decided.

The appeal is consequently allowed with costs and the judgment of the Court below is altered to read "The rule *nisi* granted on 23rd February, 1948, is discharged with costs."

For Appellant: Mr. Muggleston, Umtata.

For Respondent: Mr. Hughes, Umtata.

CASE No. 9.

KONO TABATA *v.* JOHN NOMANA.

UMTATA: 17th June, 1948. Before J. W. Sleigh, Esq. (President) Messrs. J. A. Kelly and C. C. Elston, Members of the Court (Southern Division).

Native Appeal Cases—Practice and Procedure—Rule 21, *Government Notice No.* 2254 *of* 1928—*Representation of a party in Native Appeal Court by "relative" —Relative has no right to appear unless he represented the party in Native Commissioner's Court—Rules for Transkeian Territories do not provide for representation by relative.*

Appeal from the Court of the Native Commissioner, Cala.

Sleigh (President) delivering the judgement of the Court:

The appellant in this case is in default, but Mr. Qamata, who is not a legal practitioner, appears and applies for leave to represent the appellant and to argue the appeal on his behalf. He produces a power of attorney in his favour and states that appellant who is the brother-in-law of his brother, has no means to engage councel to represent him. He confirms that he is related to appellant by marriage only.

Advocates and attorneys of the Supreme Court of South Africa are enttiled to appear in a Native Appeal Court [Section 16 (1) of Act No. 38 of 1927]. Nowhere in the Act itself are provisions made for representation of a party by a relative. But in terms of section 13 (5) (*f*) the Governor-General is empowered to make rules relating to "the appearance of parties or of persons on their behalf". Such rules have been made. They appear in section 21 of the Native Appeal Court rules (Government Notice No. 2254 of 1928) and are as follows: In any case in a Native Appeal Court a party may appear on his own behalf or be represented by his guardian or by a duly authorized relative or by a legal practitioner.

The word "relative" is not defined in the Act or in the regulations. This rule, in its literal interpretation, confers an absolute right upon any person who can trace relationship to a party to an action to represent such party in the Native Appeal Court.

Now, all members of a clan are, according to native law, theoretically related. In actual practice it will be found that members of a clan can trace relationship to a common ancestor. As inter-marriage in a clan is, by native law, forbidden, the blood relationship of a member is extended by exogamous marriages of ascending, descending and collateral relatives to members of other clans. In a native area such a member can therefore claim relationship to a vast number of people. If then it was the intention of the legislature to confer an absolute right upon a native to represent a relative without stipulating the degree of relationship it would be tantamount to allowing any native to practice as an attorney provided only that his clients are in some degree related to him. This, in our opinion, could never have been the intention of the legislature.

In our opinion the word "relative" is ambiguous. We must therefore look to other regulations for the true meaning of rule 21.

Appeals to the Native Appeal Court lie from decisions in Native Commissioners' Courts. In that Court a relative authorized by a party is entitled to represent the party but only with the leave of the Court (rule 24 of Government Notice No. 2253 of 1928). The right to represent is therefore not absolute. Here we think we have the key to the problem. The Native Commissioner's Court has facilities for going into the question of relationship which this Court has not. If that Court, in the exercise of its discretion, has allowed a relative to represent a party in that Court, such relative has an absolute right to represent the party in this Court. That in our opinion is the true meaning of rule 21 (*supra*).

It should, however, be noticed that Xalanga district, from where the present case emanates, is in the Transkeian Territories, that Government Notice No. 2253 of 1928 does not apply to these territories ,and that the rules contained in Proclamation No. 145 of 1923, which do apply, make no provision for the representation of a party by a relative (see Order IV, rule 1). It follows therefore that a party in these territories cannot be represented by a relative either in the Native Commissioner's Court or in this Court.

In any event Mr. Qamata is not related to appellant. He is related by marriage to his brother's wife but not to her brother.

The application must therefore be refused.

For Appellant: In default.

For Respondent; Mr. Muggleston,

CASE No. 10.

MAFUFUKWANA GWADISO *v.* GOBINAMBA MAFANA.

UMTATA: 21st June, 1948. Before J. W. Sleigh, Esq. (President), Messrs. J. O. Cornell and R. S. Mundell, Members of the Court (Southern Division).

Native Appeal Cases—Practice and Procedure—Vindicatory action—Proof of ownership essential—Defendant entitled to rebut evidence of ownership by proving that property belong to other people—On pleadings such evidence not new defence.

Appeal from the Court of the Native Commissioner, Tsolo.

Sleigh (President) delivering the judgment of the Court:

It is common cause that Mayira is the grandmother of plaintiff, the mother of defendant and the great wife of the late Gwadiso, and that plaintiff through his father is the heir in the Great House of Gwadiso. In paragraph 4 of the particulars of claim it is alleged:—

> That on or about June, 1947, the said Mayira transferred 12 head of cattle, the property of the Great House, to Mamtolo, the wife of the defendant without plaintiff's authority or knowledge.

To this allegation defendant pleaded as follows:—

> Defendant admits that Mayira, the widow of the late Gwadiso in the Chief House, transferred 12 head of cattle to defendant's wife Mamtolo but he denies that such cattle are the property of the Chief House of the late Gwadiso or that the said Mayira had no authority so to transfer the cattle and puts the plaintiff to the proof thereof.

As Gwadiso and his heir in the Great House, the father of plaintiff, are both dead, plaintiff is the owner of all property which belonged to Gwadiso's Great House. The onus is therefore upon him to prove that the cattle in question belonged to that house.

Plaintiff gave evidence and states that one of the cattle belonged to his father's estate, another is his personal property and that the remainder belong to Mayira's house, having come from Gwadiso's right-hand house as refund of the dowry paid for the right-hand wife. He admits that the increase of the cattle from the right-hand house bear the earmark of that house, that there were no daughters in that house of which Mpikeleli is the heir, and that the cattle are the dowry of Mpikeleli's daughter. He called the deputy-messenger to prove that six of these cattle were attached in an action in which Falintenjwa Mpikeleli, heir of the right-hand house, was the judgment debtor and that these cattle were successfully claimed by Mayira as belonging to her house. Plaintiff then closed his case.

Defendant then gave evidence. He admits that none of the cattle belong to him, but states that some are the progeny of cattle *ngomaed* to him by Makendela and that the balance belong to Mpikeleli being the dowry of his daughter.

Plaintiff's attorney objected to his evidence on the ground that this was a new defence of which plaintiff had no notice. The Assistant Native Commissioner upheld the objection and ruled, in effect, that evidence that the cattle belong to third parties was inadmissible, and refused to hear the evidence of Mpikeleli and other witnesses whom defendant desired to call. Judgment was given for plaintiff as prayed with costs and defendant has appealed on the following grounds:—

(1) That the Assistant Native Commissioner erred in estopping the defendant from leading evidence to rebut the plaintiff's contention that the cattle claimed were his property and proving that such stock did not belong to the Great House of the late Gwadiso and in ruling that the defendant could only adduce evidence that such cattle were his (defendant's) property and his alone.

(2) That the judgment is contrary to law and against the rules of evidence.

This is a vindicatory action in which plaintiff must prove ownership. If he fails then defendant must succeed whether the cattle belong to him or not. Defendant denies in his plea that the cattle belong to the Great House of Gwadiso and he was therefore entitled to establish this by proving that they belong to other people. He was therefore not raising a new defence. His defence all along was that the

cattle did not belong to plaintiff. At no time did he aver that they belong to him personally; and plaintiff cannot complain that he was taken by surprise, because defendant clearly indicated, in cross-examination, that he would contend that the cattle belong to Mpikeleli. The plea does not amount to a bare denial as the Assistant Native Commissioner states in his reasons. It is a denial of an alleged fact. But if it were a bare denial and plaintiff was embarrassed he should have excepted to the plea, or called for further particulars.

The Assistant Native Commissioner relies for his ruling on the decision in Letele *v.* Moses [1936 N.A.C. (C. & O.) 51]. That case is not in point. There the plaintiff claimed payment of 9 head of cattle, the balance of a Basuto dowry. Defendant pleaded that he had rejected plaintiff's daughter and forfeited the dowry he had paid. He denied that he was liable for the balance. There was no allegation in the plea that he rejected his wife for lawful cause and consequently evidence from either side was unnecessary. The question for decision was purely one of law, that is, whether under Basuto custom a husband who has rejected his wife without lawful cause is liable for the balance of unpaid dowry.

In the present case defendant was clearly entitled to rebut plaintiff's evidence of ownership by giving and adducing evidence that the cattle belong to other people.

The appeal is allowed with costs, the judgment of the Court below is set aside and the case is remitted to that Court for such evidence as defendant may wish to lead.

For Appellant: Mr. Muggleston, Umtata.

For Respondent: Mr. Hughes, Umtata.

CASE No. 11.

MANONWANA MADONELA *v.* POSI MPIKENI AND ANO.

UMTATA: 21st June, 1948. Before J. W. Sleigh, Esq. (President, Messrs J. O. Cornell and R. S. Mundell, Members of the Court (Southern Division).

Native Appeal Cases—Practice and Procedure—Onus—Presumption of legitimacy—Presumption arises when marriage proved—If marriage denied onus on party who allege it.

Appeal from the Court of the Native Commissioner, Tsolo.

Sleigh (President) delivering the judgment of the Court:

In this action plaintiff alleges that he is the brother and guardian of Nomavo, and that first defendant has given her in marriage and has received 12 head of cattle as dowry for her. He describes the cattle which he values at £10 each. He claims delivery of the said cattle or their value, £120.

First defendant filed a plea in which plaintiff's guardianship of Nomavo is admitted. Thereafter second defendant obtained leave to intervene as a co-defendant, and 1st defendant withdrew his plea and delivered another plea. Although the Native Commissioner's notes on the record do not specifically state that leave was granted to second defendant to intervene and to first defendant to deliver a substituted plea, there is no doubt that such leave was granted.

In the pleas defendant admitted that plaintiff is the brother of Nomavo, that she was given in marriage and that dowry was received for her by first defendant, but they deny that plaintiff was her guardian. Second defendant avers that plaintiff and Nomavo are both children of Nomarili, the sister of his father, that Nomarili never married, and that second defendant, as the heir of his father, is consequently entitled to Nomavo's dowry. First Defendant denies that he received 12 head of cattle as dowry for Nomavo and also denies the description of the cattle and their value.

When the case came to trial the Assistant Native Commissioner ordered plaintiff's attorney to lead evidence first. The latter refused and the Native Commissioner then dismissed plaintiff's summons with costs,

Against this judgment plaintiff has appealed on the following grounds:—

(1) That the Assistant Native Commissioner erred in ruling that the onus was on plaintiff. Where it would appear from the pleadings that the only point in issue was the illegitimacy of the plaintiff. Applicant contends that where illegitimacy is alleged the party alleging must prove.

(2) That if no evidence was led judgment must be in favour of applicant.

The presumption of legitimacy is expressed in the maxim *pater est quem nuptiae demoustrant*—"The father is he to whom the marriage points". When once the marriage is admitted or has been proved irresistible evidence is required to rebut the presumption of legitimacy. The presumption therefore does not arise until the marriage has been proved [Ndondo *v.* Ndondo, 1944 N.A.C. (C. & O.) 80].

The onus of proving the marriage is on the party who asserts it either directly or by implication as in the present case. Since defendant in the present case deny that plaintiff is the guardian of his sister, the onus is on plaintiff to prove the marriage of his mother and farther and the death of the latter.

Moreover first defendant denies that he received twelve cattle as dowry. He also denies their description and their value. Since plaintiff is suing for the delivery of certain particular cattle or payment of the value placed on them, the onus is on him to prove these facts.

The Native Commissioner was therefore correct in requiring plaintiff to lead evidence first.

The appeal is dismissed with costs.

For Appellant: Mr Hughes, Umtata.

For Respondent: Mr. Muggleston, Umtata.

CASE No. 12.

MPAZAMO SIKWIKWIKWI *v.* **QUMBELO NTWAKUMBA.**

UMTATA: 21st June, 1948. Before J. W. Sleigh, Esq. (President), Messrs. J. O. Cornell and R. S. Mundell, Members of the Court (Southern Division).

Native Appeal Cases—Native custom—Dowry—Refund of dowry provided by senior house of out of daughter of minor wife—General principles—Reimbursement confined to dowries of daughters of minor wife and does not extend to grand-daughters of such wife.

Appeal from the Court of the Native Commissioner, Tsolo.

Sleigh (President) delivering the judgment of the Court:

Appellant and respondent are respectively the heirs in the Great House and the right-hand house of the late Ntwakumbana Gxilitshe. Appellant is therefore entitled to a refund of the dowry paid for the mother of respondent out of the dowries of the latter's sisters. He had, however, no sisters and appellant now claims refund out of the dowry paid for respondent's daughter.

In the Court below respondent excepted to appellant's claim on the ground that it discloses no cause of action. The Native Commissioner after a careful consideration of the decided cases on the point, held that the source from which refund may be claimed is limited to the dowries received for the daughters of the woman whose dowry was provided by the senior house, and does not extend to the dowries of grand-daughters of such women. The Native Commissioner consequently upheld the exception and dismissed the summons with costs.

The appeal is against the Native Commissioner's ruling on the law.

In order to establish a second or an allied house, dowry must be paid for the woman married into such house. If she is the second wife, dowry for her is provided out of property belonging to the first house, and if she is a *qadi* wife her dowry is provided by the house to which she is allied. In either case a debt due to the lending house is created. But the debt has this peculiarity that it is not payable until such time as dowry is received for the daughters of the woman so married.

It is generally stated that the heir in the senior or lending house is entitled to the dowry of the first daughter of the minor wife. This statement is misleading and has led to confusion. Native assessors have been consulted on this point in a number of cases. Their opinions have not always been consistent. A substantial majority state that if the first daughter dies before marriage, or never marries, or if the dowry paid for her is insufficient to repay the debt, settlement is effected out of the dowries of other daughters of the minor wife (see e.g. Bomela *v.* Bomela, 4 N.A.C. 71), and conversely, if the dowry received for the first daughter married exceeds that paid for her mother, the refund is limited to the amount of dowry so paid [see Mayekiso *v.* Mapitsha, 1945 N.A.C. (C. & O.) 55]. Other assessors have stated or implied that the daughter herself is regarded as belonging to the Senior House and on receipt of dowry for her the debt due to that house is extinguished, whether or not her dowry exceeds that paid for her mother.

If the daughter must be regarded as belonging to the senior house it follows that the claim for refund must lapse if the daughter dies before marriage. This is not the case (see Tungana *v.* Tungana, 4 N.A.C. 70 and Titi *v.* Titi, 4 N.A.C. 369). I think it must now be regarded as settled law, at any rate in the Cape Province, that the senior house is entitled to repayment of the debt in full out of and, has a preferent claim to, any fines and dowries received for the daughters of the minor wife.

In the present case the question for decision is whether, in the absence of daughters, repayment of the debt can be claimed out of the dowries received for granddaughters of the minor wife. The matter was referred to the native assessors. As will be seen form their replies—a record of which is annexed—the majority have answered the question in the affirmative. They state, in effect, that the claim is extinguished when the heir of the senior house has received the dowry of a daughter of the minor wife or, in the event of there being no daughters, the dowry of a daughter of the heir of the minor house, or of his heir if the former had no daughter, and so on.

We do not accept the opinion of the assessors. Apart from the fact that they are not unanimous, the majority opinion is in conflict with the decision in Ngwenduna *v.* Dubula (4 N.A.C. 142) in which the facts were on all fours with the present case. It is also in conflict with the decision in Nofidela *v.* Kekisana (4 N.A.C. 117). In that case the daughter of the right-hand house was rendered pregnant and a full fine was paid. Thereafter the daughter married another man. It was held that the claim for reimbursement of the dowry paid for the right hand house wife was confined to the dowry paid for the daughter of that house and did not extend to the dowry of the daughter of the daughter. While the assessors opinion may have been influenced by the failure to claim the dowry of the daughter while it was in existence, it is clear that their opinion in that case was not affected by the fact that the child belonged to someone else by virtue of the payment of the fine, for the say " that the Great House should have pressed its claim to the fine or dowry, or both, of the daughters of the right-hand house, and, having failed to secure such cattle as were paid, cannot extend its claim for reimbursement to the issue of the daughter."

It is true that the parties in those cases were not Pondomisi as in the present case, but the customs of the Xosa speaking tribes of the Cape Province, except perhaps the Pondos, are substantially the same. If a variation of the custom is suggested this Court must be satisfied that this variation has been freely, frequently and consistantly observed over a long period, and is just and reasonable. We are not satisfied that the opinion of the majority of the assessors meets these requirements.

The appeal is consequently dismissed with costs.

Cornell and Mundell (Members) concur.

For Appellant: Mr Hughes, Umtata.

Ror Respondent: Mr Muggleston, Umtata.

Assessors' Opnion.

Name of Assessors:

Ndekandeka Nuse, Charlie Mananga, Ntabezulu Mtirarra, Henry Makamba and John Ngcwabe.

The facts of this case having been put to the assessors.

Replies:

John Ngcwabe: It is customary for the Great House to get the dowry for the girl.

Henry Makamba: The dowry should be refunded from that of the sister. If there is no sister, when he marries and has a daughter, the dowry of that child goes to the Great House.

Charlie Mananga: I agree.

Ndekandeka Nuse: I agree.

Ntabezulu Mtirara: No. If there is no daughter in the right-hand house, the claim then lapses.

The decision in Ngwenduka *v.* Dubula, 4 N.A.C. 142, having been put to the assessors.

Replies:

Henry Makamba: According to Pondomisi custom the dowry comes from the grand-daughter's dowry.

Charlie Manenga: I agree.

John Ngcwabe: I agree.

Charlie Mananga: I agree.

Ntabezulu Mtirara: I disagree.

The Pondo custom that where the minor house is the right-hand house, *only two cattle* are returned, does not effect their custom.

Question.—If the son has no daughter, does the claim extend to the daughter of the grandson i.e. great-grand-daughter?

Replies:

Henry Makamba: We know of no such case but the claim never lapses.

John Ngcwabe: The dowry of the daughter of the right-hand house goes to the Great House. Two cattle are expected. It is not our custom that if the dowry of the first daughter is insufficient the dowry of the second daughter is taken. If 15 head are paid for the mother and only four head for the daughter then only two head go to the Great House. If the dowry of the mother is four head and that of the daughter 15 head, two head are still held back, the balance going to the Great House.

The other assessors agreed with this opinion.

Case No. 13.

MTIYENI MADONYELWA *v.* RUNDASI HLANTLATA.

UMTATA: 22nd June, 1948. Before J. W. Sleigh, Esq. (President), Messrs. J. O. Cornell and R. S. Mundell, Members of the Court (Southern Division).

Native Appeal Cases—Practice and Procedure—Interpleader action—Cattle attached in possession of debtor—Presumption of ownership—Clear, substantial and conclusive evidence required to rebut presumption.

Appeal from the Court of the Native Commissioner, Tsolo.

Sleigh (President) dissenting:

In an interpleader action the Native Commissioner declared certain three cattle executable with costs and claimant has appealed.

The facts in this case are few and they stand uncontradicted. About 9 years ago the late Madonela *ngomaed* a black heifer to Kimbili, one of the judgment debtors. This fact is testified to by the witnesses Gwiji and Booi who were specially called by Madonela to witness the transaction. The former states that he *thinks* that the beast was sent to Kimbili for milking purposes, while the latter states that it was *ngomaed* and was not sent for milking purposes. It is possible therefore that Gwiji may be mistaken, but whichever is the true version it does not affect the evidence that a beast was loaned to Kimbili. These witnesses do not know what happened to the beast thereafter and whether it had any increase. If their story had been fabricated their evidence on these points would not have been negative.

According to the evidence of claimant, the heir of Madonela, this beast had a black heifer calf which he earmarked swallow tail right ear in 1942. This beast and its two increases are the cattle now in dispute, the original beast having been removed in 1945.

Now, although claimant's evidence of the increase of the original beasts stands alone, it has not been contradicted in any way. He states that he did not earmark the other progeny because he was not instructed by his father to do so. This may be an unsatisfactory explanation, but it does not alter the undisputed fact that the mother of these two calves bears Madonela's earmark. If this beast had been allotted to Kimbili as his *ngoma* portion (which is unlikely in view of the fact that Madonela received no benefit out of the *ngoma* transaction), claimant would not have earmarked it with his father's mark.

In interpleader actions the claimant is required by the rules to lodge with the Messenger of the Court a statement of the grounds upon which his claim is based, and the Messenger is required to forward such statement to the judgment creditor. This statement was not produced by respondent in the present case, and we cannot therefore be certain that it was alleged therein that one of the cattle bears the earmark of Madonela. I shall assume in respondent's favour that the statement does not contain this allegation. Nevertheless as respondent pointed out the cattle to the Messenger he must have noticed whether the one beast was earmarked, and he had the opportunity of ascertaining whether or not the mark was that of Madonela. He should therefore have been in a position to deny the evidence of the earmark. He has not done so. It seems to me therefore that the conclusion is inescapable that respondent was not in a position to do so. This Court would therefore not be justified in rejecting the evidence of claimant merely because it stands alone. This evidence together with the uncontradicted evidence of the *nqoma* transaction, rebuts the presumption of ownership which flows from possession of the cattle by the debtor.

In my opinion the cattle should have been declared not executable, but as my brothers Cornell and Mundell do not agree with me their judgment will of course be the judgment of the Court.

Cornell (Member) delivering the judgment of the Court:

The claimant in this matter relies on a contract of *nqoma* to discharge the heavy onus resting on him. *Nqoma* is a contract of loan under which the owner of stock places stock with another man whose duty it is to look after and account to the owner for such stock. The owner is, however, bound by custom to exercise the various acts of ownership, including inspection of the stock, earmarking of progeny, disposal of natural profits such as wool in the case of small stock, and allocating to the possessor, if he is satisfied, such portion as a reward as he deems fit, in order to reveal to the world that he and not the possessor is the owner.

In addition it is essential that when the loan is made independent persons are called to witness the loan and within these limits *nqoma* becomes a contract, capable of easy proof. It is at the same time a contract capable of easy misuse and misrepresentation, particularly as against third parties.

In this matter the claimant is supported by two independent persons, who while giving evidence of a *nqoma* do not link up that *nqoma* with the cattle in dispute. It is possible to say that the transaction to which they refer is an entirely different transaction and that, therefore, leaves claimant's evidence quite alone. The most that can be said for his evidence is that he earmarked one animal with what he claims is his father's earmark and that he fetched the original beast to be slaughtered. Those are the only acts of ownership which have been exercised during the existence of the alleged *nqoma*, a matter of seven years, and with these acts he seeks to rebut the strong presumption that the possessor is the owner. It is easy for the claimant to allege that a swallowtail—right ear—is Madonela's earmark and as earmarks are not registered it cannot be expected that such a statement can be easily rebutted by a third party. In fact any testimony as to an earmark given by a person other than the possessor of the earmark is primarily hearsay and obtains credence only by virtue of positive facts connected therewith. It is therefore more than difficult—nay almost impossible—for a third party to rebut such a statement unless his rebuttal is to the effect that the earmark referred to is non-existent. On the other hand the claimant is or should be able to produce other stock in his own possession bearing the same earmark to which he has testified, or some other testimony to support his meagre statements.

The judgment creditor has not given any testimony and to assume that because of that fact he is unable to rebut the claimant's evidence is perhaps going too far. He is in the position of an ordinary bystander in relation to the contract and the most he may be able to say is that he had seen the stock in the debtor's possession and the debtor exercising acts of ownership in regard to it. To require a judgment creditor to rebut meagre and inconclusive evidence is to place an onus on him which is not his. It is for the claimant to rebut the presumption of ownership and we are of the opinion that such rebuttal must be clear, substantial and conclusive before the judgment creditor can be asked to testify in rebuttal. The claimant in this matter had at his disposal other testimony which may have strengthened his case. He did not choose to place such testimony before the Court and is therefore not entitled to ask the Court to accept that, because he has given evidence, he has discharged the onus resting on him. It is his duty to prove substantially the existence of the contract on which he relies. This he has not done and the appeal is dismissed with costs.

Mundell (Member): I concur.

For Appellant: Mr. Knopf, Umtata.

For Respondent: Mr. Hughes, Umtata.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(SOUTHERN DIVISION.)
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