SELECTED DECISIONS

OF THE

NATIVE APPEAL

COURT

(SOUTHERN DIVISION)

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CASE No. 70.

DOUGLAS NTSIMANGO *v.* GESSINAH NTSIMANGO.

BUTTERWORTH: 20th September, 1949. Before J. W. Sleigh, Esq., President (Southern Division).

Native Divorce Case—Divorce—Malicious desertion—Impounding of wife under custom of Ukuteleka *no defence to claim for restitution of conjugal rights—Marriage by Christian rites—Wife cannot be impounded for payment of dowry.*

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

According to the evidence which is not contradicted, plaintiff, a widower, married defendant, a divorcée, on the 18th June, 1940, and paid four head of cattle as lobolo to her people. After their marriage he went to work at Cape Town leaving defendant at his kraal where his relative, Willard Ntsimango, also lived. When he returned from Cape Town in 1946 he accused her of having committed adultry with Willard, drove her from his kraal and instituted divorce proceedings against her. He, however, returned to Cape Town before the case could be heard and it was dismissed for want of prosecution. He returned home again in May, 1949, and found defendant living at her father's kraal. He went to her mother, a widow, apologised for his previous conduct and, in accordance with native custom, requested that defendant be permitted to return to him (i.e. he *putumaed* her). Her father's people were prepared to allow her to return, but they demanded further lobolo. Plaintiff promised to return a few days later. He did not do so but instead sent her a letter of demand for her return. His attorney was then informed that defendant had been impounded by her people against payment of further lobolo under the Native Custom of *Ukuteleka.* This, in effect, is defendant's plea to plaintiff's claim for an order of restitution of conjugal rights and failing return a decree of divorce.

In argument it is contended on her behalf that since plaintiff failed to pay the further lobolo demanded from him, her failure to return to him, when called upon to do so in 1949, was not malicious and that therefore plaintiff was not entitled to an order of restitution. For this contention counsel for defendant relies on the decision in Mbani *v.* Mbani [1939 N.A.C. (C. & O.) 91]. In that case the wife left her husband because he would not pay lobolo. Likewise in Gama *v.* Gama [1937 N.A.C. (T. & N.) 77] the husband had not paid lobolo. In both these cases *McLoughlin* (P.), held that the husband's failure to pay lobolo justified the wife's refusal to restore conjugal rights—that the wife had not "left her husband, home and family with an evil intent of abandoning them and never returning".

In the present case the lobolo demanded from plaintiff at the time of marriage was paid. This case is therefore distinguishable. But even if it were not, with respect I find myself unable to agree with the previous decisions.

It is true that in Native Law a woman for whom no lobolo has been paid is regarded as a concubine and is of little consequence in her husband's kraal. His default is not only an affront to her, but entitles her father, if he is a member of a tribe practising *teleka,* to impound her; and a plea that a customary wife is being held under the custom of *Ukuteleka* is a complete bar to an action against the father for her return. But this custom is entirely opposed to the mutual obligations of husband and wife, married according to Christian rites. If she is legally entitled to desert her husband on the ground of non-payment of lobolo she could hardly complain if her husband marries additional wives for this would enhance her status in the eyes of the natives.

The Native Appeal Court has repeatedly held that Common Law must be applied to the marriage contract of parties married according to Christian rites. [See Nontenjwa *v.* Mafeke, 1940 N.A.C. (C. & O.) 146.] If the Court were to recognise a plea of *Ukuteleka* as a bar to a claim for restitution of conjugal rights it must also, to be consistent, hold that a deserting wife, against whom a restitution order has been made, would be excused from complying with it where she is impounded for further lobolo.

This has never been the view of this Court which has always insisted upon compliance with its orders unless she is excused for reasons which are regarded as sufficient under Common Law.

The lobolo contract is one between the husband and the wife's father. It is not essential for the validity of a christian or civil marriage. If the wife makes her return conditional upon the payment of lobolo and thus lends herself to the enforcement of a demand against her husband, such conduct from the wife, who is generally under the marital power of her husband and is expected to obey him, cannot be regarded as anything else but malicious. Moreover, the view that a wife married according to Christian rites cannot be impounded was expressed in Skweyiya *v.* Sixakwe [1941 N.A.C. (C. & O.) 126].

I hold therefore, that the plea of *Ukuteleka* must be rejected and that plaintiff is entitled to the order claimed.

For plaintiff: Mr. Wigley, Butterworth.

For defendant: Mr. Dold, Butterworth.

CASE NO. 71.

ZUKUZA NGXAWUM *v.* CAWENI SIBACA.

PORT ST. JOHNS: 29th September, 1949. Before J. W. Sleigh, Esq., President, Midgley and Leppan, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Child—Born in lawful wedlock is presumed legitimate—Fine—Payment of, in respect of legitimate child contra bonos mores.

Appeal from the Court of the Native Commissioner, Ngqeleni.

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

It is common cause that Matshedi, the sister of defendant (now appellant), was the customary wife of Ponono; that after the birth of her child, Vubesi, the union was dissolved by the return of the dowry in full; that thereafter plaintiff (now respondent) married her according to native custom, and that three children were born of this union.

Respondent's case is that Matshedi was pregnant by him when she married Ponono, that Vubesi is the child born of this pregnancy and that in 1941, that is after respondent married her, he paid appellant five cattle as fine for the pregnancy and a beast as *isondlo* for Vubesi. Appellant has given her in marriage and has received her dowry.

In the Native Commissioner's Court respondent was successful in an action for the recovery of this dowry. Appellant now appeals.

The evidence is overwhelmingly in favour of respondent that he paid appellant nine head of cattle in all in 1941—six in respect of Vubesi and three as *isondlo* for three other children who were also living with appellant. These cattle were paid in addition to dowry which was paid about the year 1931. Respondent's evidence of the payment of the nine cattle is

supported by Nonkenyana and Vubesi, by Sikonco and Nokebe from whose kraals some of the cattle were transferred to appellant, and by an entry in the dipping register. In the face of this testimony the defence evidence that no cattle were paid by respondent since the beginning of the last war must be rejected.

The mere payment of a fine in respect of Vubesi does not, however, dispose of the case. She was born in lawful wedlock and the law presumes that she is the legitimate issue of the union then subsisting. Unless, therefore, respondent is her natural father and she was rejected by Ponono, this Court will not entertain respondent's claim because the payment of fine, in such circumstances, would amount to trading in children and any agreement in respect of Vubesi would be *contra bonos mores* and null and void *ab initio*.

It is common cause that the union between Ponono and Matshedi was dissolved because the latter had become pregnant as a result of illicit intercourse with respondent. The latter states that her pregnancy with Vubesi was the cause for the dissolution. He says that he was courting her and that she was two months pregnant when she married Ponono, and that when she gave birth to Vubesi she rejected Ponono and his dowry was refunded. On the other hand, appellant and his mother say that respondent rendered Matshedi pregnant with her second child and that Ponono's mother then drove her away and demanded return of the dowry in full.

Of these two versions the Assistant Native Commissioner has rightly accepted the former. By demanding and accepting the return of the dowry in full, Ponono has, in native law, repudiated the children of his marriage and it is most improbable that he would have done so if he were the father of Vubesi. Moreover, it is improbable that appellant would have accepted the fine from respondent if the latter were not the father of Vubesi.

It is true that strong and conclusive evidence is required to rebut the presumption of legitimacy of a child born in wedlock But the evidence and the probabilities in this case are strongly in favour of respondent and his evidence that he is the father of Vubesi must be accepted. The appeal is dismissed with costs; but the judgment cannot be allowed to stand in its present form.

In his prayer respondent claims six cattle and fifteen sheep or their value, £52. 10s., but in his particulars of claim he values five cattle at £5 each, one beast at £7. 10s. and fifteen sheep at 10s. each, making a total of £40.

The judgment must therefore be amended to read: "For plaintiff for the stock claimed or their value, £40, with costs".

For Appellant: Mr. Miller, Ngqelem.
For Respondent: Mr. C. Stanford, Lusikisiki.

CASE NO. 72.

STEFANE MKANZI *v.* THEOBART MASOKA.

PORT ST. JOHNS: 29th September, 1949. Before J. W. Sleigh, Esq., President, Midgley and Leppan, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Marriage by Christian Rites—Dissolution of marriage—Dowry, return of—Deductions—Pondo custom, one for services and one for wedding outfit if supplied.

Appeal from the Court of the Native Commissioner, Flagstaff.

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

Respondent married appellant's daughter, Rosina, according to christian rites on 16th January, 1940. This marriage was dissolved by the Native Divorce Court on 21st May, 1943, on the ground of desertion by Rosina. Respondent alleges that he paid appellant 9 head of cattle, 10 sheep and a horse as dowry for Rosina and now claims delivery of 8 cattle or their value, £64, 1 horse or its value, £12, and 10 sheep or their value, £10.

After hearing evidence the Assistant Native Commissioner entered judgment for respondent (plaintiff in the Court below) for the stock claimed or their value, at £5 per beast, £12 for the horse and £1 per sheep. From this judgment appellant appeals on the grounds: (1) That the judgment is against the weight of evidence and the probabilities; (2) that according to Pondo custom the presiding officer should have allowed two cattle as deductions, namely one for the services of the woman and one for the wedding outfit; and (3) that the recognised standard value of dowry horses is £10.

The first ground of appeal must fail as the Assistant Native Commissioner's finding as to the stock paid as dowry is fully supported by the evidence.

The complaint in the third ground of appeal has been met by respondent abandoning part of the alternative monetary value placed on the horse.

In regard to the second ground of appeal, it is common cause that there were no children of the marriage and that a marriage outfit was supplied by appellant. The point in dispute is whether, upon ordering the return of the dowry, the Native Commissioner should have allowed one or two cattle as the customary deduction to be retained by the dowry-holder.

There are numerous cases in which it was held that according to Pondo custom one beast is always retained by the dowry-holder when returning the dowry upon dissolution of a customary union. It is usually said that this beast is for the services of the woman. Counsel for respondent, in supporting the Native Commissioner's decision in allowing the deduction of one beast only, contends that this beast also covers the wedding outfit. But this contention is not supported by the authorities. In Deku *v.* Nyangolo (3 N.A.C. 63), a case from a Pondo district, it was held that the deduction of one beast for the services of the woman should be made in addition to a deduction of one beast for the wedding outfit. In Nzakana *v.* Dingindawo [1943 N.A.C. (C. & O.) 12] the native assessors stated that where a wedding outfit had been supplied two cattle are deducted. This statement was made after their attention had been drawn to the opinion of the native assessors in the case Sihoyo *v.* Mandobe [1941 N.A.C. (C. & O.) 5]. In that case the native assessors expressed the opinion which was accepted by the Court, that "the beast for the services of the woman covers also the wedding outfit". That case is no authority for respondent's contention, because this Court actually allowed the deduction of two cattle, i.e. one for the services of the woman and one for the wedding outfit. That case does, however, definitely decide that a beast is always retained by the father of the wife for her services at her husband's kraal.

The point was again put to the native assessors attending the present session of the Court, and they are unanimous that two cattle are deducted if a wedding outfit had been supplied. Two of the assessors, both from Eastern Pondoland, say that at one time only one beast was deducted upon the *ketaing* of the dowry, but that recently they decided to allow a second beast for the wedding outfit. They say that this was decided at a meeting of Chiefs and Headmen at Port St. Johns about three years ago.

Whatever the custom on the point in Eastern Pondoland might have been in the past it must now be accepted as settled law that in Pondoland one beast is always deducted for the services of the woman and a deduction of a further beast is allowed if a wedding outfit had been supplied.

The appeal is consequently allowed with costs and the judgment of the Court below is altered to read "For plaintiff for 7 head of cattle or their value, £35, 1 horse or its value, £10, and 10 sheep or their value, £10, and costs".

For Appellant: Mr. F. Stanford, Flagstaff.

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

CASE No. 73.

MBUBU NGIYANA *v.* SIWABA JOMOSE.

PORT ST. JOHNS: 29th September, 1949. Before J. W. Sleigh, Esq., President Midgley and Leppan, Member of the Court (Southern Division).

Native Appeal Case—Native Custom—Ngena—Ngena husband must be duly appointed by family meeting—Onus—Onus of proving appointment of Ngena *husband, party relying on it.*

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

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

This is an appeal against a judgment in an interpleader action declaring certain four cattle not exccutable with costs.

It is common cause that the cattle form part of the estate of the late Volibi who died in 1948 leaving no male issue. He was the only son of the late Nomaqina who had three wives. After Nomaqina's death his third wife, Manyati, cohabited with one Nompaka at the kraal of the deceased and as a result gave birth to Masondo (the judgment debtor). The only point in dispute is whether Masondo is the heir to Nomaqina and Volibi. In other words whether Nompaka was duly appointed to *ngena* Manyati.

Manyati, the only witness for appellant (the judgment creditor), states that her three children by Nomaqina all died, that after her husband's death Nompaka, a relative, was appointed to *ngena* her and that she had by him three children of whom Masondo is the eldest.

It is not stated how Nompaka is related to Nomaqina, nor who appointed him to *ngena* Manyati. According to the evidence he is not a descendant of Nomaqina's father, Mbiseka, who had two other sons, namely Nopeka, the eldest, and Nodange, the youngest. Nopeka had three sons. If a family meeting had been held for the purpose of appointing an *ngena* husband, such husband would have been Nopeka if he were alive, failing which then one of his sons if they were old enough and failing such sons then Nodange (see Manyosine *v.* Nonkanyezi, 1 N.A.C. 114). If Nodange also died before Nomaqina then it would have been competent to select an *ngena* husband from among Mbiseka's other male relatives, because Volibi, the heir to Nomaqina, even if he were old enough, would not be permitted to *ngena* his father's widow. Now Nompaka may be such other relative, but the onus of proving that he was the proper person to be appointed and was in fact duly appointed to *ngena* Manyati rests with appellant, and this onus has not been discharged. The appeal is consequently dismissed with costs.

For Apellant: Mr. C. Stanford, Lusikisiki.

For Respondent: In default.

CASE No. 74.

DIMANDA DUNA & ANO *v.* GWEBINKUMBI DUNA.

PORT ST. JOHNS: 30th September, 1949. Before J. W. Sleigh, Esq., President. Midgley and Leppan Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Seed-bearer—Competent to marry seed-bearer—Must be instituted with full knowledge of family group at public announcement at wedding ceremony —Evidence—When alleged must be conclusively proved—House—Not competent for husband to alter status of existing wife—Heir—A commoner must not nominate his heir —Status—Wives of Pondo derive their status and rank from chronological order of their marriages.

Appeal from the Court of the Native Commissioner, Ngqeleni.

Midgley (Member), delivering the judgment of the Court:—

Respondent who was plaintiff in the Court below sued appellant (first defendant in the Court below) and Duna Msongelwa, his father, for an order declaring plaintiff to be the great son and heir of the second defendant in his great house and in his declaration alleged:—

1. That second defendant married seven wives, the first wife married being Masiyoyo the great wife, and the second wife was one Matomose, the mother of first defendant.
2. That the great wife, the said Masiyoyo, died without leaving any issue; the second defendant then married one Mahlwatika, plaintiff's mother and placed her in the great kraal as seed-bearer to raise an heir in that house.
3. That plaintiff is the eldest son of the said Mahlwatika and is therefore the great son and heir in the great house of the second defendant.
4. That defendant No. 1 claims that as the eldest son of the second wife Matomose, he is the heir of the great house and refuses to recognise plaintiff as the great son.

The defendants pleaded:—

1. Defendants admit paragraph 1 of plaintiff's summons.
2. Ad. Paragraph 2, save that it is admitted that Masiyoyo died without issue and that the second defendant then married Mahlwatika and that she is the mother of plaintiff, the further allegation is denied and pleads especially that if it was done that it was done contrary to native custom as applicable in Pondoland.
3. Paragraph 3 of plaintiff's summons is admitted, save that it is denied that plaintiff is the son and heir of the great house of second defendant.
4. Paragraph 4 of plaintiff's summons is admitted, but first defendant pleads that in as much as he is the eldest son in the right-hand house and there being no male issue in the great house that he is entitled to the claim as set out.

When the case came to trial the claim against second defendant was withdrawn and he was awarded costs.

The Court then heard the evidence of Duna Msongelwa and entered judgment for plaintiff against the first defendant with costs and declared plaintiff to be the heir of the second defendant, in his great house.

Against this judgment the appellant has appealed on the grounds:—

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

2. The judgment is contrary to native custom in that the Native Commissioner erred in deciding that the absence of formality and necessary preliminaries did not invalidate the placing of the woman, Mahlwatika, as seed-bearer of the great house of Duna Msongelwa.

It is common cause that Duna Msongelwa, who is the father of both plaintiff and defendant married seven wives, the first and great wife being Masiyoyo and the second wife Matomose who is the mother of defendant. Masiyoyo died without issue. Duna Msongelwa then married the woman Mahlwatika who is the mother of the plaintiff, he being the eldest son of this woman.

Plaintiff alleged that Mahlwatika was married in the great house as a sead-bearer to the deceased woman Masiyoyo. Defendant denied that Mahlwatika was married as a seed-bearer in the great house.

The issue rests entirely on the question as to whether Mahlwatika was married and instituted as a seed-bearer to the great wife, Masiyoyo, who had then died.

Now, the custom of marrying a seed-bearer to a great house has been referred to in a number of cases in this Court in the latest of which Dumalisile *v.* Dumalisile [1 N.A.C. (S) 7] the matter was fully discussed and the import and meaning of the custom together with its implications was lucidly explained.

To deal more particularly with the custom as practised in Pondoland it will be convenient, I think, to refer first to the case of Maliwa *v.* Maliwa (2 N.A.C. 193) in which the Native Assessors stated: " It is not competent for a husband during the lifetime of his wife and she having a son living at the time, to put another woman into her house to replace such wife or bear children for her. The fact that such a wife is a cripple or invalid makes no difference. On the death of a wife without male issue, or even with male issue, the husband may marry a girl and put her into the deceased wife's house to replace her, she must be given all the utensils and the belongings of the late woman. Then, failing male issue by the deceased wife, the son of the woman who replaced her would inherit. It is not competent for a husband to take a wife he has already married and place her in another house nor can a common man nominate his heir."

This seems to state basically what the custom was. Then in the case of Makoba *v.* Mntopayo (5 N.A.C. 152) 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; apparently a somewhat radical difference from the custom as anunciated in the former case. A possible explanation is, however, to be found in the fact that in the latter case the point for decision was whether a man could marry a seed-bearer to a wife who is still alive and has had children by him and the opinion of the assessors should perhaps be construed as being qualified to the extent that the institution of a seed-bearer in the first house could not take place during the lifetime of the great wife. This seems to be the view taken by the learned President in Manjezi *v.* Manjezi [1942 N.A.C. (C. & O.) 49] when he rejected the opinion of the native assessors in that case where they stated that the custom of placing a seed-bearer in the great house had been abolished.

In none of these cases therefore had it been laid down that it is not competent for a man to marry a seed-bearer into his great house after the death of his great wife nor does the last of these decisions Dumalisile *v.* Dumalisile [1 N.A.C. (S) 7] purport to lay down such a proposition, but from the opinions expressed by native assessors it would seem that amongst the Pondos this custom no longer receives general recognition and in any case where its application is alleged there should be conclusive proof that it has in fact been applied (Yoywana *v.* Yoywana, 3 N.A.C.

301). It is also clear that a commoner is not entitled to nominate his heir and the wives of a Pondo derive their status and take their ranking with chronological order of their marriages. This being so the institution of a seed-bearer in the great house after the death of the great wife is an event which would affect other wives and their children and it is natural that a man would not marry a seed-bearer into his great house without full consultation with his family and a public or formal announcement at the wedding ceremony.

Assuming then that it was competent for Duna Msongelwa to marry a seed-bearer into his great house after the death of his great wife Masiyoyo, it becomes necessary to ascertain whether he did so with the full knowledge of his family group and whether he formally announced the institution of Mahlwatika in the great house as a seed-bearer at the marriage ceremony.

The only evidence adduced by plaintiff is that of Duna Msongelwa, his father, who admits that no such announcement was made, but states that his uncles discussed the matter with his family and reported to him that Mahlwatika was taking the place of Masiyoyo and although he says that he regarded plaintiff as his heir it is clear that the customary formalities of marrying a seed-bearer into the great house were not in this case carried out.

Plaintiff has not therefore proved his assertion that his mother was married as a seed-bearer to Duna Msongelwa's great wife and he cannot succeed on his claim.

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

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

For Respondent: Mr. Miller, Ngqelen'.

CASE No. 75.

NOKO MAYIBADE *v.* NGCANGOTSHANA MCOLOGWANA

PORT ST. JOHNS: 30th September, 1949. Before J. W. Sleigh, Esq., President, Midgley and Leppan Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Adultery—Specific acts of adultery must be proved—"Catch", meaning of—Inference of adultery may be drawn, otherwise merely corroborative of woman's testimony of previous acts of adultery.

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

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

Plaintiff (now appellant) sues defendant (now respondent) for certain articles of clothing or their value. Respondent admits that he is in possession of the clothing but pleads that he is holding them as *ntlonze*. He counterclaims for payment of three head of cattle or their value, £15, as fine for adultery with his customery wife, Namkwalen'. The adultery is denied in the plea to the counterclaim.

The Native Commissioner gave judgment for respondent (plaintiff in reconvention) for three cattle of their value, £15, and ordered him to return the clothing to appellant. The latter has appealed against the judgment in reconvention.

Respondent states that on the day in question he had a beer-drink at his kraal. After the beer had been finished he left for another kraal leaving his wife at his kraal. On his return at late dusk he found her and appellant standing behind his hut.

He says that appellant was dressing himself and that his wife ran away. After calling her back he took them into the hut and sent for young men. When they arrived he took from appellant the clothing after the latter had admitted having taken the woman outside. The young men have not been called to give evidence and respondent's evidence as to whether appellant was dressing or undressing himself is unsatisfactory.

The wife's evidence is that appellant returned to her kraal about sunset and asked for beer. She went to sleep after giving him beer and later he woke her and asked her to go outside with him. She says that they went outside and had carnal intercourse behind the hut and that he was dressing himself when respondent arrived on the scene. Her evidence is most unsatisfactory. She told the headman that respondent arrived before they had had intercourse and in the trial Court she contradicted herself as to whether or not intercourse had actually taken place.

Appellant admits that he returned to the kraal for *ntsipo,* and said that when this was finished he told the wife that he was leaving, and that when they were both outside the hut, the woman relieving nature, respondent arrived. He confirms respondent's evidence as to what happened thereafter. He denies that he committed adultery that evening or at any other time. He also denies that he was dressing or undressing himself when respondent arrived.

Now, it is impossible from the woman's testimony to find that adultery had taken place. The alleged admission by appellent has not been proved. If his presence at the kraal and the circumstances in which he was found could be regarded as a " catch " such " catch " will support the woman's evidence of previous acts of adultery, but respondent in his particulars does not allege previous acts of intimacy, and the evidence of such intimacy consists of the woman's bald statement: " This was not the first time he and I committed adultery. We started in reaping season and have committed adultery—he and I at my home." She admits there was no go-between which is most unusual. It is not enough to say that previous acts of adultery had taken place. There must be evidence of specific acts of adultery (Velebayi *v.* Menziwa, 5 N.A.C. 10).

In native courts a fine is imposed on the evidence of the " catch " alone. A " catch " is any circumstance which indicates undue familiarity by a man towards a woman who is not his wife. But the practice of imposing a fine on the mere evidence of a " catch " has never been adopted in our Courts (see Bekizulu ka Tshingitshana *v.* Mkonywana, 4 N.A.C. 11). Our Courts regard a " catch " which does not justify the inference that adultery had actually been committed, as evidence *aliunde* in support of the woman's story and nothing more [Dumalisile *v.* Mqananango, 1931 N.A.C. (C. & O.) 8]. In the present case the wife's evidence of the adultery cannot be accepted and consequently the " catch ", if it can be regarded as such, does not assist the respondent's case.

This case is dissimilar to the case of Wayasi *v.* Majavu (not reported). In that case there was also a " catch " and general evidence of previous acts of adultery, but in addition there was an actual payment of the fine which payment would not have been made if no adultery had taken place.

The evidence and the circumstances in this case are such that we are unable to come to the conclusion that adultery had been committed. The appeal is consequently allowed with costs and the judgment of the Court below is altered to read " For plaintiff as prayed with costs on the claim in convention. Absolution from the instance with costs on the counterclaim ".

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

For Respondent: In default.

CASE No. 76.

CHEMIST NOLUNTSHUNGU *v.* JOHN MAKOHLISO.

KOKSTAD: 5th October, 1949. Before J. W. Sleigh, Esq., President, Cornell and Wakeford, Members of the Court (Southern Division).

Native Appeal Case—Practise and Procedure—Judgment for claim not pleaded—Should not be granted if it causes prejudice—Alternative Relief—Meaning of—Should not be granted unless facts in support of such relief fully investigated.

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

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

Respondent (plaintiff in the Court below) claims in his summons (*a*) the sum of £12; (*b*) delivery of a certain red ox or payment of its value, £10. 10s.; (*c*) alternative relief; and (*d*) costs of suit.

At the commencement of the trial appellant consented to judgment for £11 in respect of claim (*a*). This was accepted by respondent's attorney. I will not refer to this claim further except to say that the Assistant Native Commissioner should have entered a judgment in terms of the consent. This will be done now.

The particulars in regard to claim (*b*) are as follows:— During the year 1947 plainttiff purchased from defendant a young red ox with white underparts for the sum of £9. 12s. 4d. which has been duly paid to defendant, but despite demand defendant fails and neglects to deliver the said ox to plaintiff.

These allegations are denied in the plea and respondent was put to the proof thereof.

Respondent led evidence to prove that while in Cape Town he sent appellant the sum of £4 to hand to Solomon Magwada which appellant failed to do; that at appellant's request he sent him ten bags of fertilizer which cost him £3. 12s. 4d.; that appellant thereafter offered to discharge his indebtedness by the delivery of a red ox upon payment by respondent of a further sum of £2 and that respondent accepted this offer and sent appellant £2.

Appellant admits misappropriating the £4. He also admits having received the fertilizer but says that on respondent's instructions he handed two bags to the latter's wife and that the balance was given to him as a present or as remuneration for looking after respondent's kraal and affairs. He denies making the offer of the ox and having received the further sum of £2.

The Assistant Native Commissioner was not satisfied that the agreement in regard to the sale of the ox had been established, but entered judgment for respondent for the sum of £7. 12s. 4d. being the £4 misappropriated and the price of the fertilizer, and ordered appellant to pay the costs.

From this judgment appellant appeals on the following grounds:—

> That the Assistant Native Commissioner, having rejected the letter (exhibit " B ") as not being genuine and not having been written or sent by, or on behalf of, defendant to plaintiff, and having held that plaintiff had failed to discharge the onus of proving the contract of purchase and sale in respect of plaintiff's claim (*b*), as alleged in paragraph 3 of the particulars of claim, erred in granting judgment in favour of plaintiff for the sum of £7. 12s. 4d., with costs,

based on the grounds not alleged in the summons, in as much as no such claim was made, embodied, or alleged in the summons and he should have entered judgment in favour of defendant, with costs, or granted absolution with costs, in respect of claim (*b*).

The Assistant Native Commissioner in giving judgment for an amount not claimed in the summons, relies on the decision in Robinson *v.* Randfontein Estates G.M. Co., Ltd. (1925 A.D. 173). At page 198, *Innes, C.J.*, said:— "The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for the pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been so thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been". Needless to say the principle here enunciated has been followed in a number of cases. It is applied more readily where the defence proved has not been pleaded, as for instance in Robinson's case, but it may also be applied where the cause of action proved was not pleaded as for instance in Vos *v.* Cronje and Duming [1947 (4) S.A.L.R. 873], in which case an estate agent claiming commission was awarded damages for breach of contract. The principle should not, however, be applied where it will result in prejudice to one of the parties.

In the present case the judgment does cause prejudice. If respondent had sued for refund of the £4 it is probable, in view of the evidence, that appellant would have consented to judgment and thus saved costs. As it turned out he was ordered to pay all the costs.

Moreover, the supply of ten bags of fertilizer to appellant has not been fully investigated. Respondent admits that he instructed appellant to hand two bags to his wife and appellant's evidence that he did so and used it on respondent's land is not contradicted by any admissible evidence. For the purpose of respondent's case refutation was unnecessary, because it was not part of his case to prove that appellant had appropriated the whole consignment. His case is that appellant undertook to deliver a beast in exchange for £6 and fertilizer received. In any case a *pro rata* deduction in respect of the two bags delivered to respondent's wife should have been made from the total value of the fertilizer.

It is contended on behalf of respondent that the judgment is covered by the claim for alternative relief. It is not uncommon for pleaders to include this "salutary clause" in a summons. It is intended to provide for cases where it appears at the trial that a plaintiff is entitled to some relief falling short of, or similar to, that specially prayed; it cannot be interpreted to cover the grant of relief totally different in character from that prayed; and of much wider ambit [Paull *v.* Cullum, 1932 (2) P.H. F.166]. Thus *Beck* (*Principles of Pleading*, page 50) says:— "The object of this (claim of alternative relief) is to ensure the granting of such relief as the premises of the declaration and the evidence at the trial may warrant the Court in granting, even though it has not been specially claimed. The extent to which the salutary clause may be permitted to cover claims which have not been specifically made cannot be precisely indicated, but from the opposite and negative point of view it can be said definitely that it will not operate to permit the granting of relief which is of quite a different nature from that primarily sought, at all events where the necessity for that relief is not revealed by the pleadings and established by the evidence".

As *Beck* says it is not possible to say precisely when alternative relief should or should not be granted. The function of the Court is to do justice between man and man, and it cannot do justice if it deprives the defendant of the opportunity of pleading a defence which might have been taken if the alternative relief granted had been specifically claimed in the summons. The Court should therefore ask itself whether the facts established have been fully investigated and whether any other defence might have been successfully advanced against the alternative relief desired. If the facts have not been fully investigated and if such defence might have been raised then the alternative relief should not be granted.

In the present case appellant has no possible defence against the claim for refund of £4, but the question of costs should have been considered.

In regard to the claim for the price of the fertilizer, appellant's plea would probably have been that eight bags were given to him as remuneration for ploughing respondent's land and for looking after his affairs. To establish this plea it was necessary to investigate the terms of the agreement expressed or implied when appellant undertook the management of respondent's affairs during his absence, and also the price of the fertilizer and the number of bags used by appellant on respondent's land. These points have not been investigated for the simple reason that they were never in issue.

It is contended that appellant knew how the purchase price of the ox was arrived at as the matter had been before the headman. That may be so, but he came to Court to contest the allegation that he had promised to deliver the beast. He was not there to give evidence of the number of bags of fertilizer used on his land, the reason why it was delivered to him and to dispute the price. When the Court found that the agreement in regard to the ox had not been established it should have given an absolution judgment so as to enable respondent to bring a fresh action which probably will be successful if the missing letter can be produced.

The appeal is allowed with costs and the judgment of the Court below is altered to read "For plaintiff by consent for the sum of £11 with costs up to and including 16th March, 1949. Absolution from the instance with costs on claim (*b*)".

For Appellant: Mr. Eagle, Kokstad.

For Respondent: Mr. Walker, Kokstad.

CASE NO. 77.

SOLOMON CIYA *v.* **MOSES MALANDA.**

KOKSTAD: 5th October, 1949. Before J. W. Sleigh, Esq., President, Cornell and Wakeford, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Child—Custody of illegitimate child not born of adulterous intercourse—Natural father entitled to custody of child born of another woman prior to christian marriage—Claim not a breach of the marriage contract—Custom—Acquisition of child by payment of fine not harmful to the community as a whole—Marriage by Christian Rites—Conflict of laws.

Appeal from the Court of the Native Commissioner, Umzimkulu.

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

Plaintiff (now respondent) sued defendant (now appellant) for the custody of his illegitimate child by Sina, the unmarried daughter of appellant. The parties belong to the Xosa tribe.

It is common cause that respondent paid appellant a fine of five head of cattle for the pregnancy of Sina but his claim is resisted on the grounds (1) that subsequent to the birth of the child respondent married another woman according to christian rites and consequently he has forfeited whatever rights he had to the child under native custom; (2) that respondent is a christianised native and in the circumstances his claim is immoral and *contra bonos mores.*

The Assistant Native Commissioner entered judgment for respondent and appellant appeals on the following grounds:—

(1) That the litigants having admitted that plaintiff married his present wife by christian rites after the seduction of defendant's daughter and after the birth of the illegitimate child (Tamsanqa) plaintiff cannot now legally claim the child and native law and custom does not apply.

(2) Plaintiff's claim is a breach of the christian marriage contract and is *contra bonos mores.*

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

In regard to the third ground of appeal the only points on which the parties disagree are whether respondent offered marriage to Sina when he paid the fine and whether he claimed the child before or after his marriage. I will assume in favour of appellant that respondent did not offer marriage and that he demanded the custody of the child after his marriage. In my opinion these facts have no legal bearing on the issues involved.

In support of the first and second grounds of appeal counsel for appellant relies on the decisions in Mnintshana *v.* Ngqingili (5 N.A.C. 20) and Mpande *v.* Mdingi [1929 N.A.C. (C. & O.) 20]. It is contended that the bringing of his illegitimate child into a christian home would render the living together of respondent and his wife intolerable and insupportable; that such conduct on the part of respondent would be immoral and in violation of the marital relationship which should exist between husband and wife, and further, that by his own act in marrying his wife according to christian rites he has forfeited all rights in respect of the child.

In the first case quoted the appellant who was married to his wife according to christian rites, claimed a child born of his adulterous intercourse with a spinster. This Court held that his relationship with the spinster was a breach of the solemn marriage contract entered into by him and for that reason he had no claim to the child under native law notwithstanding the payment of the customary fine. In Mpande's case the appellant purported to enter into a customary union with another woman during the subsistance of a christian marriage. This Court held that the children born of the customary union were adulterine and that the appellant was not their guardian notwithstanding the payment of dowry. The circumstances in those cases are, however, entirely different from those in the present case. The claim for the child is not a breach of the christian marriage contract. There is nothing in that contract which denies the husband the right to claim a child which legally belonged to him at the time of the marriage. He is in law solely responsible for the maintenance of the child and in claiming its custody he may be actuated by the highest motives. If his wife has any objection, and there is nothing on record to show that she is opposing his claim, she has her remedy. Prior to his marriage he had the right to compel appellant to give him the custody of the child and we fail to appreciate why he should be deprived of this right upon marriage. The custom by which a natural father can obtain the custody of his illegitimate child upon payment of the customary fine is not one which is harmful to the community as a whole and there is thus no reason why his claim should be rejected on the grounds of public policy, morality or natural justice.

This action was brought under native law, whereas appellant's defence is based on common law. Section 11 (1) of Act No. 38 of 1927 confers on Native Commissioners the discretion of applying native law in cases in which native law is involved. and, as was pointed out in Lebona *v.* Ramokone [1946 N.A.C. (C. & O.) 14] the parties cannot by their pleadings fetter the discretion of the Court.

In our opinion the Native Commissioner has exercised a wise and proper discretion in deciding the case according to the principles of native law and custom.

The appeal is accordingly dismissed with costs.

For Appellant: Mr. Walker, Kokstad.

For Respondent: Mr. Eagle, Kokstad.

CASE No. 78.

MORGEN GOVUZELA *v.* GOBA NGAVU.

KOKSTAD: 6th October, 1949. Before J. W. Sleigh, Esq., President. Cornell and Wakeford Members of the Court (Southern Division).

Native Appeal Case— Native Custom—Dowry—Liable to full Hlubi dowry unless agreement entered into as to particular system of native law to be applied—Practise and Procedure—Section 11 (2) *of Act No.* 38 *of* 1927, *ambiguous—Section interpreted*—Nqutu, Mqoba, Sidwangu *and* Isihewula *beast—Marriage by native custom—Slaughtering takes places after ten or more dowry cattle have been paid.*

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

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

Respondent belongs to the Pondomisi tribe but removed with his family from Qumbu district about 1916 and settled in a Hlubi location in Mount Frere District in which location appellant, who is a Hlubi, also resides. Here appellant eloped with and married respondent's daughter according to native custom, and paid certain cattle on account of dowry. She is still living with him and has had seven children.

Appellant, in his plea to an action by respondent for payment of the balance of a full dowry fixed according to Hlubi custom, denies that he married respondent's daughter according to Hlubi custom or that he became liable to pay the customary Hlubi dowry. The Assistant Native Commissioner, however, held in effect that the case must be decided according to Hlubi custom and that there was a balance of eleven head of cattle and a horse still owing to complete a full Hlubi dowry. He entered judgment for respondent for the payment of eleven cattle and a horse or their value, £65. From this Judgment appellant appeals.

In terms of section 11 (2) of Act No. 38 of 1927, as amended, the law to be applied in the circumstances disclosed in this action is the law in operation at the place where appellant (defendant in the Court below) resides, that is Hlubi custom, unless there was an agreement between the parties as to the particular system of law to be applied to the transaction.

This section is undoubtedly ambiguous. Does the agreement in question refer to an agreement at the time of the transaction or to an agreement in the pleadings as to the particular system of law to be applied? On the grammatical construction the latter seems to be the correct meaning in view of the fact that the comma appears after the word " proceedings " and not after

the word "applied". But to adopt this construction would lead to an absurdity because it is unlikely that a defendant would agree to the application of a more onerous system of law to his case. It is an elementary principle in construing the terms of a contract, to ascertain the intention of the parties, and it could therefore never have been the intention of the legislature to create an impossible situation, viz. that the parties, when already disputing the law applicable to the matter, must agree on the law to be applied and that the Court must disregard any agreement which might have been come to at the time when the contract was concluded. I therefore interpret the sub-section to mean that the Court shall apply the system of law in operation at the place where the defendant resides, unless the parties, in entering into the contract, had agreed that a different system of law shall apply to the transaction.

Since appellant (defendant) resides in a Hlubi location Hlubi custom must be applied in respect of the payment of dowry unless the parties agreed to apply Pondomisi custom to the lobolo contract. The onus of proving this agreement rests on appellant [Beneshe *v.* Sikweyiya and Ano., 1942 N.A.C. (C. & O.) 1].

Now, no agreement is alleged in the plea. Appellant merely denies that respondent practised Hlubi custom, that he married respondent's daughter according to Hlubi custom or that he is liable to pay the customery Hlubi dowry. He avers that if respondent requires further dowry he must *teleka* his daughter and is not entitled to sue therefor. I shall, however, assume for the purpose of this appeal that if the evidence shows that the lobolo contract was concluded according to Pondomisi custom the appeal must succeed and that respondent is not entitled to sue for dowry.

It appears from the evidence that when appellant eloped with respondent's daughter, messengers, who were sent to fetch her, demanded a fine and were paid a sum of money which the Assistant Native Commissioner found to be £2. This fine was called the *nqutwazana* (little *nqutu* beast). Appellant says that when he married respondent's daughter he knew he was liable for a full Hlubi dowry and that he is prepared to pay it, but that he is defending the action because respondent had sought to *teleka* his daughter and had demanded a *nqutwazana* which were not Hlubi customs; and that respondent had not slaughtered a beast according to Hlubi custom to celebrate the marriage.

According to Hlubi custom a beast is slaughtered after the bridegroom has paid ten or more cattle as dowry. As appellant admits that he has paid only nine he cannot expect a slaughtering. The inference cannot therefore be drawn that respondent was observing Pondomisi custom.

The words *nqutu, mqobo, sidwangu* and *isihewula* are synonymous and are applied to a beast which is payable to the woman of the kraal as compensation or fine for the loss of virginity of a girl of that kraal. There is this difference that the *isihewula* or *sidwangu* beast is not exacted if the young man offers marriage, whereas the *nqutu* or *mqobo* beast is payable in any case and, when marriage takes place, it can be sued for and forms part of the dowry even if the girl had not been seduced before marriage (see Mehlomane *v.* Nkwatsha, 1 N.A.C. 33, and Magwanya *v.* Mtambeka, 1 N.A.C. 42). Now, in my opinion, it is beside the point whether the beast is called *nqutu* or *mqobo*. It means the same and in fact the Zulu word *nqutu* is in common use among the tribes of the Cape including the Hlubi. There is therefore no substance in the contention that respondent was not following Hlubi custom when he demanded a *nqutu* beast. He was certainly not following Pondomisi custom because a *nqutu* or *mqobo* beast does not form part of the dowry payable under that custom.

It was accepted in the Court below that respondent did attempt to *teleka* his daughter, but the Assistant Native Commissioner explains that, in a previous case in which respondent described himself as a Baca, the Court upheld an exception to the summons on the ground that, as respondent was a Baca, he could not sue for balance of dowry but must *teleka* his daughter, and that it was as a result of this judgment that he recently attempted to *teleka* the woman. In the circumstances, that fact does not establish that the customary union was entererd into according to Pondomisi custom.

The payment of *nqutwazana* is a custom of recent origin. It is some payment in addition to and of lesser value than the *nqutu*. One hears of this custom among the Hlangweni tribe, but I do not know of any instance where this custom has been recognised by a Court of law. If the custom is not recognised by the Hlubis it is certainly foreign to Pondomisi custom, and the fact that respondent did claim it does not affect his right to demand and enforce payment by action at law of a full Hlubi dowry.

Appellant has thus failed to prove any facts from which the Court must necessarily infer that respondent agreed to give his daughter in marriage according to Pondomisi custom. The appeal is consequently dismissed with costs.

For Appellant: Mr Walker, Kokstad.

For Respondent: Mr. Eagle, Kokstad.

CASE No. 79.

JOEL NTABENI *v.* MLOYI MLOBELI & ANO.

KOKSTAD: 10th October, 1949. Before J. W. Sleigh, Esq., President, Cornell and Wakeford, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Dowry—Payment of, not essential to the validity of a christian marriage—Dowry contract is ancillary to civil marriage contract—Agreement to pay cannot be implied—Recovery of dowry from person who negotiated the marriage—Dowry is paid at the kraal where girl resides—Not competent for bridegroom to question authority of person who gives girl in marriage and receives dowry—Fixed Hlubi dowry consists of 20 *cattle, a horse and a* mqoba *beast—Party claiming* 25 *cattle must prove bridegroom agreed to pay.*

Appeal from the Court of the Native Commissioner, Matatiele.

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

Plaintiff's claim is set out in paragraph 3 of the particulars of claim. It is as follows:—

> Plaintiff claims from the above-named defendants jointly and severally the one paying the other to be absolved, 25 head of cattle and one horse or alternatively their value amounting to £135, being amount of dowry owing in respect of the marriage by native custom of defendant No. 2 to plaintiff's daughter, Maria Ntabeni, during or about the month of January, 1947; which said dowry defendants refuse or neglect to pay despite legal demand, wherefore plaintiff asks for judgment against defendants as claimed with costs.

Defendants in their plea aver that the marriage was according to christian rites and deny it was according to native custom. They plead that Maria was given in marriage to second defendant by Tandani who represented himself to be her father, that

the dowry agreed upon was 20 cattle, a horse and 10 sheep and that they have paid to Tandani 15 cattle and a horse. They deny liability for the dowry already paid to Tandani and consent to judgment for 5 head of cattle and 10 sheep or their value.

Plaintiff's replication is as follows:—

1. Plaintiff has no knowledge of the fact that his daughter, Maria, is married according to christian rites to defendant No. 2 and avers that if such be the case she was so married whilst a minor and without his consent.

2. Defendants knew that plaintiff is the father of Maria and that dowry is respect of the marriage to defendant No. 2 was payable to him and not to Tandani and that any agreement made with Tandani was irregular and in defiance of plaintiff's rights and wishes.

3. Plaintiff has no personal knowledge of the payment to Tandani of dowry and states that in any event the defendants wilfully and against plaintiff's wish and instructions made such payment to Tandani.

4. Plaintiff avers that the defendants are jointly and severally liable to him for a full Hlubi dowry, namely, 25 cattle and one horse as claimed by him and he again asks for a judgment with costs.

The Assistant Native Commissioner found that first defendant was warned that plaintiff is the father of Maria, but notwithstanding such warning, paid the dowry to Tandani, and that if dowry had been paid to plaintiff he would have been entitled to 25 cattle and a horse. The Native Commissioner entered judgment for plaintiff for 10 cattle or their value, being the difference between what he held to be a full Hlubi dowry and what was paid to Tandani. From this judgment plaintiff appealed and defendants have noted a cross-appeal.

According to the evidence, plaintiff, a Hlubi, is the father of Maria who married second defendant according to christian rites on 24th June, 1947. She says that she did not know that plaintiff was her father, that when she reached the age of understanding she was living with her mother at Cedarville and that she went to live at the kraal of Tandani, a Basuto, when she was about seven years of age. Tandani, who is now dead, had married her mother's sister. Plaintiff's witnesses tried to discredit her evidence by alleging that she was at school at Sigoga and in the fifth standard when she deserted to Tandani's kraal, but this evidence must be rejected as she was not cross-examined on this point and I can find no other reason for disbelieving her testimony.

In 1946, second defendant, who was employed in Durban, requested his father, first defendant, to ask for Maria in marriage. Messengers were then sent to Tandani where Maria lived and the ultimate result was that first defendant agreed to pay Tandani a full Basuto dowry for Maria, and actually paid the equivalent of 15 head of cattle, a horse, a *nqutu* beast, and the further sum of £4 for the publication of the banns, leaving a balance of 5 head of cattle and 10 small stock owing.

It is clear from the evidence that plaintiff took practically no interest in Maria. Although he knew that she was about to be married he took no steps to recover her and in this respect he contradicts his own witnesses.

The payment of dowry is not essential to the validity of a civil or christian marriage. When it is paid in respect of such a marriage the lobolo contract is ancillary to the marriage contract, and must be the subject of a special agreement and cannot be implied [Skweyiya *v.* Sixakwe, 1941 N.A.C. (C. & O.) at P. 127]. When, however, the parties belong to a tribe which has a

fixed dowry and the husband has agreed to pay dowry the inference may be drawn that he agreed to pay such fixed dowry if the woman was a spinster, and such dowry can be recovered by an action at law. But it must be emphasised that there must be evidence that the husband agreed to pay dowry or, at any rate, that the payment of dowry was contemplated by the husband and the person who gave the woman in marriage, because if there were no such agreement, fixed dowry cannot be recovered when the marriage is contracted according to christian rites. The agreement is the sole basis for the action.

Before plaintiff can therefore recover the fixed dowry from defendants he must establish that the latter agreed to pay dowry to him or his representative. Now, plaintiff admits in effect that defendants never agreed to pay dowry to him and he repudiates the authority of Tandani to give Maria in marriage and to receive her dowry. There is therefore no agreement on which he can base an action. He was therefore fortunate in obtaining a judgment at all.

Plaintiff's contention is that a customary union preceded the christian marriage. It is clear that he did not expressly consent to this union, but it is also clear that he had not objected thereto, because he actually demanded payment of dowry from defendants. Now, it is a well established custom that dowry is paid at the kraal where the girl resides [see Bushula *v.* Madap, 1945 N.A.C. (C. & O.) 32]. She is presumed to belong to that kraal and the head of that kraal is presumed to have authority to give her in marriage and receive the dowry. It is not competent for the bridegroom to question that authority even if he knows that some one else claims to be the guardian of the girl. A dispute between the guardian and the head of the kraal where she resides is not his concern. In the absence of some special agreement as to the place where dowry is to be paid, payment is made to the person who has the girl under his control and is in a position to give her in marriage. Counsel for plaintiff contends that this is not so and relies on the opinion of the native assessors in Nobeqwa *v.* Sinekile [1942 N.A.C. (C. & O.) 70] wherein they stated that the custodian of a girl has no right to give her in marriage. In that case the question for decision was whether a custodian could sue for the balance of dowry. This Court held that he could not, at any rate not when the guardian was known, as was the case in that action, and it seems that it was that fact which influenced the assessors, because our reports teem with cases in which custodians had given girls in marriage.

The position is then that if plaintiff recognizes the validity of the union between second defendant and Maria, as he does, he cannot disown the person who negotiated the marriage on his behalf. His remedy lies against such person for the dowry received. The appeal consequently fails.

One of the grounds of the cross-appeal is that the Native Commissioner erred in holding that a full Hlubi dowry consists of 25 head of cattle and a horse. In Kesa v. Ndaba [1935 N.A.C. (C. & O.) 64], the latest case on the point, the native assessors stated that Hlubis are of two kinds, that is, Hlubis proper and Hlubis who have adopted Basuto custom. The dowry of the former is 20 cattle, a horse and a *mqoba* beast and the dowry of the latter is the same except that they claim in addition 10 small stock. There are, however, a number of previous cases in which it was held that a Hlubi dowry consists of 25 head of cattle and a horse. In view of this difference the matter was again referred to the native assessors. Doda Sipika, the only Hlubi among them, explains that when the Hlubis came from Herschel about 60 years ago their dowry was 20 cattle, a horse and a *mqoba* beast and this is still paid by the Hlubis in the Mt. Fletcher District and in some locations in the Matatiele District, but in other locations in this District the dowry is 25 cattle, a horse and a *mqoba* beast. He states that this change

was decided upon at a meeting. If this is so then the Hlubis have ceased to have a uniform fixed dowry and if any one claims 25 head of cattle he would have to prove that the bridegroom agreed to pay that number of cattle. It cannot be accepted as a fixed Hlubi dowry if, at the marriage negotiations, no mention was made of the number of cattle to be paid.

Now, first defendant admits that if he had negotiated the marriage with plaintiff he would have had to pay 25 cattle, a horse and a *mqoba* beast which, he says, is a Hlubi dowry. But the fact remains that he did not agree to pay this dowry, and, as I have pointed out, plaintiff's cause of action, if he has any, must be based on the agreement with Tandani. According to this agreement defendants were liable only for 20 cattle, a horse, a *mqoba* (*nqutu*) beast and ten small stock.

There is overwhelming evidence that defendants paid the equivalent of 15 cattle, a horse and a *nqutu* beast. The balance is therefore 5 cattle and 10 small stock, for which he consented judgment.

The appeal is consequently dismissed with costs. The cross-appeal is allowed with costs and the judgment of the Court below is altered to read "For plaintiff by consent for 5 cattle or their value, £25, and 10 small stock or their value, £5, with costs up to and including 30th October, 1947, costs after this date are awarded to defendants".

Native Assessors' Opinion.

Names of Assessors:

Doda Sipika (Matatiele), Joseph Moshesh (Matatiele), Wana Makaula (Mount Frere), Khorong Lebenya (Mount Fletcher), and Bishop Ntlabati (Umzimkulu).

Question: The assessors' attention is drawn to the opinion in Kesa *v.* Ndaba and they are asked to state what the Hlubi dowry is.

Doda Sipika (*Hlubi*): Lobolo today amongst Hlubis is 25 head of cattle, one horse and a *mqoba* beast. It used to be 20 head of cattle, one horse and a *mqoba* beast.

Bishop Ntlabati (*Hlangweni*): The Hlubi dowry is the same as ours, i.e., 25 head of cattle, one *nqutu* beast. Horses (2) are counted amongst the cattle—also sheep.

Doda Sipika: We changed from 20 to 25 head when we came from Herschel. The children from Herschel who married still paid 20 head. The change was decided at a meeting because we found here that a Chief claimed 30 head and it was decided to make it 25 head for both Chief and commoners. I am 70 years of age and came here as a small boy. In Zibi's location, Mount Fletcher, and in Madlangala's Location, Matatiele, they pay 20 head. In Mguba's, Magadla's and Lupindo's people pay 25 head.

For Appellant: Mr. F. Zietsman, Kokstad.

For Respondent: Mr. Elliot, Kokstad.

CASE No. 80.

ALBERT KHOAPA *v.* LETEBELE MOTHAPA.

KOKSTAD: 11th October, 1949. Before J. O. Cornell, Esq., Acting President, Cockcroft and Wakeford, Members of the Court (Southern Division).

Native Appeal Case—Practise and Procedure—Native Appeal Court has no power to hear fresh evidence—Inordinate protraction of proceedings deprecated—Inspection in loco—

Presiding Officer must make notes on record of holding inspection and record result and observations—Exhibits—Presiding officer must make explanatory notes on record regarding any exhibit.

Appeal from the Court of the Native Commissioner, Matatiele.

Cockcroft (Member), delivering the judgment of the Court:—

At the commencement of this session of the Court, on the 5th October, 1949, appellant's counsel, Mr. F. Zietsman, made application for the postponement of the hearing of this appeal to the next session of this Court at Kokstad in February, 1950.

The grounds advanced were that (*a*) the copy of the record had only just been received and (*b*) defendant's attorney had, after receipt of the Assistant Native Commissioner's reasons for judgment, which are dated the 19th April, 1949, visited the locality where the stock had been seized. By using a compass he had come to the conclusion that Mathlalepule's kraal, which the presiding officer, in his reasons for judgment, states is approximately 150 yards west of the culvert was actually north of the culvert. Defendant's attorney was at present away from Matatiele, and he desired to submit further evidence to show that the presiding officer had wrongly stated that this kraal was west of the culvert. The application was not supported by affidavits.

When informed by the Court that argument of this appeal would be heard only on the 10th October, Mr. Zietsman did not press the first ground. Mr. Elliot for respondent strenuously opposed the application.

As the rules of the Native Appeal Court do not provide for the production before this Court of fresh evidence [Mcitakali *v.* Sibaxa, 1938 N.A.C. (C. & O.) 74] the application was refused with costs.

Argument on the appeal was heard on the 10th October, 1949, but owing to the omission of essential data from the record it is felt that justice cannot be done by giving a decision on the appeal as the record stands at present.

This case comes from the district of Matatiele and defendant has appealed against a judgment for plaintiff for 9s., being the amount paid to release his stock seized by defendant and £2. 10s. special damages for wrongful seizure and costs.

Defendant is headman of Khoapa's location, Matatiele, which has, it is alleged in the summons, a common grazing ground with Ramohlakoa's location, Matatiele, where plaintiff is a resident. Plaintiff in his claim further alleges that on 23rd January, 1944, plaintiff's cattle, 20 in number, were grazing on the common grazing ground and were wrongfully and unlawfully seized by defendant and/or his agents and that to obtain the release of these cattle, he had to pay defendant and/or his agents the sum of 9s. By reason of this unlawful act plaintiff claimed £5 as special damages for defendant's "high-handed and wrongful act".

Defendant eventually filed a plea dated 1st August, 1945, which reads as follows:—

(1) The parties are natives residing in adjoining locations, the defendant being the headman of Khoapa's location and the plaintiff being a native peasant of Ramhlakwana's location.

(2) At all revelant times there was a common boundary between the locations and there was a dispute as to its whereabouts between the respective headmen and their people.

(3) The headman and people of Ramhlakwana's location were wrong in their contention as to where the boundary line really was and defendant and his people were right; and the line wrongly claimed by Ramhlakwana's encroached upon Khoapa's location.

(4) The land where the cattle were seized was land in Khoapa's location, and was land wrongly claimed by Ramhlakwana's location.

(5) The land upon which the cattle were seized had been duly reserved for winter grazing and was so reserved when the cattle were seized thereon as being cattle found upon commonage in Khoapa's location which had been duly reserved for winter grazing.

(6) That the action of seizing such stock by defendant as headman or by his deputies was neither wrongful or unlawful and plaintiff is neither entitled to refund of any money paid for their release or to payment from defendant of damages and none was sustained. Defendant puts plaintiff to the proof that defendant received as much as 9s. from him or that the special damages was sustained at all or are payable by defendant.

All allegations in the summons not admitted are denied.

The judgment is appealed against on the following grounds:—

(1) The issue in this case was whether the cattle seized were inside or outside the Khoapa location winter grazing area.

(2) The presiding officer's finding, that the cattle were not inside the winter grazing area, was actually in contradiction of and against the admission on the point in the evidence led by plaintiff as well as against the evidence led by the defendant.

(3) Also, where the judgment may favour the plaintiff as against the defendant as to credibility, such finding is against the weight of evidence, also the probabilities and what was seen at the inspection in loco as well as the relevant contradictory evidence and admission in the evidence led by plaintiff.

(4) That the plans drawn by defendant should not have been used as the basis of the judgment against him by the presiding officer, as they are, as to the general layout of the country and the situation and the outlines thereof, inaccurately and incorrectly drawn and set out, and, in consequence it follows that any lines filled in on such a map as indication, the boundaries of the winter grazing cannot possibly be in their correct position and on their correct alignment.

(5) That the judgment should have been, in the circumstances, for defendant, and the most the plaintiff might have expected to have received was an ordinary absolution judgment.

We feel constrained to comment on the inordinate protraction of the proceedings in this case. Summons was issued on the 16th June, 1944. After three notices to file his plea, dated 11th July, 1944, 30th November, 1944, and 19th September, 1945, defendant eventually filed his plea dated 1st August, 1945, and the case was set down for trial on the 10th January, 1946. An inspection *in loco* was held on this day, but no sworn evidence was recorded, nor according to the record, was a note made of any postponement.

Thereafter evidence was heard on the 2nd May, 1946, and the further hearing postponed to the 9th July, 1946. On that day plaintiff's attorney applied for a postponement as his

witnesses were not at Court. He was ordered to pay the wasted costs and the case was postponed to the 16th July, 1946, and after further evidence to the 30th July, 1946. On that day, although defendant had not completed his evidence, the case was postponed to a date on which Mr. Sleigh, the President of this Court, was able to attend.

On 12th October, 1948, the attorneys for the parties appeared and by consent the hearing was postponed to a date in March, 1949, to coincide with the next visit of the Native Appeal Court to Kokstad, defendant's attorney to be responsible for fixing the date. Plaintiff's attorney intimated that he was not prepared to agree to a further postponement.

The hearing was resumed on the 22nd January, 1949, when Mr. Sleigh gave evidence, and at the close of his short testimony the case was further postponed to the 29th March, 1949. On this latter date defendant completed his evidence, and judgment was given on the same day.

From the day summons was issued to the day judgment was given in this case a period of over four years and nine months elapsed, a period even longer than that which *McLoughlin* (P.), deprecated in Mdletshe *v.* Kunene, 1945, N.A.C. (T. & N.) 52, at page 54, in the following terms:—

> "In passing, this Court is constrained to comment on the inordinate protraction of the proceedings in this case, a practice which other records to be heard at this session indicate to be not uncommon at this centre. It would seem that postponements have been granted for the convenience of practitioners extremely readily. The first appearance was on 8th September, 1941. There are no fewer than eighteen postponements. The final judgment was given on 9th April, 1945. This practice is one which this Court must deprecate strongly, and unless it ceases, the matter will have to be represented to the proper quarter for correction."

From the record the responsibility for most of the delay rests with defendant or his attorney. Although defendant's attorney filed a notice of intention to defend the action on the 27th June, 1944, he failed to comply with three notices dated 11th July, 1944, 30th November, 1944, and 19th September, 1945, from plaintiff's attorney, in terms of Rule 3, Order IX, requiring him to file his plea within forty-eight hours. It was only after a request for default judgment, dated the 25th July, 1945, that defendant's attorney filed his plea dated the 1st August, 1945.

After several hearings, spread over the period 10th January, 1946, to 30th July, 1946, the proceedings were on the latter date postponed to a date on which Mr. Sleigh, defendant's witness, was able to attend.

The next note on the record is that the two attorneys appeared on the 12th October, 1948, and by consent the further hearing was postponed to a date in March, 1949, to coincide with the next visit of the Native Appeal Court to Kokstad, defendant's attorney to be responsible for fixing the date. At this appearance plaintiff's attorney intimated that he was not prepared to agree to a further postponement.

It may here be explained that Mr. Sleigh is the President of this division of the Native Appeal Court. The reports of the Native Appeal Court, Cape and O.F.S. Division, disclose that this Court held sessions in Kokstad during September, 1946, January, 1947, June, 1947, October, 1947, February, 1948, at each of which Mr. Sleigh presided.

Thereafter the division of this Court was renamed the Southern Division. The reports of this Division reveal that the Court held sessions at Kokstad during June, 1948, at which Mr. Sleigh again presided, but he did not preside at the session during October, 1948.

It seems, therefore, that if defendant's attorneys wished to study the convenience of Mr. Sleigh by not subpoenaing him to appear at a time when this Court was not sitting at Kokstad, he had the opportunity, during the period from September, 1946, to October, 1948, of subpoenaing him to give evidence on six occasions when the Court sat at Kokstad, which is 45 miles from Matatiele.

Plaintiff's attorney has contributed towards the protraction of the proceedings by adopting an over-generous attitude towards the apparent apathy of defendant's attorney. It is not clear why it should be necessary to send three notices requiring defendant's attorney to file his plea. Nor does it appear from the record why plaintiff's attorney did not lead evidence, as he stated he would in his request for a default judgment, dated the 25th July, 1946, and thereafter apply for a default judgment. The cover of the case record actually bears a rubber stamp endorsement (Judgment for plaintiff by default for 9s.) dated 30th July, 1947, but is unsigned.

Plaintiff, as *dominus litis,* is in a position to exercise control over the progress of the proceedings in the early stages, and the facts set out in the preceding paragraph indicate anything but a desire for the speedy completion of the action.

On the 9th July, 1946, plaintiff and his witnesses did not appear at Court and his attorney was compelled to apply for a postponement which was granted, and plaintiff was ordered to pay the wasted costs of the day.

When the hearing was postponed on the 30th July, 1946, to a date on which Mr. Sleigh would be able to attend, plaintiff's attorney should not have stood by for over two years till the 12th October, 1948, before insisting that the hearing should proceed.

The practice of unduly protracting judicial proceedings between natives, who are usually less vociferous and more long-suffering than other sections of the community in asserting their rights is one that cannot be too strongly condemned and cannot be countenanced by this Court.

From the record it appears that an inspectoin *in loco* was held on 10th January, 1946, before any evidence was heard in Court.

In evidence recorded on the 30th July, 1946, the witness David Maseza stated that he was present at an inspection *in loco* held in Khoapa's location that morning.

The witness, J. W. Sleigh, giving evidence on the 22nd January, 1949, refers to a donga which he pointed out to the Court that morning. From the remarks of these two witnesses it is deduced that two additional inspections *in loco* were held, but no notes to this effect were made on the record by the presiding officer.

As the inspection *in loco* is of paramount importance in this case, because it is difficult to appreciate the oral evidence about the exact location of the boundaries of the reserved winter grazing area and the spot where plaintiff's cattle were seized, it was the duty of the presiding officer to have made notes on the record of the fact of the holding of the inspections and to have recorded the result of his observations (see Havenga *v.* van Wyk and Assistant Magistrate of Potchefstroom, 1929 T.P.D. 358 and Rex *v.* Olivier, 1945 O.P.D. 10, in which latter case the Court of Appeal went so far as to order the Magistrate to amend the record so as to reflect the facts emerging from the inspection).

Towards the end of defendant's evidence, a sketch plan, exhibit " F ", was put to defendant, and he made certain comments

on features shown on the sketch. This exhibit comes into the record out of the blue, and there is no previous evidence introducing it. On it is shown the Matatiele-Qachas Nek road and the old road, the culvert over which both old and new roads cross, and near which plaintiff's cattle were seized. Various points are lettered and the eastern boundary of the reserved area is shown in its relevant positions as at (*a*) the time of the seizure, winter grazing period 1943/44, (*b*) its extension for the 1944/45 period by the headman, and (*c*) the position to which Mr. Sleigh ordered it to be altered, which is west of the 1943/44 line. The Hill, Thoboreng Elinoha, is also shown. Attached to this exhibit "F" is an explanatory key.

Exhibit "F" and its key may have been prepared by the presiding officer, but as stated earlier in the judgment there is no note on the record or on the exhibit itself, giving any indication of its origin, and this Court cannot presume that it represents the observations of the presiding officer as the result of one or other of the various inspections *in loco*.

As the exhibit was first put to defendant by his attorney during his examination in chief, it may indeed even be a sketch and key prepared by defendant's attorney.

The necessity for the presiding officer to make suitable notes on the record explanatory of the exhibit is again stressed. While he himself may be well aware of its origin this Court is not in so fortunate a position.

In considering the application by counsel for appellant that the Court should itself inspect the locality, difficulties which were insuperable presented themselves. Any such inspection must be restricted to the limits of the inspections made by the lower Court and as the record contained no information whatsoever as to these inspections this Court would run the risk of importing fresh evidence into the matter if it held an inspection itself. But this Court is still quite in the dark as to the relative situation on sketch A of the Matatiele-Qachas Nek road, of the culvert thereon, of the Mahlalepule's kraal, of Matluli's hut, of a pool near the road, of old Qachas Nek road, of Polokeng school, of Mophatso's kraal, of Mbucwana's kraal, of Mkokeli's kraal, of the various points on sketch F referred to by Albert Khoapa in his evidence and of Mole Hill.

In Havenga *v.* van Wyk *supra* and Norwitz *v.* De Villiers and Bam, 1928 O.P.D. 109, it is laid down that facts learned and conclusions arrived at by a judicial officer at an inspection should be recorded as part of the proceedings or mentioned in his reasons for judgment. This has not been done in this matter nor has the *dictum* in Kruger *v.* Ludick, 1947 S.A.L.R. (III) 23, to the effect that it is important, when an inspection *in loco* is made, that the record should disclose the nature of the observations of the Court, been observed. In Rex *v.* Andreka, 1946 E.D.L. 254, at pp. 259-60, it was stated that the Court should disclose to the defence all specific facts found upon an inspection *in loco* to enable it to meet them, but need do no more, when the inspection merely assists the Court to appreciate the evidence in general, then note on the record that the inspection was held.

Clearly the inspections in this matter were not made to assist the Court to appreciate the evidence in general and therefore all specific facts found at the inspections should have been disclosed to the parties to enable them to meet them.

This Court finds itself quite unable to arrive at a just decision in this appeal on the record it has before it and has decided that the record should be returned to the lower Court to insert, after study of the decisions referred to herein, in the record the missing links mentioned. As there has been a challenge of the Assistant Native Commissioner's finding of fact in regard to the situation of Mahlalepule's kraal by appellant's counsel, the judgment will be set aside to enable the parties to adduce any

evidence necessary to amplify or meet any of the facts or conclusions arising out of the various inspections. Thereafter the Assistant Native Commissioner will find afresh in the case and the unsuccessful party may, if then so advised, again appeal to this Court.

The judgment of the Assistant Native Commissioner is therefore set aside and the record is returned for the inclusion therein of proper notes of facts and conclusions arrived at as a result of inspections *in loco* and specifically mentioned herein, and to afford the parties an opportunity to meet such facts and conclusions. Judgment will thereafter be given afresh, the unsuccessful party, if then so advised, to note a fresh appeal. Costs of this appeal to abide the final decision in either the lower or this Court in due course.

For Appellant: Mr. F. Zietsman, Kokstad.

For Respondent: Mr. Elliot, Kokstad.

CASE No. 81.

NOTOFU MNENO *v.* **ABNER NGILANA.**

UMTATA: 21st October, 1949. Before J. W. Sleigh, Esq., President, Kelly and Wilbraham, Members of the Court (Southern Division).

Native Appeal Case—Adultery—Damages under common law—Evidence—Not necessary to prove that defendant caused woman's pregnancy—Damages awarded for loss of consortium *and for* contumelia*—No loss of* consortium*—Plaintiff cannot complain of* contumelia *in view of his own adultery with defendant's wife—No appeal against* quantum *of damages—Practise and Procedure—Judicial officer should not take cognisance of his administrative experiences.*

Appeal from the Court of the Native Commissioner, Qumbu.

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

This is an appeal against a judgment for respondent for £25 as damages for adultery with respondent's wife, Esther.

Esther states that her intimacy with appellant commenced shortly after respondent left for Cape Town in March, 1948, and that she missed her periods in June. The child was born on the 23rd January, 1949. Her evidence is corroborated by respondent's aunt, Madeyi, who proposed love to Esther on behalf of appellant.

Appellant denies the adultery and states that the action was brought against him because respondent himself was mulcted in damages for committing adultery with appellant's wife. This adultery is admitted by respondent and affords a motive for the present action. But the Assistant Native Commissioner who has had the advantage of seeing and hearing the witnesses, believed the testimony of Esther and Madeyi and no reason has been shown why we should disbelieve them.

It is contended in this Court that it is possible, from a medical point of view, that plaintiff himself might be the father of the child because there are 329 days between the beginning of March, 1948 and the 23rd January, 1949, but this contention is disposed of by Esther, whose evidence shows that she last menstruated in May, 1948.

Esther says she thinks she conceived in May, 1948. One of the grounds of appeal is that there is no corroboration of Esther's

testimony of intimacy in May. But such corroboration is unnecessary since the action is brought under Common Law under which respondent is entitled to damages for loss of *consortium* and for *contumelia*. It is therefore not necessary to prove that appellant caused the woman's pregnancy.

There has been no loss of *consortium* and in view of respondent's own misconduct with appellant's wife, he can hardly complain of *contumelia* [see Bukulu *v.* Cebisa, 1946 N.A.C. (C. & O.) 45]. There is, however, no appeal against the *quantum* of of damages awarded.

The appeal is dismissed with costs.

The Assistant Native Commissioner, in his reasons for judgment, has imported his administrative experience in support of his finding that plaintiff was in Cape Town in March, 1948. We feel constrained to remark that it is dangerous to take cognisance of administrative experience which a party has had no opportunity of challenging.

For Appellant: Mr. Hughes, Umtata.

For Respondent: Mr. Airey, Umtata.

CASE No. 82.

NGUWEDA DOLO *v.* MZIMTATU MBEWU.

UMTATA: 21st October, 1949. Before J. W. Sleigh, Esq., President Kelly and Wilbraham, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Seduction and Pregnancy—Corroboration of girl's statement—What is sufficient—Metsha—*Where proved and admitted the man is required, in native law, to prove his innocence—"Catch"—Undue familiarity between a man and a woman affords strong corroboration of previous acts of intimacy*—Ntlonze—*The manner in which recovered is consistent with man's guilt—Evidence—False denial of proved facts is inconsistent with man's innocence.*

Appeal from the Court of the Native Commissioner, Qumbu.

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

This is an appeal against a judgment of absolution in an action in which appellant claims five head of cattle or their value, £25, less £1 paid on account as damages for the seduction and pregnancy of his daughter, Nomagaweni, who is said to be 13 years of age.

The evidence, which the Court accepts, is to the effect that in the early hours of a Sunday morning about the month of November, 1948, respondent was found fully dressed in the hut of the girl who sleeps alone. On being questioned as to what he was doing there, he replied that he was visiting the girl with whom he was in love. A beast was demanded from him as a fine for being in the girl's hut and an *ntlonze* was taken from him. The following day his aunt, with whom he resides, paid £1 on account as fine. After Christmas the girl informed him that she was pregnant and, at his instigation, she then surreptitiously took possession of the *ntlonze* and handed it to him. He immediately thereafter left for the mines. About a month or so later her condition was discovered. Her pregnancy was then reported to the people of the kraal where he resides and the case was thereafter taken before the headman who did not give a decision because respondent was absent.

Nomagaweni states that respondent did not have full intercourse with her on the night he was found in her hut but that he seduced her on the previous Thursday night and also had full connection with her on a subsequent occasion.

The question for decision is whether the evidence of intercourse on these two occasions is corroborated as is required by law.

Before considering this question, there are three observations we must make in regard to the corroboration which is required in seduction cases. Firstly, if the seduction is denied on oath the law requires that the woman's evidence must be corroborated and unless there is such corroboration the plaintiff is not entitled to judgment even if the woman's evidence is believed. (Bekker *v.* Westenraad, 1942 W.L.D. 214); secondly, by corroboration is meant, "some evidence . . . in addition to the woman's, which, *in some degree*, is consistent with her story and inconsistent with the innocence of the defendant." (Wiehman *v.* Simon, N.O. 1938 A.D., at p. 450); and finally, the accumulation of pieces of evidence, none of which, taken singly, is corroborative, cannot amount in the whole to corroboration (van der Merwe *v.* Nel, 1929, T.P.D., at pp. 269-70).

Now, we want to say at once that we believe the girl's evidence. It is most improbable that a girl of her age would accuse respondent falsely. If she was an untruthful witness she would have said that he had full intercourse with her on the night he was found in her hut. However, acceptance of her evidence of her seduction is not sufficient. It must be corroborated. Do the following pieces of evidence afford that corroboration? viz. (1) his presence in the girl's hut on the night in question; (2) his admission that he was in love with her; (3) the payment of the sum of £1 on his behalf; (4) the underhand means he adopted to recover the *ntlonze;* (5) his false denial of these facts; (6) his disappearance from the district immediately he became aware of the girl's pregnancy; and (7) the fraudulent attempt to show that Velile (who is apparently the same person as Wellington Matshaya) was intimate with the girl at the time she concieved.

His presence in the hut supports the girl's evidence that he *metshaed* with her that night and that they were in love with each other. *Ukumetsha* is widely practised among Natives and while it is possible for a woman to become pregnant as a result of such intercourse, the girl herself does not say that she was rendered pregnant on this occasion, and the fact that they did *metsha* does not rule out the possibility that she may have been rendered pregnant by some other man. However, where *metsha* is admitted or proved the man is required in Native law to prove his innocence [Dalisile *v.* Dungulu & Another, 1940 N.A.C. (C. & O.), at p. 86]. Moreover it was held in Dumalisile *v.* Mqananango [1931 N.A.C. (C. & O.) 8] that a "catch", i.e., undue familiarity between a man and a woman, affords very strong corroboration of previous acts of alleged intimacy.

The payment of the £1 was not a payment on account of a fine for seduction and such payment is not, therefore, inconsistent with his innocence.

The manner in which he recovered the *ntlonze* is, however, consistent with his guilt, because if he were innocent there was no necessity to recover it by stealth.

His false denial of the facts goes to show that his evidence is unworthy of credence (Kleinwort *v.* Kleinwort, 1927 A.D. 123), and moreover, it is inconsistent with his innocence because it gives to the relationship between him and the girl a complexion which it would not have had if no false denial had been made. (Poggenpoel *v.* Morris, N.O. 1938 C.P.D. 90).

It has become almost the routine procedure for a man to leave the district when he has caused the pregnancy of a woman. However, respondent's sudden departure for the mines shortly after he was advised of the girl's condition is equally consistent with his innocence as with his guilt.

Respondent's witness, Bokwena, says that he produced at the headman's Court a letter written by Velile to the girl which shows that they were on intimate terms. The headman and other witnesses deny that the letter was produced, and there is no satisfactory explanation why this important document, which was apparently available on the day of the trial, was not put in as evidence. We must conclude that no letter from Valile was produced in the headman's Court and that a letter was apparently fabricated with the object of making use of it in the Native Commissioner's Court. This attempt to mislead the Court, although reprehensible, is not inconsistent with respondent's innocence, because an innocent man may in desparation fabricate evidence to suit his case.

We are thus satisfied that there is ample corroboration of the girl's statement that the respondent seduced her and rendered her pregnant.

The appeal is allowed with costs and the judgment of the Court below is altered to one for plaintiff as prayed with costs.

For Appellant: Mr. Hughes, Umtata.

For Respondent: Mr. Airey, Umtata.

CASE No. 83.

TATANE VITSHIMI & ANO. *v.* **DANTE MAKADE.**

UMTATA: 22nd October, 1949. Before J. W. Sleigh, Esq., President. Kelly and Wilbraham, Members of the Court (Southern Division).

Native Appeal Case—Practise and Procedure—Rescission of default judgment—Minor—Must be assisted in action—Objection non locus standi *must be taken timeously—If not taken. judgment valid—Not ground for rescission—Evidence—Minority must be proved by admissible evidence—Default judgment—Application for extension of time necessary if application for reopening not made timeously—Wilfull default—Default wilful if defendant has not valid excuse.*

Appeal from the Court of the Native Commissioner, Tsolo.

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

In a summons issued on 17th March, 1947, plaintiff sued first defendant and his mother for certain six cattle or their value, £72. There are the bare allegations that the cattle are plaintiff's property and that the defendants are in possession of them. Appearance was entered on behalf of defendant (not defendants) on 25th March, 1947, and a plea was delivered after a peremptory notice. The case was set down for trial on the 24th July, 1947, and thereafter, for various reasons, was postponed to 6th November, 1947, 20th April, 1948, 8th September, 1948, and 13th January, 1949. On this date defendants were in default. Their attorney, in applying for postponement, stated that first defendant was at the mines and that second defendant was indisposed, and produced a medical certificate in support thereof. The application was opposed by plaintiff's attorney and refused by the Court, and a default judgment was entered after defendant's attorney had withdrawn from the case.

On the 7th February, 1949, second defendant gave notice of application for rescission of the default judgment. This was granted and the case was set down for trial on 19th May, 1949.

On 23rd March, 1949, first defendant applied for the rescission of the default judgment against him. In the supporting affidavit, which was attested at Healdtown on 5th March, 1949, he declares that he is a minor, having been born on 30th April, 1928. This application came before the Court on 5th May, 1949. After argument it was postponed to 19th May, 1949, when it was refused. From this judgment first defendant has appealed on the ground that the judgment is bad in law in that the Assistant Native Commissioner erred is not granting a reopening and in that applicant was a minor and was sued unassisted.

In the Court below appellant's attorney in applying for a reopening contended that the judgment was void *ab origine*. In this Court counsel for appellant does not support this contention but states that it is voidable. It is not even that. It is either valid or invalid. What counsel probably means is that a minor can avoid, under certain circumstances, the consequences of a contract entered into by him. But the present action is not based on contract. However, when a minor is sued, irrespective of the cause of action, the procedural requirement is that he must be assisted in the action and if not so assisted objection to the proceedings may be taken. Now, in terms of Rule 1, Order XII, of Proclamation No. 145 of 1923, particulars of an objection of *non locus standi in judicio* on the ground of minority must be delivered within seven days after entry of appearance or after delivery of further particulars, and if the particulars of objection are not so delivered the defendant cannot thereafter raise the objection without leave of the Court granted on application after notice to the plaintiff. No objection was taken. The judgment is therefore as valid as if appellant had been cited duly assisted. It is too late now for him to raise the question of minority. I say nothing about his legal guardian's right to raise the question.

Apart from this appellant can have no personal knowledge of the date when he was born and his bare statement that he was born on 30th April, 1928, unsupported by a birth certificate or other evidence, is therefore mere hearsay. There was therefore no admissible evidence before the Court that he was a minor.

The default judgement was given on 13th January, 1949. In terms of Rule 1 (4), Order XXVIII, of the Proclamation he is presumed to have had knowledge of the judgment on 15th January, there being no proof to the contrary. The latest date for applying for rescission was therefore the 15th February. There is no application for extension of time in terms of Rule 2, Order XXXII, and without such application the Court had no power to entertain the application for reopening (Pier Street Mosque Trustess *v.* Abrahams, 1922 E.D.L. 330).

Finally, according to the correspondence put in, appellant interviewed his Johannesburg attorney on 30th November, 1948, and informed him that he would be unable to attend the Court on 13th January, 1949, because his wife (presumably he meant his mother) had received injuries. This woman, the second defendant, was assaulted on 15th September, 1948, spent two weeks in hospital and thereafter resumed her employment. When she was examined by the doctor on 15th December, she was still, according to the doctor's certificate, " in a poor state of health as a result of this assault ". The doctor does not certify that she was unable to travel. Be that as it may, her state of health was no excuse for appellant's default on 13th January, 1949. His default was therefore wilful (de Beer *v.* Dippenaar, 1922 O.P.D. 196) and consequently the Assistant Native Commissioner had no jurisdiction to entertain the application.

For these reasons the appeal is dismissed with costs.

For Appellant: Mr. Airey, Umtata.

For Respondent: Mr. Muggleston, Umtata.

CASE No. 84.

ALFRED MATUMBA *v.* MDLAMBE CORA.

UMTATA: 24th October, 1949. Before J. W. Sleigh, Esq., President, Kelly and Wilbraham, Members of the Court (Southern Division).

Native Appeal Case—Nqoma—Nqoma *holder not liable for loss of stock through no fault of his—Enrichment—Doctrines lies outside realm of contract—It contemplates that loser has done some act or incurred expense in connection with a thing and has no contractual hold on party enriched—Compensation—Loser entitled to recover the amount by which other party enriched—Cannot recover loss occasioned by wrong act of third party or by own negligence.*

Appeal from the Court of the Native Commissioner, Cala.

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

Respondent sued appellant for £20, the value of two calves which were left with the latter for safekeeping and which were attached on a writ for his debts. The Assistant Native Commissioner held that appellant had been enriched at the expense of respondent by having his debts satisfied and gave judgment for respondent for £10 and costs. From this judgment appellant appeals.

The evidence shows that respondent desired to wean three calves which he owned. As it was difficult to keep them from the cows he took them to the kraal of appellant who agreed to look after them. This transaction took place about the year 1929. Shortly after this arrangement, the parties left the district in search of work. While they were both away one of the calves died and its death was reported to respondent's mother. Thereafter, the other two calves were attached by the Messenger of the Court for appellant's debts. The attachment was reported to respondent's mother who, accompanied by her brother, claimed the calves from the Messenger, but did not interplead. The calves were sold in execution and when respondent returned home about the year 1930 he could not trace them. Appellant returned home about the year 1931. Respondent then claimed the two calves from him but he refused to pay. Apart from calling upon appellant from time to time to replace the cattle no steps were taken by respondent to recover their value from the Messenger of the Court or from the judgment creditor. In 1948 respondent took his complaint to the headman, who ordered appellant to compensate respondent. He did not do so and respondent then brought this action.

There is some dispute as to whether appellant agreed to compensate respondent after the headman's judgment. Respondent and the headman say he did, but appellant denies it and his denial is consistent with his attitude all along that he would not pay because respondent allowed the cattle to be sold. It is also consistent with the fact that immediately after the headman's judgment he went to see his attorney. We come to the conclusion that no admission of liability was made, nor did he agree to compensate respondent. In any event, respondent in his summons does not rely on such agreement.

Appellant denies that the cattle were left with him under the *nqoma* custom. It is doubtful whether they were, because it is clear from the respondent's own evidence that they were there for a purely temporary purpose. But, in view of the circumstances of the case, it does not matter whether the calves were left with appellant under the *nqoma* custom or merely for herding purposes, because in either case appellant would not be liable

if the cattle were lost or destroyed through no fault of his own and such loss was reported [Lukuleni *v.* Menziwa, 1945 N.A.C. (C. & O.), at p. 44]. In order to succeed respondent must show that he has suffered loss through the negligent or wrongful act of appellant and this he has not done. In fact the proximate cause of the loss is respondent's own negligence in failing to interplead.

The obvious objection to the Native Commissioner's ruling that appellant had ben enriched at the expense of respondent is that the latter does not rely on the doctrine of enrichment but is suing on a breach of contract.

The equitable rule that " it is by the law of nature just that no one shall become the richer to the loss or injury of another " is of very wide application. It governs many legal relations which are not regulated by express agreement between the parties (van Rensburg *v.* Straghan, 1914 A.D., at p. 329, and Wille's Principles of S.A. Law, 2nd Ed., p. 435 *et seq.*). Its general operation lies outside the realm of contract. It contemplates that the loser has done some act or incurred expenses in connection with a thing and has no contractual hold on the party enriched.

In the present case respondent has done nothing nor has he incurred any expense which enriched appellant. He has suffered a loss but such loss was occasioned by the wrongful act of a third person and by his own negligence in failing to interplead.

In cases where the doctrine of enrichment does apply the compensation recoverable is not the loss suffered by the plaintiff but the amount by which the defendant has been enriched. In the present case there is no evidence of the extent to which appellant has been enriched. The judgment is therefore wrong even if the doctrine did apply.

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

For Appellant: Mr. Muggleston, Umtata.

For Respondent: Mr. Hughes, Umtata.