In our opinion plaintiff has failed to prove that Elizabeth was rejected by her husband's relatives and consequently he cannot claim to be the guardian of Esther on the ground that her mother was repudiated.

Our attention has been drawn to the decision in Magcoba *v.* Magcoba (6 N.A.C. 17) where it was held that a civil marriage is absolutely and completely dissolved by the death of one of the spouses and that the immediate effect of such dissolution is to put an end to all the legal consequences of the marriage. It is contended that as the death of Edward dissolved the marriage, Elizabeth reverted to the status of an unmarried woman and consequently her illegitimate children born after her husband's death belong, in native law, to her father or his heir. This contention is not well-founded. A widow is of course an unmarried woman, but she is not a spinster, and the principles which govern the rights to an illegitimate child of a spinster and of a widow respectively are entirely different. The general rule among most tribes is that the illegitimate child of a spinster —if no fine has been paid—belongs to its maternal grandfather, whereas a widow, whose dowry has not been returned, bears children for her deceased husband. Plaintiff cannot therefore claim guardianship under native law over the illegitimate children of his widowed sister.

In *Magcoba's* case (*supra*) the Court held that the illegitimate son born of a widow of a christian marriage cannot inherit the estate of her deceased husband. The reason for this decision was that the Court was not prepared to recognize a custom which encouraged "the widow of a christian marriage, for the sake of bearing an heir to her deceased husband, to indulge in illicit intercourse under circumstances repugnant to the moral principles of christian marriage and which would perpetuate in certain respects the consequences of a contract which has been absolutely and completely dissolved by her husband's death." It is thus clear that the decision was based entirely on moral grounds. It may, or may not, be possible to support the judgment on strictly legal grounds, but one thing is certain that, if the husband in that case had left a legitimate son and the illegitimate child of the widow was a girl, the Court would not, and could not, have invoked moral principles as a ground for depriving the son and heir of the dowry paid for the girl, and it would have made no difference whether or not the girl was born at the kraal of the deceased husband. Be that as it may, we are not now asked to decide who is the proper person to institute the action. We are asked to say that plaintiff is the legal guardian of Esther according to native law. As we have pointed out he is not nor is he the guardian under common law. He has therefore no title to sue. The special plea should therefore have been upheld. As the appeal succeeds on this ground it is unwise at this stage to give a decision on the question of seduction.

The appeal is allowed with costs and the judgment of the Court below is altered to read: "The special plea is upheld and the summons is dismissed with costs."

For Appellant: Mr. Stanford.

For Respondent: Mr. Gillett.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(SOUTHERN DIVISION)
1950

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G.P.-S.12836—1949-50—500

CASE No. 86.

BHOTA SIDYODYO *v.* MNINIMZANA VOOI.

BUTTERWORTH: 18th January, 1950. Before J. W. Sleigh, Esq., President, Rein and Whitfield, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Costs—General rule Successful party entitled to costs—Rule not to be departed from except for good reasons—If claims in summons separate and distinct Court may award costs separately on each claim—Or make no order as to costs when one party successful on one claim and the other on another claim—Court's discretion in depriving successful party of appearance costs for wasting time.

Appeal from the Court of the Native Commissioner, Willowvale.

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

Plaintiff, the heir according to native custom of late Sidyodyo Vooi, sues defendant for the delivery of certain property consisting of six head of cattle, which are described, a bay mare and its colt and a cultivator, a plow and a roll of wire netting. It is alleged that the property belongs to the estate of Sidyodyo.

The defence is a denial that the property forms part of the estate.

The Native Commissioner divided the claim in the summons into four items, namely (1) The red and white cow paid as *ngoma* fee with its two increase, (2) the other three cattle, (3) the mare paid as dowry and its foal and (4) the farm implements and wire netting. He entered judgment for plaintiff for the stock mentioned in items (1) and (3), absolution from the instance in respect of the other two items and made no order as to costs.

Defendant appealed against the judgment in favour of plaintiff and the latter cross-appealed on the question of costs. The appeal has been withdrawn and we are now concerned only with the cross-appeal.

The general rule is that the costs in a case should be awarded to the successful party. The rule should not be departed from except for good grounds. The fact that a party has claimed more than is found to be due is not as a rule, sufficient ground for depriving him of his costs. But if a plaintiff claims what he knows is not due and such knowledge is *clearly* proved, such conduct amounts to fraud and the trial court, in the exercise of its discretion, would be justified in depriving him of his costs. A successful litigant may also be deprived of his costs if his conduct was the cause of vexatious or unnecessary litigation.

The Native Commissioner deprived plaintiff of his costs because he considered that plaintiff did not act in good faith when he claimed the articles mentioned in item 4, and that he wasted the time of the Court unnecessarily by claiming the stock and articles in respect of which he was unsuccessful.

Now, the evidence does not bear out the Native Commissioner's finding that plaintiff's claim for the property mentioned in item (4) was *mala fide*. There is at any rate no clear proof of *mala fides*. The Native Commissioner seems to recognize this by his judgment of absolution. Plaintiff was a minor under the guardianship of defendant. He says that when he became a major there was a plow and a cultivator at Sidyodyo's kraal and a roll of wire which was used to fence Sidyodyo's garden. This site, according to defendant, has been reallotted to him. Plaintiff might well have been under the genuine impression that the plow and cultivator belonged to Sidyodyo's estate and that he was entitled to the wire netting.

When the claims in a summons are separate and distinct the general rule is that each claim carries costs in favour of the party successful thereon, but it is not an uncommon practice to effect a rough adjustment by making no order as to costs (Ohlsson's Cape Breweries, Ltd., *v.* Artesion Well-Boring Co., Ltd., 1919 C.P.D. 125). This is the proper course to adopt where the costs which would be awarded to each party are approximately the same (Williams & Ano *v.* Director of Education, 1922 T.P.D. 498). But the claims in the present case are not separate and distinct. The claim is for estate property and the evidence in support of the separate items is inextricably interwoven. The Native Commissioner therefore in making no order as to costs acted on wrong principles. Defendant forced plaintiff to come to Court and the latter was successful on some items. It was defendant's defence which in some respects was vexatious. He could have avoided costs by tendering the property in respect of which plaintiff was successful. The cross-appeal consequently succeeds.

The Native Commissioner says in his reasons that if plaintiff had not persisted in his claims in respect of which he was unsuccessful the case would have been disposed of in one day. We have no means of verifying this statement and must accept the Native Commissioner's word for it. Undoubtedly, if a litigant unduly labours a point and takes up the time of the Court unnecessarily, the trial Court would be exercising a proper discretion in depriving him of some of his appearance costs. In allowing the appeal we will take this point into consideration.

The cross-appeal is allowed with costs and the order as to costs in the Court below is altered to read "Defendant is ordered to pay costs. Appearance costs are limited to one day".

For Appellant: Mr. Mahoud, Butterworth.
For Respondent: Mr. Dold, Willowvale.

CASE No. 87.

ENOCH MEMAMI *v.* WELLINGTON MAKABA.

BUTTERWORTH: 20th January, 1950. Before J. W. Sleigh, Esq., President, Rein and Whitfield, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Marriage by native custom—Essentials to customary union absent—Engagement cattle—Where engagement broken off, by girl or guardian, bridegroom entitled to recover dowry together with increase—Fine—Payment of followed by payment of dowry—Fines merge into dowry not when dowry is paid but when marriage takes place—If engagement broken off by girl, guardian entitled to retain cattle paid as fine before or after payment of dowry—Defendant not entitled to claim five head under Tembu custom as fine for first pregnancy and two head under Fingo custom for second pregnancy.

Appeal from the Court of the Native Commissioner, Nqamakwe.

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

In the particulars of claim plaintiff alleges that in 1945 he married defendant's daughter, Doris, according to native custom and paid £50 and two cattle as dowry, that there are two children of the marriage and that in February, 1949, defendant gave Doris in marriage to another man and received five cattle as dowry. He admits that he has received a refund of £15 and claims from defendant (1) the return of his wife or the restoration of the dowry paid for her, namely, two head of cattle or their value, £25, and £25 in cash, being the difference between £50 paid as dowry and the £15 refunded, less £10 as deductions in respect of the two children born, and (2) delivery of the five cattle received by defendant as a second dowry, or their value, £50.

Defendant avers in his plea that plaintiff seduced and caused the pregnancy of Doris in 1944 and paid £25 as fine, that in 1947 Doris became pregnant a second time by plaintiff who then offered marriage and paid as dowry £25 in cash and a cow and its calf, that thereafter Doris married the other man and that defendant then refunded £15 to plaintiff. He claims he is entitled to retain two cattle as fine for the second pregnancy and consents to judgment for two cattle or their value, £10. In effect, therefore, he denies that there ever was a customary union between plaintiff and Doris; he admits having received £50 in cash and two cattle, the equivalent of twelve head of cattle, but claims that he is entitled to seven head of cattle as fine for the two pregnancies, leaving a balance due to plaintiff of five head of cattle of which the equivalent of three head had been paid.

The Assistant Native Commissioner held that plaintiff had entered into a customary union with Doris and during the subsistence of this union defendant gave her in marriage to another man and received a second dowry. He further held that the fines paid merged into the dowry and that plaintiff was entitled to recover the full dowry less the usual deductions for the children. He entered judgment for plaintiff on claim (1) for £25 and two cattle or their value, £10, and absolved defendant in respect of claim (2).

Defendant now appeals against the judgment on claim (1) and plaintiff cross-appeals against the judgment of absolution.

The cross-appeal was noted late and application is now made for condonation. The application is not supported by an affidavit and no cause has been shown at all why this Court should exercise its discretion in applicant's favour. Moreover, no security has been lodged as is required by the rules. The application is consequently refused.

The grounds of appeal are as follows:—

(1) That the judgment is against the Law and Evidence.
(2) The evidence established that the first two payments, totalling £25, were paid as fine. In fact the Court held that the plaintiff failed to prove that payment was made as dowry, but that in any case the fines merged into dowry. when dowry was paid at a later stage.
(3) It is contended, according to native custom, that fines only merge with dowry after the marriage or union takes place.
(4) The plaintiff failed to prove that a customary union ever subsisted between him and defendant's daughter, and consequently the judgment should have been for plaintiff in terms of defendant's plea.

If the Assistant Native Commissioner's finding that a customary union subsisted between plaintiff and Doris is correct, then he should have given judgment for plaintiff on claim (2) also. [See Sicefe *v.* Nyawozake, 5 N.A.C. 17, and also Xanase *v.* Tunce, 1939 N.A.C. (C. & O.) 36.] These cases enunciate the principle that where a farther has given his daughter in marriage a second time during the subsistence of the first union, the first husband is entitled to recover from his father-in-law such number of cattle of the second dowry as would correspond to a claim for damages for adultery. No proof of adultery in such a case would be required as the payment of dowry and the handing over of the girl to her second husband would be *prima facie* proof thereof. But it is clear from the evidence in this case that no valid customary union was contracted between plaintiff and Doris.

The following facts emerge from the evidence. Doris and plaintiff are first cousins, her father being his maternal uncle. In 1944 she went to visit plaintiff's mother and he seduced her and caused her pregnancy, which was discovered when she returned to her father's kraal. A messenger was then sent to demand damages and the sum of £25, representing five head of cattle, was paid in two instalments of £15 and £10 as fine. Plaintiff and his witnesses say that they then proposed marriage and the offer was

accepted. The Assistant Native Commissioner has not accepted this evidence.

The first question for decision is whether the Assistant Native Commissioner was correct on this point. It is contended that, as the parties are Fingos and the fine for pregnancy among that tribe is three head and not five head of cattle, the £25 was paid on account of dowry, especially, as it is common cause that the money was sent by plaintiff and not fetched by defendant as is the custom when fines are paid. Now it is true that among Fingos the customary fine payable in respect of a first pregnancy is three head of cattle (Godongwana *v.* Runeli, I N.A.C. 54). Moreover, plaintiff says that when defendant's messenger came to report the pregnancy he demanded three cattle only.

Defendant, however, says that he claimed five cattle which is the customary fine payable in the Xalanga District. From the decision in the case of Tsotsi *v.* Dyosi [1931 N.A.C. (C. & O.) 51] it is clear that in the Ciskei the Fingos pay five head of cattle and even more, and since plaintiff lives in Xalanga District, which adjoins the Ciskei and which also form part of Tembuland, it is not surprising that defendant claimed the customary fine payable according to Tembu custom.

But a more cogent reason for disbelieving the evidence for plaintiff that marriage was offered, when the first pregnancy was reported, is that a customary union between him and Doris would not have been countenanced on account of their blood relationship. In fact plaintiff's intercourse with Doris was, according to native custom, incestuous. It is regarded as utterly disgraceful and, therefore, a matter which should be kept a secret in the family. This might account why the fine was paid in money and not in cattle. Defendant and his messenger denied that marriage was proposed at this stage and Amos who, according to plaintiff, was sent to negotiate the marriage has not been called. In my opinion the evidence and the probabilities are against plaintiff's contention that an offer of marriage was made and accepted at the time this payment was made.

It is common cause that Doris absconded from defendant's kraal immediately after the payment of the second and final instalment of the £25. She says she left because she was not on good terms with her father, that she was then in her eighth month of pregnancy and that, after the birth of the child, plaintiff left for the mines and thereafter her father fetched her.

Now two of the essentials of a customary union are the consent of the father of the girl and the handing over of the bride. Both essentials may be inferred from the conduct of the father, for instance, where the girl is *twalaed* and the father accepts cattle in payment of dowry and leaves the girl at the man's kraal. In such a case consent by the father is presumed and no formal handing over of the bride is necessary. In the present case the fact that defendant did not immediately *putuma* his daughter, when she absconded might have been evidence of his consent, had cattle passed as dowry, but the fact that defendant fetched her before any proposal of marriage was made, is clear proof that he did not consent to a customary union. When plaintiff returned from the mines about 1947 he found Doris at defendant's kraal. He visited her secretly and she again became pregnant. Defendant says that plaintiff then paid £25 representing five cattle as dowry and that he then agreed to his daughter marrying plaintiff by christian rites. Plaintiff agrees that the marriage was to be in a church. The fact that this form of marriage was raised at this stage is further proof that defendant did not agree to the customary union after the payment of the fine. Moreover, it is common cause that Doris never lived with plaintiff as his wife after she was fetched by defendant in 1945. Two of the essentials to a customary union are therefore absent in this case, i.e., the consent of the guardian or his representative

to a customary union and the handing over of the bride after such consent had been given.

As there was no valid customary union between plaintiff and Doris, the money which was paid must be regarded as engagement cattle. The general rule is that where the engagement has been broken off by the girl or her guardian, as in this case, the bridegroom is entitled to recover the dowry paid by him together with the increase. The next question for decision is whether plaintiff is also entitled to recover the £25 fine, since, according to Mampondo *v.* Manqunyana (4 N.A.C. 67), fines merge in dowry immediately the agreement to the marriage is concluded and something in addition to the fine is paid as dowry.

It was decided in Ngxabalaza *v.* Njovane [1939 N.A.C. (C. & O.) 96] that the dowry holder has no right to retain the fine should it be necessary to *keta* the dowry in order to dissolve the union (see also Mampondo's case *supra*). Does the same principle apply where no marriage has taken place and the guardian is required to return the engagement cattle? The decisions upon this point are conflicting. In Kwezi *v.* Rayi (4 N.A.C. 65) the native assessors stated that a merger of fine in dowry takes effect upon the marriage taking place and not upon payment of dowry as stated in Mampondo's case, and in Masiza *v.* Gonjana (4 N.A.C. 211), in which case the engagement was broken off on account of the girl's misconduct, her guardian was allowed to deduct from the dowry paid two head of cattle as fine for abduction and pregnancy of the girl subsequent to the payment of dowry. So also in Nyila *v.* Mnyama & Ano. (4 N.A.C. 2) the Court allowed the father one beast where the girl was abducted and seduced subsequent to the payment of dowry. The native assessors in the present case (a record of their opinions is annexed) also state that the guardian of the girl is entitled to retain fines paid for seduction and pregnancy subsequent to the payment of dowry. But in Mgqambeli *v.* Jafta (4 N.A.C. 102), in which there had also been an abduction subsequent to the payment of dowry but the girl was returned intact, the native assessors stated that " when dowry has been paid for a girl who is subsequently abducted no abduction beast out of that dowry can be retained by her guardian in the event of the marriage not taking place and the dowry being returnable." This decision was followed in Mziba *v.* Mgqoboka [1935 N.A.C. (C. & O.) 58]. Now the last four cases come from Fingo Districts where a beast is always payable for the abduction of a girl, even if the abduction was made with a view to marriage, and a further beast is payable where the girl had been seduced.

As a rule the guardian of a girl will not consider marriage proposals until the seducer has paid something more than the usual fine (Tanyana *v.* Mabiya, 3 N.A.C. 260), but, if the guardian does not claim the fine for seduction and/or abduction but accepts cattle as dowry, he cannot retain some of the dowry cattle as fine when he is obliged to return the engagement cattle to the suitor (Binase *v.* Ngqase, 4 N.A.C. 115). This decision, which also comes from the Xalanga District, implies that where the guardian has received cattle paid as fine he can retain such cattle.

There is one more case which I should quote and that is Malusi *v.* Dandi (1 N.A.C. 169) in which the native assessors stated " That, if the intended wife was made pregnant by the man to whom she was to be married, such a case would be treated as if marriage had taken place and one beast be deducted from the dowry. " That is, as deduction for the child as in a case where a marriage is dissolved by the return of the dowry.

From these decisions it appears that where a fine is paid for the seduction or pregnancy of a girl and thereafter marriage negotiations are instituted and further cattle are paid on account of dowry, the cattle paid as fine do not immediately become merged in dowry as stated in Mampondo's case *supra,* but are counted as dowry for the purpose of deciding if sufficient cattle have passed to permit of the marriage taking place. When such

marriage takes place merger takes effect ss stated in Kwczi's case *supra*. If, however, the engagement is broken off by the girl, her guardian is entitled to retain the fine when returning the dowry paid by the suitor, and this includes such fine as may have been received even after payment on account of dowry has been made. If no such fine was demanded or paid the guardian is not entitled to withhold any portion of the dowry (Binase's case *supra*).

Now, in the present case defendant claims the right to retain five head of cattle under Tembu custom for the first pregnancy and two head of cattle under Fingo custom for the second pregnancy. Although the parties are Fingos, defendant is not entitled to damages for the second pregnancy because, when he reported this pregnancy, he accepted payment of dowry and did not insist on payment of a fine, and under Tembu custom no fine is payable for the second pregnancy. He has received in all in fines and in dowry the equivalent of twelve head of cattle. He is entitled to retain the equivalent of five head of cattle paid as fine and must refund the balance. He has already refunded the equivalent of three head of cattle thus leaving a balance of four head.

The appeal is consequently allowed with costs and the judgment on claim (1) is altered to read " For plaintiff for £10 and two head of cattle or their value, £10, and costs of suit."

The cross-appeal is struck off the roll with costs.

NATIVE ASSESSORS' OPINION.

Names of assessors: G. Reve (Kentani); H. Bikitsha (Butterworth); Phillip Mgidi (Nqamakwe); M. Mlata (Willowvale) and J. Z. Makongolo (Idutywa).

Question: Girl's father is brother of man's mother. Can a man marry his maternal cousin according to native custom?

Answer (per Mgidi): We have not come upon such a thing. (All agree.)

Question: Where parents of these people pay and accept dowry and girl handed over and children are born, is such marriage recognised?

Answer (per Mlata): We take it the man has married his own sister and we do not recognise the marriage. (All agree.)

Question: Nevertheless the man and woman live together and have children. The man dies. Who will inherit his estate—his son or his brother? To whom will the daughters belong—the man or to the woman's father?

Answer (per Reve): We do not know of any such case. (All agree.)

Per Mlata: The children would be similar to illegitimate children.

Question: Where people so related have intercourse, is a fine payable?

Answer (per Mgidi): No fine is payable except a cleansing beast. (All agree.) The child belongs to the woman's father.

Question: Is there a fine for a second pregnancy?

Answer (per Mlata): No fine is paid for a subsequent pregnancy. The man can be disinherited or marked.

Question: Where the man denies the seduction and the matter has to be taken before the Court, does the man pay the usual fine or merely a cleansing beast?

Answer (per Reve): Only the cleansing beast which will be slaughtered. We disagree with what the majority of assessors said in Mountain *v.* Mandla [1946 N.A.C. (C. & O.) 38].

Question: The man and the girl are not related. The man renders the girl pregnant. Her father claims the fine which is paid. Thereafter a marriage is agreed upon. Further payment is then made on account of dowry. The girl breaks the engage-

ment. When the father returns the dowry is he entitled to retain the cattle paid as fine for the pregnancy?

Answer (per Reve): The fine is not returnable. (All agree.)

Question: Where the man renders the girl pregnant after payment of cattle on account of dowry and the girl then breaks off the engagement, what cattle paid as dowry are returnable?

Answer (per Mgidi): The father can claim the usual fine for the seduction and keep those cattle back. We do not agree with the opinion in Malusi *v.* Dandi (1 N.A.C. 169).

Question (per Mr. Mahoud: Reve replied: The father can retain the fine paid by the first man even if the girl has been given in marriage to another man who has paid dowry for her.

Mlata replied: If the man has paid a fine of 5 instead of 3 head, the father can keep only the three, those being only what he is by custom entitled to.

Question: Is it a fact that the Gcaleka Chiefs marry the daughters of the Tembu Chiefs and the Tembu Chiefs marry the daughters of Gcaleka Chiefs thus creating close blood relationship, and if so, can a Chief then marry his maternal cousin?

Answer (per Mlata): Yes, that is so.

Question: Why can chiefs and not commoners do this?

Assessors unable to reply.

For Appellant: Mr. Kockott, Nqamakwe.
For Respondent: Mr. Mahoud, Butterworth.

CASE No. 88.

NJIKILANA MBOKOJWANA *v.* MAGADENI GWAGWENI & ANO.

PORT ST. JOHNS: 26th January, 1950. Before J. W. Sleigh, Esq., President, Midgley and Leppan, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Person who is not guardian has no right to sue for dowry—Dowry—Such person not barred from giving girl in marriage and receiving dowry.

Appeal from the Court of the Native Commissioner, Bizana.

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

It is alleged in the particulars of claim that appellant (plaintiff in the Court below) is the guardian according to native law of Menziwa, the minor son and heir of the late Gambula, and of his sister Nokwake. As guardian of the latter he claims from respondents (*a*) payment of a beast or £5 as *bopa* fee and the return of Nokwake, and (*b*) failing the return of Nokwake then payment of ten head of cattle and a horse as dowry for her.

Respondents in their plea deny specifically that appellant is the guardian of Menziwa. They aver that Qibiti, the brother of Gambula, is the guardian. They deny that appellant has any right to institute the action.

In a replication appellant admits that he is not the guardian. He says that Gumbula's other brother, Tshakumani, is the guardian but that both Tshakumani and Qibiti are absent from the district and that Menziwa and Nokwake are temporarily under his charge and guardianship.

The Native Commissioner dismissed the summons with costs and appellant now appeals.

It is common cause that after the death of Gumbula his widow went with Menziwa and Nokwake to the kraal of Silulu where she was *ngenaed* by appellant, although he was not the proper person to *ngena* her. First respondent desired to marry Nokwake and asked for her in marriage from Silulu who referred him to appellant. He did not approach appellant but *twalaed* the

girl and when this was reported he again offered marriage to Silulu who, again referred him to appellant. When first respondent again failed to contact appellant the latter *putumaed* the girl, but she returned to respondent's kraal. Appellant then issued the summons.

On the pleadings the only persons who can institute the action in respect of the girl are Menziwa, duly assisted by his guardian or a *curator ad litem* appointed by the Court, or his guardian suing in that capacity. Even if appellant was placed in charge of Tshakumani's affairs, he has no right to sue in his own name for the recovery of dowry or fine [Nobeqwa *v.* Sinekile, 1942 N.A.C. (C. & O.) 70] unless he had Tshakumani's authority to do so, or unless the latter was an absconder and had been appointed *curator ad litem* [Ndontsa *v.* Fumbalele, 1946 N.A.C. (C. & O.) 68]. Neither of these conditions apply in the present case. The fact that Menziwa is 20 years of age and supports the action cannot confer on appellant the right to sue because Menziwa had no legal capacity to confer that right.

There is no legal bar to appellant giving the girl in marriage and receiving her dowry, but his authority to do so does not clothe him with the right to institute the action.

In the Court below two cases were relied upon. In Mgodla *v.* Galela and Mbongolwana (3 N.A.C. 200) the Court held that an uncle who was residing with the minor defendant could assist the latter where the real guardian of the minor had notice of the action and was living permanently outside the jurisdiction of the Court. It is unnecessary to go into the question whether that case was correctly decided because the conditions in that case are absent in the present case.

The other case (Madunzela *v.* Johan Yose, 4 N.A.C. 300) is not in point. In that case respondent sued for the recovery of dowry received by, and in the possession of, the appellant, a widow. She excepted to the summons that, being a widow, she had no *locus standi in judicio*. The Magistrate overruled the exception but on appeal it was held that as she was holding the cattle on behalf of the estate its representative should also be sued.

In the present case appellant has arrogated to himself the rights and privileges of the guardian of Menziwa. He has no such rights. The appeal is consequently dismissed with costs.

For Appellant: Mr. Birkett, Port St. Johns.
For Respondent: Mr. C. Stanford, Lusikisiki.

CASE No. 89.

KABINYANGA BITYA *v.* MAPEPENI KABINYANGA.

KOKSTAD: 6th February, 1950. Before J. W. Sleigh. Esq., President. Cockcroft and van Aswegen, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Application for rescission of default judgment refused—Applicant in wilful default—Irregularity in judicial proceedings does not render judgment void ab origine.—*Trial Court has no jurisdiction to recall its own judgment on ground of irregularity.*

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

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

Respondent sued appellant for the delivery of a certain beast. On the day the summons was served on him he spoliated, so it is alleged, another beast. Appearance was entered on 10th February, 1949. On 15th February notice was given that on the day of the trial, application would be made to amend the summons so as to include a claim for the second beast. On 17th February appellant pleaded to the summons as it stood

and the case was set down for trial on 2nd June, 1949. On this date appellant was in default and his attorney was ill. By arrangement between the attorneys the case was postponed to 15th September, 1949. On 4th August, 1949, appellant, who is the husband of respondent, appeared in a case against his son. His attorney was still ill and, as it was known that the latter had ceased to practice owing to his illness, appellant was informed by the presiding officer that the present case would be heard on 15th September and was advised to obtain the services of another attorney if he so desired. On this date he was again in default and after the summons had been amended in terms of the notice the Native Commissioner entered default judgment against him, without hearing evidence, for two cattle or their value £10. A warrant of attachment was issued on 29th September and on 4th October two cattle were attached.

On 3rd November, 1949, application was made for rescission of the default judgment and for setting aside of the writ and the attachment thereunder. In his supporting affidavit appellant declares that, owing to the illness of his attorney, he was not aware that the case had been set down for hearing on 2nd June, 1949, nor, that it had been postponed to 15th September, and that he became aware of the default judgment only when his cattle were attached.

Replying affidavits were filed by respondent, by her son, by her attorney and by the court interpreter. They all testify to the fact that appellant was informed on 4th August by the Acting Assistant Native Commissioner that this case would be tried on the 15th September. Respondent and her son further declare that on their return home on 15th September, one Day Nutting, informed respondent in their presence that the Court had ordered him to return the two cattle. This is denied in a further affidavit by appellant, but the Assistant Native Commissioner believed the evidence of respondent and refused the application. Against this order appellant appeals on the ground that he was not in wilful default and that he has a good defence.

At the hearing of the appeal application was made *in limine* to raise two additional grounds of appeal, viz.—

> 1. That regard being had to the provisions of Section 99 of Proclamation No. 145 of 1923, as amended, the judgment by default on the 15th September, 1949, is irregular, vitiated to the prejudice of the defendant and bad in law for the following reasons: (*a*) that although the Court *a quo* amended the summons it failed to embody the amendment it granted in the relative paragraph of the particulars of claim. (*b*) That as the notice of amendment and the granting thereof in the terms thereof embodied an additional claim and cause of action entitled the defendant to the right to plead thereto, the case ought to have been postponed upon proper notice to the defendant to enable him to exercise that right within a time fixed by the Court *a quo*, and (*c*) since no such order was made defendant was not and is not in default according to law.
>
> 2. That the default judgment for two head of cattle or their value £10 granted on the 15th September, 1949, was *void ab origine* for the reason that the defendant having entered an appearance to defend and having filed a plea it was not competent for the Native Commissioner to grant judgment by default for plaintiff (now respondent) without hearing evidence on behalf of the plaintiff (now respondent) to discharge the onus of proof which was placed upon the plaintiff (now respondent).

There is of course no substance in ground 1 (*a*). It was in fact abandoned. In regard to grounds 1 (*b*) and (*c*), Section 99 of the Proclamation does not provide that the Court, in allowing an amendment, must postpone the case. I shall, however, for the purpose of this appeal assume that the Trial Court acted irregularly in not ordering a postponement so as to enable

appellant to contest the additional claim. I shall also assume that the Native Commissioner's failure to call upon respondent to prove her claim is an irregularity in the proceedings, and that appellant has suffered substantial prejudice as a result of these irregularities.

Now Counsel for appellant contends that these irregularities vitiated the default judgment of 15th September and rendered it void *ab origine*.

This contention is not well founded. An irregularity in judicial proceedings does not as a rule render the judgment void *ab origine*. It is, for instance, a gross irregularity to refuse to hear the evidence for a party against whom judgment is given. Such irregularity will be a substantial ground for review, but it does not render the judgment void. A judgment can be void only where the Court has no jurisdiction or where there is some material defect in the process of the Court [Goniwe *v.* Diniso, 1940 N.A.C. (C. & O.) at p. 139]. It cannot be said that the failure to order a postponement was a defect in the process of the Court nor is the failure to notify appellant of the postponement a defect, since the rules do not provide for the giving of notice of postponements to absent litigants once the case has been set down for trial.

It is clear that Section 36 of the Proclamation does not empower the Court *a quo* to recall its own judgment on the ground of some irregularity in the proceedings. The application to argue the additional ground of appeal must therefore be refused. It is, however, necessary to point out that even if the judgment was void *ab origine* the power of the Assistant Native Commissioner to rescind the judgment is still dependent upon whether appellant's default was willful, because it is provided in Rule 3 of Order XXVIII that the rules in that Order shall *mutatis mutandis* govern all proceedings for the rescission or variation of any judgment by the Court in the exercise of the jurisdiction conferred by Section 36 of the Proclamation.

I turn now to the original ground of appeal. Counsel for appellant accepts that appellant was informed on 4th August that the case would be tried on 15th September but he submits that a native litigant would not accept such information from his opponents but would wait for instructions from his own attorney. He is of course entitled to expect his attorney to communicate with him, but if he chooses to disregard the warning of the Acting Assistant Native Commissioner and fails to ascertain the true position from his own attorney, he has only himself to blame if the trial Court comes to the conclusion that his default was wilful and deliberate, and of this there is not a shadow of doubt. The fact that he took no immediate steps to apply for rescission after being informed of the result of the trial, supports the view that he was quite indifferent as to what the consequences of his default might be.

The circumstance of this case fully support the Assistant Native Commissioner's judgment. The appeal is dismissed with costs.

For Appellant: Mr. Elliot, Kokstad.
For Respondent: Mr. Zietsman. Kokstad.

CASE No. 90.

SICEMFU NABENI *v.* NTLIZIYOMBI QEYIYANA.

KOKSTAD: 7th February, 1950. Before J. W. Sleigh, Esq., President, Cockcroft and van Aswegen, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Rescission of judgment on account of common mistake refused—Presiding officer misled by wrong interpretation not mistake common to parties—Consent judgment—Cannot be set aside except on ground of instrumentum noviter repertum.

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

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

Respondent (plaintiff in the Court below) sued appellant and one, Malusi Xoma, for the return of his customary wife, Mampemvu, or restoration of the dowry paid for her. It is alleged in the particulars of claim that Mampemvu is the daughter of Malusi but at the time of the marriage she was living with appellant who gave her in marriage and received the dowry and that after deserting respondent she went to live with Malusi.

Malusi, who was represented by an attorney, pleaded that appellant had not accounted to him for the dowry and consequently he was not, in native law and custom, liable for the claim.

Appellant, who was unrepresented, delivered a plea in which he admitted having given the woman in marriage, but averred that the dowry was received by Malusi. During the course of the trial he amended his plea to read: "At the time of payment (of dowry) defendant No. 2 (Malusi) was living with me. Plaintiff (respondent) paid dowry to him and when he (Malusi) left my place, he left the cattle with me to keep on his behalf."

Appellant in his evidence stated that he received five head of cattle and gave the girl in marriage, that thereafter at Malusi's request he demanded more dowry from respondent who pointed out three cattle but that these were not delivered and that Malusi disposed of the five cattle before he left appellant's kraal. His evidence is thus in direct conflict with his amended plea and is contradicted by respondent who said that since the commencement of the action he had seen three of the original five cattle at appellant's kraal.

After appellant had given evidence the case was postponed. At the resumed hearing appellant desired to give further evidence. He produced a note alleged to have been written by Malusi. The note is vague but the gist of its contents is that he (Malusi) had disposed of the dowry cattle and that respondent should come to him if he had anything to say and leave appellant alone.

The note is of course inadmissible as evidence and it would probably have been disregarded, but at the end of appellant's evidence he said: "I have discussed matter with Malusi and I am willing to consent to judgment provided Malusi also consents."

Malusi, according to affidavits now before the Court, was never at any stage of the hearing present in Court, but he was represented by Mr. Gordon. After appellant had stated that he was willing to consent to judgment Mr. Gordon on behalf of Malusi also consented to judgment. The Assistant Native Commissioner thereupon entered judgment against appellant and Malusi jointly and severally. Appellant appealed against the judgment but the appeal was withdrawn and application was then made for the rescission of the judgment in so far as it affected appellant on the ground of common mistake and misunderstanding.

In his supporting affidavit appellant re-iterates that he had accounted to Malusi for the dowry, and this is confirmed in an affidavit by the latter. Appellant denies that he had consented to judgment. He declares that he heard, for the first time, that he had consented when his attorney informed him that he had no grounds for appeal as he had consented to judgment. He states further that he thought the note from Malusi had established the fact that he had accounted to the latter for all the dowry received. He avers that he does not understand English and does not know what the interpreter said to the presiding officer. He declares: "The most I ever said to the interpreter which he may have construed as meaning that I consented to judgment or that I was willing to consent to judgment was that I told him

that I was willing to go to Malusi to try and get him to send Mampemvu back to plaintiff."

When the application came before the Court it was apparently opposed and was refused. Appellant now appeals against this decision.

Now it is quite clear that a trial Court can set aside its own judgment which was obtained by mistake common to the parties [Section 36 (2) of Proclamation No. 145 of 1923], but it is essential that the mistake must be common to the parties.

In this Court it is contended that appellant's denial that he consented to judgment is not rebutted, and that if the interpreter misunderstood him and misled the presiding officer by a wrong interpretation, then he also misled Mr. Gordon who represented respondent and that, therefore, there was in effect a mistake common to the parties. He thus attacks the correctness of the record. The evidence that he was wrongly interpreted is meagre in the extreme. There is no evidence that Mr. Gordon was in fact misled. *Ex facie* the record appellant did consent to judgment. This Court cannot go outside the record. Before, therefore, it can be asked to set aside the judgment appellant must take steps, in terms of Rule 3 Order XIX, to have the record of proceedings corrected. He has not done so. We are, therefore, not satisfied that there has been a mistake or misunderstanding common to the parties.

It is obvious that if appellant had in fact not consented to judgment the Assistant Native Commissioner would not have entered a consent judgment. But on the face of the record the Native Commissioner has entered the very judgment which appellant invited him to make and it cannot therefore be set aside except on the ground of *instrumentum noviter repertum* which does not apply in the present case [Florence *v.* Florence, 1948 (3) S.A.L.R. 71].

The appeal is dismissed with costs.

For Appellant: Mr. Eagle, Kokstad.
For Respondent: Mr. Elliot, Kokstad.

CASE No. 91.

MGOLODELWA NYATI *v.* **MPIKWA MTIKANA.**

KOKSTAD: 8th February, 1950. Before J. W. Sleigh, Esq., President, Cockroft and van Aswegen, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Application for rescission of default judgment granted—What is wilful default —Previous test reconsidered.

Appeal from the Court of the Native Commissioner, Umzimkulu.

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

This is an appeal from an order of the Assistant Native Commissioner refusing an application for rescission of a default judgment.

Plaintiff sued defendant for damages for defamation. Defendant entered appearance personally of 1st July, 1949, and he was then informed by plaintiff's attorney that he had seven days in which to file a plea. No plea was delivered and on 20th July peremptory notice to plead, addressed to plaintiff's attorney, was given. This too had no result and on 5th August default judgment was taken. Application for rescission of this judgment was made on 16th August.

From the supporting affidavit and the annexures thereto it appears that defendant wrote to his attorney on 6th July and intimated that he was opposing the claim. On 10th July, he

received a letter from his attorney instructing him to call immediately. He declares that he did not do so because he was then confined to bed and subsequently went to hospital at Creighton, Natal, where, according to the doctor's certificate, he was confined one day suffering from an abcess in the jaw, and was an out-patient for two weeks. The doctor's certificate is of little value. It does not state when defendant was admitted to hospital or when he ceased to be an out-patient. However, defendant states that he returned home on 3rd August, and there found a letter from his attorney, dated 19th July. In it defendant was requested to call personally and he was warned that unless he did so immediately default judgment would probably be entered against him. Notwithstanding this urgent warning and the previous letter, he delayed five days before he went to see his attorney. On this evidence the Assistant Native Commissioner found that defendant was in wilful default.

The question arises again what is meant by wilful default. In the past this Court has adopted the test laid down in Hitchcock *v.* Raaff (1920 T.P.D. 366) but the test there enunciated was criticised by Gardiner, *J. P.*, in Hendrisk *v.* Alen (1928 C.P.D. 519). In that case it was stated that if a defendant knows that he has been summoned to appear and, for whatever motive, neglects to appear, then he is in wilful default—if he is a free agent. But the learned Judge in Chedburn *v.* Barkett (1931 C.P.D. 421) adopted, with modification, the test laid down by De Villiers J.P. in Hainard v. Dewes (1930 O.P.D. 119) as follows: " A default is only wilful if the defendant knows what he is doing, intends what he is doing, and is a free agent, and is indifferent as to what the consequence of his default may be."

In our opinion this test is one that can be applied in all default judgments. The sentence in Hitchcock's case " and is perfectly willing that judgment shall be given against him " is a correct statement where the defendant failed to enter appearance, because in the summons he is warned that if he fails to enter appearance he will be held to have admitted the claim and judgment may be given against him in his absence; but where a defendant had entered appearance, delivered a plea and was in default at the trial it cannot be said that he was perfectly willing that judgment should be entered against him.

It is clear from the evidence before the Court that on the 6th July defendant had made up his mind to defend the action and that from the 10th July to the 3rd August he was too ill to see his attorney. It cannot therefore be said that he was in wilful default with his plea on the 22nd July when the period allowed him under the peremptory notice expired.

The further question arises whether his subsequent delay from 3rd to 5th August (when default judgment was entered) was reasonably occasioned. It is true that when he arrived home on the 3rd August he found a letter from his attorney giving him an urgent warning of the consequences of further delay. On this warning a reasonable person would have realised that the matter was urgent and would have complied with his attorney's instructions, but defendant declares " on the 8th August, 1949, I proceeded to Umzimkulu having then recovered sufficiently to travel ". The inference is that he was still in poor health and unfit to travel after his return to his kraal, and there is no evidence to rebut this inference. The default was, therefore, reasonably occasioned and the application should have been granted.

The appeal is allowed with costs and the judgment of the Court below is altered to read " The default judgment granted on the 5th August, 1949, as well as the writ and the attachment thereunder is set aside. Applicant is ordered to pay wasted costs ".

Costs of the application to be costs in the cause. It is further ordered that defendant deliver a plea on or before 22nd February, 1950."

For Appellant: Mr. Elliot, Kokstad.

For Respondent: Mr. Eagle, Kokstad.

CASE No. 92.

TSHUTSHUTSHU UMVOVO *v.* KULUMELEKWAKE UMVOVO.

KOKSTAD: 8th Februrary, 1950. Before J. M. Sleigh, Esq., President, Cockcroft and van Aswegen, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Trial Court has a discretion to decide case according to native law—Doctrine of enrichment discussed—Extent of enrichment not proved—Rights of bona fide *and* mala fide *occupier in regard to compensation for useful expenses—Contract—Breach of—Creditor may recover claim against deceased estate from heirs—Debt not owing by deceased's estate—No privity of contract between appellant and respondent—No. satisfactory data on which loss suffered can be assessed.*

Appeal from the Court of the Native Commissioner, Umzimkulu.

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

The late Umvovo, father of appellant and grandfather of respondent, was the registered owner of the farm Roodewal in the Umzimkulu District. This farm was purchased by Umvovo, his relatives and one Mswazi, each contributing towards the purchase price. They all lived on the farm, built their huts on sites and ploughed lands, allotted to each, and grazed their stock on the common grazing ground.

Umvovo bequeathed the farms to Maqayekana, his eldest son by his principal wife, and when he died it was transferred to this son. At that time their was still the sum of £600 owing on the farm and a further sum of £300 became due in connection with the administration of Umvovo's estate. In order to liquidate these debts Maqayekana called a meeting of the heads of families living on the farm and at this meeting it was agreed that the head of each family (including appellant) would contribute as much as he could afford, and Maqayekana promised that every one who contributed could live on the farm with his family and stock until his death.

After this meeting Mswazi demanded the refund of the sum of £940 being the amount contributed by him. Maqayekana then called another family meeting at which it was decided to borrow £1,000 on bond in order to pay out Mswazi, and it was agreed that the heads of the families living on the farm would each pay £8. 10s. per annum in order to liquidate the bond, and Maqayekana confirmed his previous promise in regard to the rights of occupation of those who contributed. Appellant states, and the trial Court found, that he contributed the sum of £88. 10s. towards the payment of the bond and the sums of £600 and £300.

In 1934 Maqayekana died leaving a will in which the farm was bequeathed to respondent, to whom it was transferred in 1935. At that time he was a boy 16 years of age under the guardianship of Mpikwa, half-brother of appellant. On 12th August, 1948, respondent obtained an order of ejectment against appellant. This judgment was confirmed on appeal on 29th January, 1949 [see 1 N.A.C. (S) 97], this Court holding that as appellant's right to reside on the farm was not registered against the title deed, and as respondent had no notice of such right at the time of the transfer of the farm to him, he was not bound to recognize appellant's right.

At the time of the order of ejectment appellant had five huts and seven peach trees on his kraal site which was fenced, and after the judgment of 12th August, 1948, he cultivated his lands, planting mealies, kaffir corn and pumpkins. When he was ejected

in March, 1949, the crops had not been reaped. Appellant now claims from respondent the following amounts, viz:—

Amount contributed by him	£88	10	0
Interest thereon from January, 1929 (the date that bond was cancelled) at 6 per cent. reduced to	88	10	0
Value of five huts	31	0	0
Fencing	4	0	0
Value of seven peach trees	0	7	0
Value of crops on lands	25	0	0
	£237	7	0

The Native Commissioner entered judgment for defendant (respondent) with cotss, and appellant now appeals on the following grounds:—

(1) That the judgment is wrong in law for the following reasons:—

(*a*) That the basis of the plaintiff's claim is one of damages for breach of contract.

(*b*) That the evidence discloses that the contribution of £88. 10s. made by the plaintiff to discharge the liabilities of £600, £300 and £1,000 was in consideration of the allotment to plaintiff of a garden and certain lands on the farm Roodewal and the promise that plaintiff could remain on the said farm for his life together with his wife and children and his livestock thereon.

(*c*) That any deprivation of plaintiff of these rights by either the late Umvovo or the late Maqayekana or their heirs without plaintiff's consent would constitute a breach of contract and would entitle plaintiff to an action for damages.

(*d*) That defendant is the heir of the late Maqayekana and inherited movable and immovable property from him including the said farm Roodewal and has deprived plaintiff of his aforesaid rights and having deprived plaintiff of his aforesaid rights is therefore liable to plaintiff for damages.

(*e*) The evidence discloses that defendant was a bona fide occupier of the farm Roodewal and that as such he erected thereon five huts and fences and planted thereon peach trees and mealie, kaffircorn and pumpkin crops.

(*f*) The evidence further discloses the value of such huts, fences, trees and crops or in any event there was sufficient evidence led before the Native Commissioner to enable him to assess the values thereof.

(*g*) That as such articles have a value they thereby enhanced the value of the farm Roodewal to the extent of the value of such articles.

(*h*) That as a result of the defendant's ejectment of the plaintiff from the said farm Roodewal and by reason of the fact that thereupon the huts and fences erected by plaintiff upon the farm and the trees and crops planted by plaintiff thereon became the property of the defendant, the latter has been enriched to the detriment and injury of the plaintiff to the extent of the value of the said huts, fences, trees and crops and the Native Commissioner was therefore wrong in law in coming to the conclusion that there was no evidence upon which to assess the damages sustained by plaintiff as a result of plaintiff being deprived of the use of the said huts, fences, trees, and crops.

(*i*) That the plaintiff having noted an appeal against the judgment for ejectment delivered by the Native Commissioner for the District of Umzimkulu on the 12th August, 1948, and the appeal against this judgment not having been heard and disposed of until the 29th January, 1949, the plaintiff during the period 12th

August, 1948, to 29th January, 1949, was not in the position of a *mala fide* occupier on the farm Roodewal and was entitled during such period to plant crops thereon and is entitled to compensation for any such crops not reaped by him.

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

In this Court the claim for interest was abandoned and the balance of the claim was argued under three heads, namely, (1) the capital contribution, (2) the improvements on the farm, and (3) the growing crops. Before considering these heads I must deal with an allegation in the summons in which appellant seeks to hold respondent liable under native law and custom.

It is clear that appellant was given the right to reside on the farm on condition that he assisted Maqayekana with the payment of the bond and the estate debts. This agreement embodies the custom amongst natives who have purchased a farm collectively. The head of the tribe, clan or family cannot eject a member except for serious misconduct. Maqayekana, as head, could not have ejected appellant, and respondent, as his heir, is bound, in native law and custom, to honour the agreement in the same manner as if he himself had entered into it [Letlotla *v.* Bolofo, 1947 N.A.C. (C. & O.) 16], and if he fails to fulfil his part of the contract he can be compelled to make restitution. It was therefore competent for the Native Commissioner to decide this case according to the principles of native law and custom and if he had done so and had given judgment for respondent the appeal must clearly succeed. But the Native Commissioner was not bound to decide the case according to native law. He is given a discretion in this respect by Section 11 (1) of Act No. 38 of 1927, and this Court will not interfere with the exercise of this discretion unless it is clear that he has exercised his discretion improperly [see Lebona *v.* Ramokone, 1946 N.A.C. (C. & O.) at p. 16]. In the present case the action according to the particulars of claim, is based partly on common law and partly on native law, and the defence is based entirely on common law. The Native Commissioner has given satisfactory reasons why he decided the case according to common law, and we are not prepared to say that he has exercised his discretion improperly.

I revert now to the three heads under which the case was argued. Considerable argument was devoted to the second head, namely, the improvements. It is urged that appellant is entitled to compensation for the huts, fence and peach trees on the doctrine of enrichment. The rule that no one shall unjustly be enriched at the expense of another is well established and is a distinct legal principle. In Roman-Dutch law it has no place in the realm of contract. It generally, but not always, commences where the contract ends. I have been unable to find a precise definition of its scope, nor is it desirable to attempt such definition; but it is of very wide application. When it does apply, an obligation is imposed on the person enriched to restore the property to the other person or pay him compensation (*Voet* 6.1.36). Where a person has made improvements or additions to landed property without the express or implies permission of the owner and compensation has to be made, the measure of compensation depends on whether the expenses incurred were necessary or merely useful. Expenses necessarily incurred for the protection or preservation of the property are repayable in full. If the expenses were merely useful, the sum recoverable is the difference between the value of the land with, and the value of the land without, the improvements, in so far as it does not exceed what he has actually expended. (*Maasdorp's* Inst. Vol. II, 5th Ed., p. 58). It should be pointed out, however, that according to *Voet* the person who has incurred the expenses has no claim where the owner can derive no advantage from the work; nor can he claim anything if the owner gives him leave to remove what he has placed on the land.

Now, in the present case, there is a good deal of evidence, of what it cost to erect the huts and the fence, but the record is silent as to what extent, if any, the value of the land has been enhanced. Respondent admits, that the huts as they stand have a value, but they are unoccupied and there is no evidence that they can be let. Moreover, respondent has no use for them. No doubt the huts have a breakdown value and if respondent demolished them and appropriates the material he will be enriched to the extent of the value of the material, but on the 28th February, 1949, respondent gave appellant permission to remove the huts and fencing. Appellant's remedy therefore lies in his own hands.

In regard to the peach trees, these belong to the owner of the soil and appellant is entitled to recover from respondent, only the bare costs of putting them into the ground. There is no evidence of this cost.

In regard to the third head—the growing crops—the Native Commissioner has disallowed this claim on the ground that when appellant planted the crops he had a judgment of ejectment standing against him. The Native Commissioner points out that a lessee, who has planted crops which he knew he could not reap before the expiration of the lease, loses his right to such crop, and he goes to say " How much right then to complain has an occupier who ploughs and sows after his rights have been clearly determined and when he is a *mala fide* occupier?" The Native Commissioner is not quite correct in drawing this comparison. The rights of a lessee to grow crops are affected by the Placaats of 26th September, 1658, and 24th February, 1696. These do not affect the rights of a bona fide or *mala fide* possessor. Both are entitled to compensation for useful expenses incurred in regard to improvements made by them upon land in their possession. If the owner of the land refuses to refund such expenses, both classes of occupiers are entitled to remove the improvements, if this can be done without material damage to the land. They are, neither of them, bound to follow this course, but may recover compensation by way of action on the equitable doctrine that " It is by the law of nature just that no one shall become the richer at the loss or injury of another ". The essentials of this equitable doctrine are that the owner has unjustly accepted the benefits resulting from expenditure incurred by the occupier. Apart from the fact that there is no evidence of the amount of expenses incurred in planting the crops, there is no evidence that respondent benefited. On the contrary, the evidence goes to show that the crops, which were poor on account of the drought, were destroyed by stock and that respondent reaped nothing. Appellant is therefore not entitled to compensation under this head.

I come now to the main head, namely, the refund of the sum of £88. 10s. The Native Commissioner found that the contribution was a gift to Maqayekana and says that nowhere in his examination-in-chief did appellant couple the £88. 10s. with his right to live on the farm of which Maqayekana was owner. This is not correct. Appellant says in his evidence in chief " When this loan was paid off, I had paid £88. 10s. to Maqayekana in connection with the £600, the £300 and the £1.000. For the payment of £88. 10s. I had the right to live on Roodewal with my family and stock for my lifetime." He was closely cross-examined on this statement. The effect of his answers is " I did not expect repayment of the £88. 10s. from Maqayekana. That was a gift to him because he promised I could die on the farm," In re-examination he repeats " There was nothing given me for the £88. 10s., but I was given the right to stay, if I contributed and did what was required of me." Then the Native Commissioner says that the fact that other members of the family were ejected without claiming repayment indicates that the contribution was a gift. Appellant is not concerned with what other members did. In any case, the member who did not claim refund states that he left voluntarily. In that case, he had abandoned his rights to

reside on the farm and has no claim to a refund. It is clear from the evidence as a whole that Maqayekana did promise that appellant could remain on the farm until his death. This was a valid contract which effectively bound Maqayekana. The point for decision is whether it also binds his son and heir, the respondent.

Mr. Elliot, for appellant, contends that respondent is bound by the promise made by his father. He relies on the decision in Laing *v.* Le Roux (1921 C.P.D. 745). The head note in that case reads as follows: " A creditor of a deceased estate who proves his claim and is informed by the executor that the claim will not be allowed, and who takes no further steps to enforce his claim before the liquidation of the estate and discharge of the executor, is not debarred from recovering the amount of his claim from the persons who have benefited from the estate as heirs or legatees." This in accord with Roman-Dutch Law, which provides that by the acceptance of the inheritance the heir becomes liable for the debts of the deceased, but only to the extent to what he has inherited. (*Voct* 29.2.38). *Maasdorp's* Inst. (Vol. I, 5th Ed.) is to the same effect. The learned author says at page 252 " Any creditor who fails to lodge his claim within the period specified or afterwards before the funds are distributed, will have no right to complaint if a distribution has not been made in accordance with his legal order of preference, and will not be entitled to recover from any other creditor who has been paid out of his due order before him, nor will he have any recourse against the executor who has fully administered the estate and no longer has any funds of the estate in his hands. The only remedy a creditor would have in such a case would be to proceed against the heirs, to whom the executor has paid over the net residue of the estate." But the present claim is not a debt owing by Maqayekana's estate. Neither he nor his executor disturbed appellant in his occupation. If appellant has a claim for compensation or damages, it accrued only when he was ejected by respondent. The executor, if he were aware of appellant's right, should have protected it by an endorsement on the title deed. This was not done, and this Court has held that, in the absence of an endorsement, respondent was not bound by the agreement entered into by his father and that he had the right to eject appellant. There is thus no privity of contract between appellant and respondent, and consequently appellant cannot recover damages for the breach thereof.

Even if I am wrong in holding that respondent is not bound by the agreement between appellant and Maqayekana, the appeal must still fail for want of proof of damages.

Counsel for appellant asks this Court, is assessing the damage, to add to the capital sum, interest thereon at 6 per cent. p.a. from 11.1.29 (the date the bond was cancelled) to 11.1.49, and deduct from the total thus arrived the sum of £58 being £2 p.a. rent for 29 years. (It was appellant's refusal to pay rent that led to his ejectment.) To adopt this basis of assessment would amount to awarding appellant compensation for benefits he has already enjoyed. Obviously, the loss he has suffered is the value of his occupation for the remainder of his life. There is no evidence of his age, the state of his health, and of his expectation of life. There is thus no satisfactory date on which the loss he has suffered can be assessed.

The appeal fails, but the judgment as it stands may preclude appellant from bringing the action afresh. This is conceded by Mr. Zietsman, who appears for respondent. The judgment must therefore be altered.

The appeal is dismissed with costs, but the judgment of the Court below is altered to one of absolution from the instance with costs.

Cockcroft and van Aswegen (Members) concur.

For Appellant: Mr. Elliot, Kokstad.

For Respondent: Mr. Zietsman, Kokstad.

CASE No. 93.

MGINYANA NTSODO *v.* PALISO DLANGANA.

UMTATA: 20th February, 1950. Before J. W. Sleigh, Esq., President, Mundell and Elston, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Onus—Onus of proving dissolution of union on party alleging it—Native Customary Union—If union dissolved at least one beast must be returned to mark dissolution—Allegation that husband agreed to dissolution without keta *must be conclusively proved—Practice and Procedure—Onus on defendant—Court refused to alter judgment for defendant to one of absolution on the ground of prejudice.*

Appeal from the Court of the Native Commissioner, Engcobo.

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

Respondent is the brother and heir of the late Tintelo who married the late Nometele according to native custom. This woman, who was the sister of appellant, had two daughters, namely, Nonqanzana and Ntekesi. They grew up at the kraal of appellant who has given Nonganzana in marriage and received 9 head of cattle for her. Respondent claimed, against payment of two cattle as *isondlo*, custody of the girl Ntekesi and delivery of the 9 cattle or payment of their value, £75.

Appellant resisted respondent's claim on the ground that the union between Tintelo and Nometele had been dissolved by the *keta* of the dowry before the birth of the two girls. The Additional Assistant Native Commissioner found that the dissolution of the union had not been proved and entered judgment for plaintiff (respondent). From this judgment appellant appeals.

The onus of proving the dissolution of the union and that the girls were born after such dissolution is, of course, on appellant. His evidence stands virtually alone. He says that all the people who were present on his side when the dowry was *kataed* are dead except one who is in Johannesburg. There is no explanation why the evidence of this witness was not obtained.

He states that no cattle were actually returned to Tintelo because he paid only four cattle and a horse and Nometele gave birth to four children and a marriage outfit was supplied. The customary deductions thus equal the dowry. In that case one beast should have been returned to mark the dissolution (Nikiwe *v.* Dzeke, 3 N.A.C. 169). In Bobotyane *v.* Jack [1944 N.A.C. (C. & O.) 9] McLoughlin P. said: "On the part of the wife, a repudiation (of the union) can become effective only by restoration of the *lobolo* or part thereof, for there is no corresponding practice known to native law which gives the wife a right similar to the husband's of public repudiation with resultant forfeiture of *lobolo*." There are other decisions to the same effect. They all indicate that if the wife desires to terminate the union there must be a return of at least one beast to mark the dissolution, or otherwise she must obtain an order of Court dissolving the union as in Qeyi *v.* Latyabuka (4 N.A.C. 203).

Assuming that it is permissible for the husband to agree to the dissolution of the union without the return of *lobolo*, evidence of such agreement must be strong and conclusive. There is no such proof in the present case.

A point which appears to be in favour of appellant is that immediately prior to her death Nometele lived apart from her husband for a long time. It appears, however, that she became

mentally ill and was trained by her mother to become a witch doctor. During her period of training, and as a doctor she would naturally be away from her kraal frequently. But respondent and his witnesses say that she often returned to Tintelo's kraal. She would not have done this if her dowry had been *ketaed*.

Another point which might be said to favour appellant is that when respondent went to *putuma* the girls after the woman's death, appellant drove him away, and when Tintelo returned from work he was informed of this and took no immediate steps to recover the children. We are asked to infer from this that appellant did not recognise Tintelo's right to the children. It appears however from the evidence that Nometele was under *teleka* for further dowry at the time she died, and it is therefore quite possible that appellant refused to surrender the children without payment of a *teleka* beast or *isondlo*. Unfortunately Tintelo died before the case came to trial. He has therefore not had an opportunity of explaining the reason for his delay.

Appellant states that after the *keta*, Nometele lived with another man as his sweetheart, inferring that if there had been no *keta* Tintelo would have taken action against this man. It is not admitted that the woman did live with this man and no evidence has been called to prove this allegation.

A further point which favours appellant is that Nomqanzana was *tombisaed* by him and not by Tintelo. This point is, however, not conclusive, as according to the evidence, Tintelo was frequently away at work and the girl grew up at appellant's kraal.

Appellant states that Tintelo complained to Headman Sitelo in connection with the *keta*. Respondent however says that Tintelo complained of the woman's desertion and that the headman ordered the appellant to return her which was done. The probability is in favour of the latter version because if Tintelo had agreed to the dissolution of the union he had no grounds for complaint.

Respondent and his witnesses deny that the dowry was *ketaed*. They all say that the two girls were born at Tintelo's kraal and that when Nometele left the kraal for the first time she took with her the two girls and a baby which subsequently died.

It is very improbable that Tintelo would have agreed to the dissolution of the union without the return of at least one beast, and the evidence adduced to prove the agreement is so inconclusive that it is not surprising that the Assistant Native Commissioner refused to accept it.

Counsel for appellant urges that as the judgment is a judgment *in rem*, and affects the status of the girls, this Court should alter the judgment to one of absolution from the instance so as to enable the appellant to bring fresh evidence, notwithstanding the fact that the onus of proof was on appellant. In effect therefore he asked the Court to reverse the judgment in favour of respondent to one in favour of appellant. We are unable to accede to this request. It is in the interests of justice that there should be finality in litigation, and as appellant was represented in the Court below, he should have known what evidence it was necessary to place before the Court. If we were to reverse the judgment now we would be placing the burden on respondent to bring a fresh action in a matter in which he has been successful.

The appeal is dismissed with costs.

For Appellant: Mr. Hughes, Umtata.

For Respondent: Mr. Alison, Umtata.

CASE No. 94.

ENOCH MHLOKONYELWA *v.* GRISHION NGOMA.

UMTATA: 21st February, 1950. Before J. W. Sleigh, Esq., President, Mundell and Elston, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Rescission of Default Judgment—Applicant merely to show that he has a bona fide defence—Native Custom—Kraalhead responsibility—Inmates—Kraalhead may be liable for torts of temporary inmates or visitors—Not liable for torts of casual visitors—Liability based on control and not relationship.

Appeal from the Court of the Native Commissioner, Tsolo.

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

In an action for damages for seduction and pregnancy default judgment was entered against one Samuel Mhlokolyelwa (an unmarried man) and appellant in his capacity as kraalhead of Samuel. In an application for the rescission of the default judgment appellant avers that he has a good defence to the action as he is not the guardian of Samuel who is not a permanent resident of his kraal.

The application was dismissed and appellant now appeals.

There is no question of appellant having been in wilful default. The only question is whether he has a bona fide defence.

At the hearing of the application appellant gave evidence which goes to show that he is employed as an agricultural officer in Ngqeleni District, but visits his kraal in St. Cuthbert's location, Tsolo District, periodically; that Samuel's parents are dead; that he grew up at the kraal of appellant's sister and has an elder brother in Umnga Location; that on 29th March, 1949, he came to live at appellant's kraal pending his appointment in the police force; that he lived there and continues to reside there with appellant's consent, and that his residence there is for an indefinite period.

The seduction is alleged to have taken place in May, 1949.

It is correct, as is urged on behalf of appellant, that he is not required to show that he has a complete defence to respondent's claim. He need only show that he has a bona fide defence. Now it is generally stated that a kraalhead is responsible for the torts of inmates of his kraal. It is impossible, and indeed undesirable to attempt to define what is meant by an inmate of a kraal. It is useless to try and draw a distinction between permanent inmates, temporary inmates and visitors, for the kraalhead may be liable for the torts of even visitors, and temporary inmates of his kraal. It is more satisfactory to approach the question from the negative point of view and say that a kraalhead is not liable for the torts of casual visitors.

Now it is clear from appellant's own evidence that Samuel was living at his kraal as an inmate and not a casual visitor. he says in effect that Samuel will live with him until he can find employment. It cannot therefore be said that Samuel is a visitor spending a few days with relatives before passing on. He is living there for an indefinite period and while residing there he is under the control of appellant who is consequently liable for his torts [Skenjana *v.* Gusa and Others, 1944 N.A.C. (C. & O.) 102]. The fact that Samuel has an elder brother makes no difference to appellant's liability, because kraalhead responsibility for the torts of inmates of the kraal is not based on

relationship but on control which the head of the kraal is supposed to exercise over all inmates of such kraal [Motseoa *v.* Qungane, 1 N.A.C. (S) 16].

Although appellant's default was not wilful, it is clear that his defence must inevitably fail. No purpose will therefore be served by setting aside the default judgment against him.

The appeal is dismissed with costs.

For Appellant: Mr. K. Muggleston, Umtata.
For Respondent: Mr. Hughes, Umtata.

CASE No. 95.

DALIBUNGA NGWENYA *v.* **NALISILE GUNGUBELE.**

UMTATA: 22nd February, 1950. Before J. W. Sleigh, Esq., President, Mundell and Elston, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Nomination of great wives —Right to nominate exclusive prerogative of the Supreme Chief —A member of a clan who is not the head cannot nominate his great wife without approval of supreme chief—Family custom—Court not prepared to give judicial approval to family practice which is in conflict with established Tembu customs.

Appeal from the Court of the Native Commissioner, Mqanduli.

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

Plaintiff (now respondent) alleges that he is the eldest son and heir in the great house of the late Gungubele and as such he is entitled to certain property appertaining to that house and in the possession of defendant (now appellant).

Appellant admits that he is in possession of some of the property claimed. He also admits that respondent is the eldest son of the first wife married by the late Gungubele, but he denies that defendant is the heir in Gungubele's great house. He avers that when Gungubele married his third wife Nobuwa, the daughter of a chief, he, with due formality at a public meeting and in the presence of Chief Sipendu the present head of his tribe, installed her as his great wife, and that the heir in Gungubele's great house is therefore her son, Sonqomboqo, on whose behalf appellant is holding the property.

The Assistant Native Commissioner held in effect that it was not competent for Gungubele to appoint Nobuwa as his great wife and entered judgment for respondent for what is admitted to be great house property. From this judgment appellant appeals. Briefly the ground of appeal is that the Native Commissioner erred in holding that it was not competent for Gungubele to nominate his great wife.

The parties are Tembus and belong to the Amaqiha clan of which Sipendu Bacela is the head. He is a direct descendant of Hlanga who, according to Hammond Tooke's Genealogical Tree of Native Chiefs compiled in 1883, was the son of an unnamed chief who was the brother of Dlomo, the then Tembu Chief. Another tree shows Hlanga as a half-brother to Dlomo and the father of Ndungwana and Umdhlopi the founders of the Amadungwane and Amaqiha clans respectively. Gungubele and appellant are the sons of Ngwenya who was the grandson of Yokwe. It is not stated how Yokwe is related to Hlanga. He is not even shown in the trees we have consulted. He must have been a junior son of either Hlanga or of Umdhlopi. At the most, therefore, Gungubele was the great-grandson of a petty chief and very far removed from Sipendu, the head of the clan, and even further removed from the ruling house of the Tembus.

It is, however, accepted for the purpose of argument that it has been the practice for generations past for Hlanga's descendants to nominate their great wives who were the daughters of Chiefs and whose dowries were paid by the Amaqiha clan; that Gungubele so nominated his third wife, Nobuwa, as his great wife, and that her dowry was paid by the Amaqiha clan. The question is whether this Court should recognise this practice as established native law and custom.

It is an old custom that the head of a tribe has the privilege of nominating his great or royal wife. She is invariably the daughter of a Chief and her dowry is provided by the tribe which looks to her to give birth to its future chief. Hence she is said to be the mother of the tribe. (See Ntola *v.* Situkutezi, 1942 N.A.C. (C. & O.) 46]. But, apart from the Abambo tribes, it is only a ruling chief who is legally entitled to exercise this privilege. In Dyosini *v.* Bekwa [1933 N.A.C. (C. & O.) at p. 49] Barry P. said: "In the cases of the Pondos, Tembus and other of the great tribes, it is permissible for the paramount chief only to nominate or substitute his great wife, and among the Tembus a lesser chief too, but in his case he must be a chief of very considerable standing, and could so nominate *but only* with the permission of the paramount. This privilege is rightly esteemed to be a great and a very exclusive one, and for cogent reasons one to be exercised only by a supreme or paramount head of the tribe. Among some of the peoples and tribes to whom the generic name of 'Abambo' is applied, the custom was also recognised, but this Court is not for that reason prepared to accept as correct the contention that every male descendant from an original royal stock, even if such male happens to be the eldest son in his own particular house, is entitled to enjoy the full rank of chief, and to exercise the exceptional privilege which is the exclusive prerogative of the undisputed head of the tribe". The decisions in Masipula *v.* Masipula (4 N.A.C. 373) and in Poto *vs.* Costa [1931 N.A.C. (C. & O.) 38] are to the same effect.

In Dumalisile *vs.* Dumalisile [1939 N.A.C. (C. & O.) 87] this Court recognised the right of a Chief who was not the head of a tribe to nominate his great wife, but the circumstances in that case were exceptional in that Dumalisile was the eldest son in the great house of the powerful Gcaleka Chief Ncapayi and that when Dumalisile married his second wife, the daughter of the Tembu Chief Mgudlwa,Sarili, the paramount chief of the Gcalekas, was present and actually declared her to be the great wife of Dumalisile.

The authorities I have consulted do not give the reason why the right of nominating the great wife is the exclusive prerogative of the supreme chief of the tribe. The reason seems to be that if a petty chief were allowed this privilege it might lead to an undesirable alliance with his wife's tribe and to the disintegration of the tribe to which the petty chief belongs. Moreover, if the privilege were not exclusive the son of a nominated wife of a petty chief might claim that as his mother was married as "the mother of the tribe" his section of the tribe has acquired independent status. A claim which must be resisted if the cohesion of the tribe is to be maintained. Hence the necessity for obtaining the approval of the paramount chief, and it may be certain that such approval will not be given unless there are very good reasons.

The parties are, however, Tembus and as was stated in Dyosini's case (*supra*), among this tribe a lesser chief may also nominate his great wife. This point was referred to the native assessors. A record of their opinion is attached. The Tembu assessors state that since Ngubencuka's reign the heads of the various Tembu clans were permitted to nominate their great wives. It was not necessary to obtain the approval of the paramount chief but the nomination had to be reported to him and presumably he was entitled to voice his disapproval. The assessors are however definite that a member of a clan who is not the head cannot nominate his great wife.

Now, it is clear that the late Gungubele was not the head of the tribe. It is doubtful even whether he could be regarded as a chief, but even if he were, there is not a title of evidence that the paramount chief of the Tembus approved of the appointment of Nobuwa as his great wife. Chief Sipendu is not the paramount chief and would have no authority to grant approval.

Although it was eccepted that Hlanga's descendants exercised the privilege of nominating their great wives, this Court is not prepared to give judicial approval to what appears to be a purely family practice, which is itself in conflict with the established customs of the Tembu tribe. The ruling of the Assistant Native Commissioner is therefore confirmed and the appeal is dismissed with costs.

NATIVE ASSESSORS OPINION.

Names of Assessors: John Ngcwaba (Cofimvaba), Dumalisile Mbekeni (Engcobo), Bazindlovu Holomisa (Mqanduli) and E. C. Bam (Tsolo).

The facts of the case are put to the assessors and they are asked whether the paramount chief of the Tembus would recognise in his Court the right by a member of Hlanga's family to nominate his great wife.

John Ngcwaba.—From Ngubencuka's time the heads of the various Tembu clans were permitted to nominate their great wives. This is still so to-day. A member of the clan who is not the head cannot nominate his great wife.

Dumalisile Mbekeni.—It is not necessary to get the approval of the paramount chief of the Tembus. The nomination is reported to the paramount chief and the clan to which the chief is head will contribute towards the woman's dowry. Sipendu may allow his younger brothers to practise the custom of nominating their great wives.

For Appellant: Mr. K. Muggleston, Umtata.
For Respondent: Mr. Airey, Umtata.