SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(Southern Division)
1951

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CASE No. 125.

SIMILO GXOBANA & ANO. *v.* KWEDANA CETYWAYO.

PORT ST. JOHNS: 1st Frebruary, 1951. Before J. W. Sleigh, Esq., President. Wilbraham and Holdt, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Adultery followed by infection of syphilis—Adultery proved—Onus—on defendant to rebut woman's testimony that he communicated disease to her.

First defendant is the inmate of the kraal of second defendant. Plaintiff is married according to Native Custom to one Mampemvu which marriage still subsists. Defendant committed adultery with plaintiff's wife and infected her with venereal disease. Plaintiff claimed damages in eight head of cattle or their value £40. Defendant denies the allegation of having committed adultery and deny that plaintiff suffered damages in the amount claimed.

Judgment was given for plaintiff as prayed against both defendants jointly and severally, the one paying the other to be absolved.

Held: That the Native Commissioner's finding that adultery had been committed is correct and that defendant communicated the disease to Mampemvu.

Appeal dismissed with costs.

Appeal from the Court of the Native Commissioner, Libode.

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

In the particulars of claim it is alleged that first defendant committed adultery with plaintiff's customary wife, Mampemvu, and infected her with syphilis. Plaintiff claimed eight head of cattle or their value £40 and obtained judgment. From this judgment defendant and his father, the kraalhead, appeal.

It is not disputed that when plaintiff left for the mines about the end of June, 1948, Mampemvu was pregnant and gave birth during his absence. It was then found that both Mampemvu and the child were suffering from syphilis. The district surgeon's certificate, which was admitted as evidence by consent, indicates that on the 8th July, 1949, Mampemvu was found to be suffering from syphilis which she had contracted about 12 months previously.

Mampemvu blames first defendant, and her evidence of the adultery is corroborated by her daughter, a child of about 10 years of age and also by a woman, Magadi, who was in Mampemvu's hut one evening when first defendant arrived and who left him in that hut when she departed. This evidence indicates that first defendant and Mampemvu were on very intimate terms. There are no discrepancies of any importance.

The Native Commissioner who is an experienced judicial officer was impressed with the evidence of Mampemvu and her daughter and believed them. He has not overlooked the fact that it is unusual for a woman to commit adultery in the presence of her children. Moreover, since the woman was already pregnant when her husband left for work, she ran little risk of her misconduct being discovered and her adultery would not have been exposed if she had not contracted the disease. When she discovered that she did have the disease she was no doubt extremely annoyed with the person who communicated it to her. She immediately blamed first defendant and in the circumstances it is improbable that she would have accused him of adultery falsely. We agree therefore with the Native Commissioner's finding that adultery had been proved.

The next question is whether first defendant communicated the disease to Mampemvu. The onus of proving this is on the plaintiff. He says that he has never had syphilis, but he should

have produced medical evidence to this effect, since the doctor's certificate does not exclude the possibility that he had infected his wife. However, Mampemvu, whom the Native Commissioner found to be a truthful witness, states that her husband was free from the disease and that she became aware that she had it when the child was born about December, 1948. She states that first defendant communicated it to her and there is no evidence that she misconducted herself with anyone else. There was thus a *prima facie* case against defendants which they had to rebut.

First defendant also says that he has never had the disease. He says he went to work on the mines in May, 1949, and was physically examined both before he left and when he arrived on the mines and was free from the disease. It is unlikely that he would have been accepted for work if he were visibly suffering from the disease. But the fact that he was accepted for work does not exclude the possibility that he did have the disease. He says further that his wife and children are free from the disease. That fact also does not prove that he was free from the disease at the time adultery was committed. Finally he says that he was willing to submit to an examination by a doctor. If a doctor had found that he was free and that he did not have the disease recently, it would have completely demolished plaintiff's case. It is therefore difficult to understand why he did not produce this evidence. The only reasonable conclusion is that he did have the disease, and, since the adultery has been proved, that he is the person who communicated it to Mampemvu.

The appeal is consequently dismissed with costs.

For Appellant: Mr. C. Stanford, Lusikisiki.

For Respondent: Mr. H. Stanford, Libode.

CASE No. 126.

MQANGAYI MDINGE *v.* TSHWILI KOTSHINI.

PORT ST. JOHNS: 1st February, 1951. Before J. W. Sleigh, Esq., President, Wilbraham and Holdt, Members of the Court (Southern Division).

Native Appeal Case—Attorney and Client—Client not bound by private agreement between his attorney and another—Native Custom—Dowry—underlying principles governing restoration of dowry—alternative value of dowry to be returned is the present value—Onus—on husband to prove the alternative value of dowry stock—Practice and Procedure—Judicial officer not entitled to take judicial notice of average value of lobola *cattle in his area.*

Plaintiff's wife, the sister of defendant, deserted him, when he demanded her return, defendant dissolved the marriage by tendering restoration of the dowry less the customary deductions. Plaintiff accepted the tender but contended that the alternative value of the horse should be £15 and not £7. The claim was thus reduced to £8.

Judgment was entered for defendant with costs in respect of the £8.

Held: (1) That if the original dowry is no longer in the possession of the dowry holder and he does not substitute other stock, the husband is entitled to recover the present local average value of the dowry.

Held: (2) That as defendant admits that he sold the horse for £15 the Native Commissioner should have given judgment for plaintiff for the amount claimed.

Appeal accordingly allowed with costs and the judgment of the Court below is altered to read "For plaintiff for £8 and costs".

Alexander *v.* Kilzke, 1918, E.D.L., 87.

Nqakwana *v.* Sixinti, 1, N.A.C., 36.

Majongile *v.* Mpikeleli, 1951 (1), P.H. R., 1.

Matolengiwe *v.* Pateni, 1949, N.A.C. (S), 106.

Cases referred to and discussed.

Appeal from the Court of the Native Commissioner, Bizana.

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

Plaintiff's wife, the sister of defendant, deserted him, when he demanded her return, refendant dissolved the union by tendering, as restoration of the dowry, the sum of £17 the estimated alternative value of the dowry. This amount was subsequently increased to £23. Plaintiff, however, considered that the value of the dowry, less the customary deductions, was £50, viz. four cattle or £20, one horse or £15, £5 in cash and a saddle and bridle or £10. He sued defendant for the balance, namely £27.

Defendant pleaded in effect that Plaintiff was entitled to three head of cattle valued at £15, one horse valued at £7, a saddle and £1 for the bridle, that is £23 and a saddle which was also tendered. He admitted that he had sold the horse for £15.

When the case came to trial plaintiff accepted the tender, but contended that the alternative value of the horse should be £15, and not £7. The claim was thus reduced to £8.

It appears from the notes on the record that the attorneys for the parties had agreed in 1941 that they would in future regard £7 as the value of a horse paid as *lobolo*. The Assistant Native Commissioner considered that the parties in this case should be bound by this agreement and entered judgment for defendant with costs in respect of the £8. From this judgment defendant appeals.

Now, of course, the Native Commisisoner was quite wrong in holding that the parties were bound by the agreement. According to the ordinary form of power, an attorney is authorised to take action in a Native Commissioner's Court "and proceed to the final end and determination thereof". When the case has been finally disposed of his mandate ceases. No admission, compromise or agreement made by him before the commencement of the case or after the determination thereof can possibly bind his client. Much less is the client bound by some private understanding between his attorney and another attorney regulating their future attitude in regard to civil cases in which they might appear. Even a compromise made by an attorney on behalf of his client during the course of the proceedings may be repudiated by the latter (Alexander *v.* Klitzke, 1918, E.D.L., 87).

It is clear from the pleadings that both parties considered that plaintiff was entitled to recover the alternative value of the *ikazi* as at the time dowry was paid, and not the value at the time restoration had to be made. There is some support for this belief (see e.g. Nqakwana *v.* Sixinti, 1, N.A.C., 36).

But in my opinion this is entirely in conflict with the underlying principles governing the restoration of dowry. Among the tribes which do not have a fixed dowry *lobolo* is paid in cattle only. It is not unusual to pay small stock, horses or cash as part of the dowry, when such payments are made, the parties usually agree that the horse, small stock or cash, as the case may be, shall represent a certain number of cattle. If there has been no agreement one horse, or £5 or 10 small stock are taken to be equivalent to one beast. When, for any reason, the dowry is returnable to the husband or his heir, he is entitled to recover the original dowry paid. As the native assessors put it, the husband is entitled to the "hair of his cattle". If, however, the original dowry is no longer in the possession of the dowry holder, the latter is under a legal obligation to substitute other stock or pay the cash equivalent thereof. If cash has been paid as dowry the same amount must be returned. If horses or small stock have been paid and the dowry holder is unable

to substitute others when making restoration, he must pay an amount which will enable the husband to acquire horses and small stock of the type usually paid as dowry. The husband is thus entitled to recover the present local average value of horses, small stock or cattle [see Majongile *v.* Mpikeleli (1951) (1), P.H.R. 1.] and Matolengwe *v.* Pateni [1949, N.A.C. (S), 106 and the cases there cited]. But the onus is on the husband to prove such value. The judicial officer is not entitled to take judicial notice of the average value of *lobola* cattle in his area. If the husband fails to furnish such proof, he is entitled to the standard value only; and since among the tribes which do not have a fixed dowry a horse is regarded as the equivalent of a beast (Tikolo *v.* Simanga, 1, N.A.C., 51), the standard value of a horse is £5.

Now in the present case there is no evidence of the average value of horses in Bizana district, but defendant admits that he sold the horse, which was paid as *lobolo,* for £15. He does not say that that is not the average price of horses in the district. The Native Commissioner should therefore have given judgment for plaintiff for the amount claimed.

The appeal is allowed with costs and the judgment of the Court below is amended to read "For plaintiff for £8 and costs".

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

For Respondent: Mr. C. Stanford, Lusikisiki.

CASE No. 127.

MAFANI TSALO *v.* MZANI NOZATHSWA.

PORT ST. JOHNS: 2nd February, 1951. Before J. W. Sleigh, Esq., President. Wilbraham and Holdt, Members of the Court Southern Division).

Native Appeal Case—Damages for adultery and pregnancy—Practice and Procedure—Corroboration—Woman's evidence of adultery requires corroboration—Not necessarily the act which caused the pregnancy—Native Custom—Effect of failure to report pregnancy.

Plaintiff sued defendant for five head of cattle or their value £25 as damages for adultery with and the pregnancy of his customary wife. The pregnancy was not reported to defendant until after the birth of the child. The Native Commissioner held that there was no corroboration of the woman's evidence of the act of adultery which caused her pregnancy and entered judgment for plaintiff for three head of cattle or their value £15 and costs.

Held: (1) That the woman's evidence of adultery required corroboration. When this requirement is satisfied it is not necessary to bring corroborative evidence of the actual act of adultery which caused the pregnancy.

Held: (2) That having failed to report the pregnancy plaintiff must produce stronger proof of adultery than would normally be required.

Held: (3) That corroborative evidence of compromising circumstances is not sufficiently strong.

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

Matikilane and Another *v.* Mteto, 3 N.A.C., 19.

Tsoali *v.* Lebenya, 1940, N.A.C. (C. & O.), 22.

Loquoa *v.* Sipamla, 1944, N.A.C. (C. & O.), 85.

Mapheleba *v.* Gaula, 1943, N.A.C. (C. & O.), 21.

Gates *v.* Gates, 1939, A.D., at p. 155.

Cases referred to and discussed.

Appeal from the Court of the Native Commisisoner, Ngqeleni.

Wilbraham (Member) delivering the judgment of the Court:—

Plaintiff sued defendant for adultery with and pregnancy of his customary wife Mamtembula. The Assistant Native Commissioner found that adultery had been proved but not that defendant had been responsible for the pregnancy of the woman, and gave judgment for the plaintiff for three head of cattle or their value £15 and costs.

Against this judgment an appeal has been lodged on the grounds that there was insufficient evidence to justify the finding that adultery had been proved and that as those acts of adultery found proved were alleged to have been committed after the pregnancy was known to plaintiff's wife, those acts were not covered by the terms of the summons.

The cases quoted by the Native Commissioner are not in point because in Matikilane & Another *v.* Mteto (3, N.A.C., 19) it was conclusively proved that the defendant could not have caused the pregnancy and in Koyo *v.* Sokapase (3, N.A.C., 17) damages for pregnancy were not awarded because the husband had had access.

In regard to the second ground of appeal, it may be said at once that the Native Commissioner was wrong in holding that the wife's evidence of the act of adultery which resulted in her pregnancy must be corroborated. There must be cases in which it is impossible for a woman to state with any degree of certainty which particular act of intercourse caused her pregnancy; if she had intercourse more than once during the period between her last menstruation and the date on which she missed her periods, and she can produce corroboration of the last act of intercourse only, there must be a doubt whether she was not already pregnant at the date of the last act of intercourse. If the Native Commissioner's ruling is correct, it follows that in such a case the plaintiff must fail. Corroboration means evidence in some degree consistent with the woman's story and inconsistent with the innocence of the man. It has repeatedly been held that a subsequent "catch" not amounting to adultery affords the necessary corroboration of previous acts of adultery and a judgment for the full damages claimed in this case would therefore have been competent.

There are some unsatisfactory features in this case, the chief of which is the unexplained failure to confront the defendant with the pregnancy at his kraal. Although, as will later be indicated, the evidence as to times is very contradictory and confusing, it is nevertheless clear from the mine passes of the plaintiff and the defendant that the former returned from the mines about the beginning of September. 1948, and that the latter did not leave until about the middle of February, 1949. Although there was ample time for him to report the pregnancy to the defendant at his kraal, he (plaintiff) took no steps in this direction until after the birth of the child and after the departure of the defendant. In Tsoali *v.* Lebenya [1940, N.A.C. (C. & O.), 22] the assessors stated that failure to follow custom in this respect meant that the woman was shielding the culprit. In Loquoa *v.* Sipamla [1944, N.A.C. (C. & O.), 85] it was held that failure to report made it necessary for the plaintiff to produce a very strong case in order to succeed, while in Mapheleba *v.* Gaula [1943, N.A.C. (C. & O.), 21] it was stated that the fatal effect of non-report is, if anything, more pronounced in adultery than in seduction cases.

Moreover, the relationship between the woman and the defendant in this case makes intercourse between them incest, a disgraceful and abhorrent thing among natives. It is true that the woman would not, in these circumstances, be likely falsely to accuse defendant but custom demands that a family discussion of the occurrence should have been held immediately the plaintiff became aware of the incest and this he failed to do.

As stated above, the plaintiff's failure to report the pregnancy made it necessary for him to produce stronger proof than would normally be required. His wife says she first slept with defendant after her husband had gone to the mines (i.e. February, 1948); then that her husband had been at the mines nine months before she started sleeping with defendant. But her husband was not away nine months. Again, she says the intimacy with defendant started during the ploughing season preceding the winter during which she became pregnant—i.e. ploughing season of 1947. But she also says she began her dealings with defendant in the ploughing season after her husband had gone to the mines—i.e. ploughing season of 1948. By that time, of course, her husband had already returned and found her pregnant. Her evidence as to the date of birth of the child is equally confusing. She says first that this occurred in early green mealie season of the year before last. This should mean about March, 1948, but in reply to the Court she says the birth occurred in the green mealie season and before Christmas of the year in which her husband returned. If this means December, 1948, it seems strange that this should have been referred to as "recent" when plaintiff asked for a postponement on 28th February, 1950. Accuracy in dates is not expected of ignorant natives, but here the woman is fixing the time of her relations with defendant against the time when her husband was away and one would not expect her to be so confused. However that may be, she is contradicted by the go-between on some points and particularly as to whether she was seen by the latter under one blanket with defendant. The corroborative evidence of compromising circumstances is, therefore, not strong. See Gates *v.* Gates (1939, A.D., at p. 155).

We are of the opinion that plaintiff has failed to produce the degree of proof required of him in the circumstances of this case. The appeal is allowed with costs and the judgment in the Court below altered to one of absolution from the instance with costs.

For Appellant: Mr. C. Stanford, Lusikisiki.

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

CASE No. 128.

MIKAYI NGQUZE *v.* HAUGHTON NGQUZE.

PORT ST. JOHNS: 2nd February, 1951. Before J. W. Sleigh, Esq., President. Wilbraham and Holdt, Members of the Court (Southern Division).

Native Appeal Case—Native custom—Unusual for a man to act as go-between—much less when he is a relative of the woman—Failure to report pregnancy is an indication that real culprit is being shielded.

Plaintiff sued defendant for five head of cattle of their value £25 as damages for the pregnancy of his sister, A, who with defendant and a man N, worked for a trader. A and N had rooms at the trading station. It is alleged that N acted as go-between for defendant.

Judgment was for plaintiff as prayed with costs.

Held: (1) That the pregnancy of A was not reported to defendant.

Held: (2) That failure to report the pregnancy is an indication that real culprit is being shielded.

Held: (3) That the employment of a man as go-between was unnecessary, unnaturel and contrary to custom.

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

Appeal from the Court of the Native Commissioner, Ngqeleni.

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

Respondent sued appellant for five head of cattle or their value £25 as damages for the pregnancy of his sister, America. Appellant denied the allegations of sexual intercourse and pleaded specially that America was a married woman and consequently respondent has no title to sue. The Assistant Native Commissioner ruled against the special plea and there is no appeal against his ruling. He held further that appellant was responsible for America's pregnancy and entered judgment for respondent as prayed. This judgment is attacked on appeal on its merits.

Appellant, America and the go-between, Nolete, all worked for Mr. Puchert at Mtokwana in Ngqeleni district. America, who previously had a child by another man, states that she commenced to work for Mr. Puchart in January, 1949, and that appellant had sexual relations with her both before and after this date. She became pregnant in March, 1949, and gave birth in November. She states that her pregnancy was taken to appellant's kraal and that thereafter the case came before headman Solomon.

In corroboration of the woman's testimony respondent called Nolete. He supports America's evidence as to two appointments made by him on behalf of appellant during ploughing season 1948, but he denies that he accompanied her on the first occasion, as she states, to the place where appellant was waiting. He also corroborates her evidence as to other appointments he made and as to finding her and appellant under one blanket on two occasions while she was working for Puchert. But there are circumstances which render the evidence for respondent entirely improbable.

Although America says that Nolete is not related to her, he himself says that he is related to her mother by clan. Appellant states that she is the daughter of Nolete's elder brother. Even if they are merely related by clan appellant would not have asked him to make appointments. On the contrary appellant would have endeavoured to keep his association with the woman a secret and not disclose it to Nolete, because the latter is one of the persons who would be expected to assist respondent to recover the customary fine from appellant should the woman become pregnant. It is most unusual to ask a man to act as go-between, but when that man is a relative of the woman it becomes an insult. Moreover, there was no necessity to bring Nolete into the matter, because America says that she and appellant were intimate before Nolete made the first appointment. If it were merely a question of conveying a message to America, appellant could have done so himself without raising any suspicion, because the woman was not at her kraal and consequently it was unnecessary to enlist the assistance of some one to get her away from the kraal.

According to America's evidence appellant had on a number of occasions, while she was working at Puchert's sent Nolete to call her from the kitchen. She used to find appellant in Nolete's room and they then used to sleep on the veld. This evidence is improbable since she was the only female servant at the station and had her own room and there was no reason why they could not have slept there.

The evidence that the pregnancy was taken to the kraal of appellant is denied by the latter. John and America say that appellant admitted responsibility. Accordnig to John he went twice and on the second occasion appellant said that he had promised to pay the fine and that if John were in a hurry he could sue. America, however, states that John went three times and that she did not accompany him on the third occasion. This discrepancy would not have been of much significance, but for the fact that the headman states that both John and America admitted to him that the pregnancy was never reported.

The Asistant Native Commisioner says that he viewed the headman's evidence with suspicion on the ground that he did not consider the headman could have remembered the facts of a case tried by him more then a year before he gave his evidence. But the headman says that he does remember because he heard that respondent was suing in the Native Commissioner's Court and he made a point of remembering the facts. This is not unreasonable. The summons was isued less than a month after the case came before him and he would naturally be interested in the result of the trial in the Native Commissioner's Court, especially as the failure to report the pregnancy was one of the reasons why he had given judgment for appellant and the circumstances of the case were otherwise exceptional.

In our opinion it is Nolete's evidence which should be received not merely with caution but also with great suspicion, because at the time America conceived they both had rooms at the trading store, whereas appellant did not. Nolete, therefore, had the best opportunity of misconducting himself with the woman, and, in view of their relationship, had the greatest motive for accusing some one else.

In our opinion the Assistant Native Commissioner should have accepted the headman's testimony. The failure to report the pregnancy is itself an indication that the real culprit was being shielded. Moreover, the employment of Nolete as a go-between was unnecessary, unnatural and contrary to custom and therefore highly improbable.

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

For Appellant: Mr. C. Stanford, Lusikisiki.

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

CASE No. 129.

NKOSANA NJEKUSE *v.* **KALAKATHSA TUTA.**

PORT ST. JOHNS: 2nd February, 1951. Before J. W. Sleigh, Esq., President. Wilbraham and Holdt, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Loss of nqoma *stock must be reported at kraal from which they came*—Nqoma—*Obligations of* nqoma *holder reviewed—Negligence—* nqomaed *stock attached by Messenger of the Court—Duty of* nqoma *holder.*

Plaintiff sued defendant for delivery of certain three cattle *sisaed* to defendant. Plainiff averred that during defendant's absence at work he (plaintiff) demanded delivery of his cattle from defendant's brother M, who was in charge of defendant's affairs and that M unlawfully refused to deliver the cattle. From the evidence it appears that during plaintiff's absence one beast fell over a krantz and was killed. The death was reported to plaintiff's father, T, and the hide was sold for 12s. That the other two cattle were attached for the debt of plaintiff's brother S; that the attachment was reported to T; that one of the two cattle died in the hands of the Messenger and that the other was sold in execution, and that neither T nor M took any steps to release the cattle.

In an appeal against a judgment for two cattle or their value and for 12s. the value of the hide.

Held: (1) That M's refusal to hand over the cattle on demand does not affect the case as there is no evidence that the cow would not have met with the accident and that the other two caltle would not have been attached if they had been deliverd to plaintiff.

Held: (2) That the loss of *nqoma* stock must be reported to the owner's kraal and that this was done.

Held: (3) That there was no obligation upon M to claim the cattle in an interpleader action and that the cause of the loss was the negligence of plaintiff to take legal action for the release of the cattle.

The appeal was allowed with costs and the judgment altered.

Cases cited:

Lukuleni *v.* Menziwa, 1945, N.A.C. (C. & O.), 42.
Matumba *v.* Cora, 1, N.A.C. (S), 172.

Appeal from the Court of the Native Commissioner, Bizana.

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

Respondent, who was plaintiff in the Court below, sued appellant for certain three cattle or their value at £8 each. He alleged that about three years ago he *sisaed* a cow and a heifer to appellant, that the cow thereafter had a bull calf and that during appellant's absence at work he (respondent) demanded delivery of the cattle from appellant's agent, Mbekwa, who unlawfully refused to deliver the cattle.

Appellant pleaded that while both parties were absent from the district the cow died, and the heifer and calf were attached by the Messenger of the Court for the debts of one Silas. He avers that the calf died while under attachment, that the heifer was sold in execution and that the death of the cow was reported to respondent's father, Tuta, who refused to take delivery of the hide which Mbekwa sold for 12s. This amount was tendered by appellant's attorney.

In a replication respondent denied that the cow died or that its death was reported, and rejected the tender. He excepted to that portion of the plea dealing with the attachment of the two cattle as disclosing no defence and applied that that portion be expunged.

There is nothing on the record to indicate what happened to the exception and the application to expunge, but after hearing evidence the Assistant Native Commissioner entered judgment for respondent "for two head of cattle or their value £13 (heifer £8 and bull tollie £5) and 12s. (being the value of the skin of dead original beast) with costs".

The judgment should have been in terms of the prayer, that is, for the heifer and the tollie, not for "two head of cattle". Then again there is no evidence of the value of the cattle, and the Native Commissioner had no right to place his own valuation on them. He should remember that he was not a witness, and could not be cross-examined by a party who might dispute the value. He must decide the case on the evidence before him and if there is no evidence on a disputed fact, it is not competent for him to supply that evidence from his own knowledge. However, there is no appeal against this part of the judgment.

The main ground of appeal is as follows:—

> "That the judgment is wrong in Law in that the pleadings, admissions on record and evidence adduced disclose that the defendant has rendered a full and true account to the plaintiff of his stewardship of the *sisa* cattle—that the attachment of the heifer and bull was made by the Messenger of the Court, Bizana, under legal process—that defendant had no knowledge thereof and no legal means of preventing same—that it was the duty of the plaintiff's representative in plaintiff's absence—his father Tuta—who had knowledge of the attachment—to protect the plaintiff's rights in the attached cattle and his failure so to do cannot be made the responsibility of the defendant."

Although in the pleadings respondent denied that the cow had died, at the hearing of the case he admitted that the carcass had been seen by his father Tuta. Again, at the commencement of the case he pretended that he did not know that the other two cattle had been attached, but in his evidence he states that he did know and returned home immediately he heard of the attachment. He says that this was in winter 1949.

The Messenger's return shows that the attachment took place on 17th October, 1949. Respondent has therefore from the very outset tried to mislead the Court. It is against this background that the evidence of respondent and his father must be viewed.

The facts of the case are few and simple. Appellant admits that respondent demanded the delivery of the three cattle from Mbekwa who refused to deliver them in the absence of instructions from appellant. The evidence goes to show that while the parties were both away the cow fell over a krantz and was killed and the death was reported to Tuta. Thereafter the other two cattle were legally attached and the attachment was also reported to Tuta; and that after the bull had died the heifer was sold in execution. Neither Tuta nor Mbekwa took any steps to release the cattle although it does appear that the former notified respondent of the attachment.

The only conflict in the evidence of any importance is Tuta's denial that the death of the cow and the attachment of the other two cattle were reported to him by Mbekwa. He says that he heard of the death of the cow from Lagweca and went to see the carcass, and that the attachment came to his knowledge as a rumour. But he was in charge of respondent's affairs; custom requires that the loss of *sisaed* stock must be reported at the kraal from which they came, and Mbekwa says that he did report the death and the attachment to Tuta. In this conflict of evidence the presumption that custom was complied with must operate in Mbekwa's favour and we therefore accept his evidence that he did make the reports.

Now Mbekwa's refusal to hand over the stock upon demand does not affect the case. The cow died as a result of an accident and the other two cattle were attached for the debt of respondent's brother, Silas, who was, at the time, living at the kraal of appellant. There is no acceptable evidence that the cow would not have met with an accident and that the two cattle would not have been attached, if they had been handed over. Respondent's statement that he desired to marry and intended to pay the cattle as dowry cannot be accepted, because he admits that he had not consulted his father and not mentioned the matter to the girl's guardian.

The action is based on contract and the question is whether appellant's inability to carry out his part of the contract was due to his negligence. In contracts of *nqoma* (*sisa*), the utmost good faith is expected of the borrower. He must punctually report to the lender all deaths, losses, thefts or attachments; he must diligently assist in the search for stolen or strayed stock, and must promptly on demand restore the stock to the lender. If he fails in these obligations he will not only forfeit the *nqoma* fee to which he may be entitled, but may be required to *vusa* (replace) the cattle the death or loss of which he has failed to report. Naturally, he will also be liable, even if he does report, to substitute other cattle for those which died or were lost through his negligence. But he is only liable for ordinary negligence. That is, he is expected to exercise that degree of care which an ordinary prudent person would exercise in respect of his own property. He is not obliged to incur expenses which, for the preservation of the property, would ordinarily fall on the owner.

Now, in the present case appellant, or his agent Mbekwa, has not been guilty of any negligent act. They could not have prevented the attachment without committing a criminal act and there was no obligation on either of them to interplead [Lukuleni *v.* Menziwa, 1945, N.A.C. (C. & O.), 42]. If they had done so without the consent of respondent and had lost the case (as was probable) they could not have recovered their expenses from respondent. On the other hand there is clear proof that the attachment was reported to Tuta who was respondent's representative. Tuta could have given instructions to interplead since he knew better than Mbekwa whether the

cattle did in fact belong to respondent or to Silas. The proximate cause of the loss is therefore the negligence of respondent or Tuta to take legal steps for the release of the cattle [see Matumba *v.* Cora, 1, N.A.C. (S), 172].

The appeal is allowed with costs and the judgment of the Court below is altered to one for plaintiff for 12s. with costs to date of tender. Absolution from the instance with costs in respect of the red heifer and the bull tollie.

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

For Respondent: Mr. C. Stanford, Lusikisiki.

CASE No. 130.

BUNZIMA GULANI *v.* KATAZILE GAMKILE.

KOKSTAD: 13th February, 1951. Before J. W. Sleigh, Esq., President. Strydom and Thorpe, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Nqoma—*Failure by the owner to exercise rights of ownership does not vitiate a contract of* nqoma.

Plaintiff did not earmark stock which he *nqomaed* to defendant, nor did he inspect them and earmark the progeny.

Held: That failure to conform with *nqoma* custom may render proving of contract more difficult but does not vitiate transaction.

The appeal is dismissed with costs.

Cases referred to and discussed.

Madonyelwa *v.* Hlantala, 1, N.A.C. (S), 25.

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

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

This is an appeal against a judgment for plaintiff (now respondent) for certain three cattle or their value £24.

Respondent is a minor and is assisted in this action by his legal guardian.

The evidence that some years ago respondent's late father sent £2 to his wife, Masinana, with instructions to buy stock and that the latter handed the money for this purpose to her late brother, Sibandatu, is not seriously disputed. Appellant says that he also handed £4 to Sibandatu who undertook to buy him a beast. It is common cause that Sibandatu did buy a grey heifer from one, Fokisi. The question for dicision is whether he bought this beast, now the mother of the other two cattle, for respondent or for appellant. On this point the evidence of Fokisi must necessarily carry great weight.

Masinana's evidence that the grey heifer was actually pointed out to her by Fokisi in the presence of Sibandatu is corroborated by the former who states that Sibandatu paid him £2 and not £4 for the beast and intimated that he was buying it for Masinana. Fokisi denies that Sibandatu ever bought a beast from him for appellant.

If Fokisi's evidence is accepted then obviously the jugdment is correct. But it is contended that the Assistant Native Commissioner erred in accepting his evidence because he is not an impartial witness. In support of this allegation of bias appellant states that Mambuka, the sister of Fokisi and the wife of Sibandatu, was "smelt out" at the instance of Nogqala, the father of Sibandatu and Masinana, and that after the death of Sibandatu, Fokisi suggested to him (appellant) that he should not disclose to Nogqala that he had certain *nqoma* stock belong-

ing to Sibandatu in his possession. Appellant states that he did inform Nogqala about the *nqoma* stock and that for this reason Fokisi is now giving evidence against him. Fokisi denies that he made any such suggestion and also denies that Mambuka was "smelt out". In our opinion Fokisi's denial must be accepted. Masinana knew that Sibandatu had *nqomaed* stock to appellant. It was for this reason that she agreed to Sibandatu *nqomaing* the grey heifer to appellant. If Masinana knew that appellant had stock belonging to Sibandatu it is most unlikely that Nogqala was ignorant of this fact.

We consequently can find no reason for disbelieving Fokisi.

It is also contended that the Native Commissioner erred in failing to take cognisance of and discarding the recognised Native Custom and Practice of *nqoma* which requires that the owner of the *nqoma* cattle shall inspect the cattle frequently and earmark the progeny.

It was stated in Madonyelwa *v.* Hlantlata [1, N.A.C. (S), 25] that "*nqoma* is a contract of loan in which the owner of stock places stock with another man whose duty it is to look after and account to the owner of such stock. The owner is, however, bound by custom to exercise the various acts of ownership, including inspection of the stock, earmarking of progeny, disposal of natural profits such as wool in the case of small stock, and allocating to the possessor, if he is satisfied, such portion as a reward as he deems fit, in order to reveal to the world that he and not the possessor is the owner. In addition it is essential that when the loan is made independent persons are called to witness the loan."

The words "bound . . . to exercise" and "essential" were unfortunately chosen. They imply that if the owner does not exercise acts of ownership or fails to call independent persons to witness the transaction, then the contract is invalid even if the possessor admits the loan. This of course is not so and the implication was never intended. Failure to confrom with custom may render the proving of the contract more difficult but it does not vitiate the transaction.

Now Masinana's evidence that the heifer was earmarked with her husband's mark at the kraal of Fokisi is not supported by the latter. He states that the beast had a slit right ear before it was sold and that it left his kraal with this mark. Masinana's evidence on this point is therefore discredited. She goes on to say that after Sibandatu's death she went by herself to inspect the beast and found that it had a calf, and that subsequently appellant reported to her that it had another calf. This gives the impression that there was no question then of appellant denying respondent's ownership. Yet when she went to demand the cattle not long after this appellant immediately claimed that he had bought the heifer from Fokisi for himself. He was quite honest in his dealings with Sibandatu's cattle. If Sibandatu had not purchased a beast for him he could have preferred his claim when he accounted for Sibandatu's stock to Nogqala. In our opinion, Masinana's evidence that appellant had previously recognised repondent's ownership and that she instructed him to earmark any progeny must be rejected. The result is that respondent, through his mother, never exercised any right of ownership over the grey heifer and its progeny.

It is common cause that the grey heifer was delivered to appellant and that it, as well as its progeny, is now in his possession. Did he acquire it as owner or as *nqoma* holder? The presumption is in favour of ownership. The evidence that appellant handed Sibandatu £4 is, however, not convincing. There are discrepancies in his evidence and that of his only witness. Then again his statement that Fokisi himself delivered the beast to him is rejected for we can find no justification for disbelieving Fokisi on this point. If, however, Sibandatu

received £4 from appellant and undertook to buy a beast for him, then Sibandatu was the agent of both Masinana and appellant. The authority given to him by Masinana terminated after he had purchased the beast and delivered it to her. He had no authority thereafter to pass ownership in it to appellant.

For this reason the appeal fails and is dismissed with costs.

For Appellant: Mr. Elliot, Kokstad.

For Respondent: Mr. F. Zietsman, Kokstad.

CASE No. 131.

NGXEKANI SIBOVANA *v.* POKOLWANA DLOKOVA.

KOKSTAD: 13th February, 1951. Before J. W. Sleigh, Esq., President. Strydom and Thorpe, Members of the Court (Southern Division).

Native Appeal Case—Marriage by Native Custom—Desertion of wife—Respective obligations of husband and dowry holder discussed before former can sue for refund of dowry—Dissolution of native union not dissolved by mere desertion.

Plaintiff's wife had deserted him and she could not be found. He sued her father for the return of his wife or refund of the dowry.

Held: (1) That the recovery of a customary wife who has deserted primarily concerns the husband. It is only after the wife has refused to return to her husband that an obligation is cast on her father, on a report being made to him, to persuade the wife to return or to restore the dowry.

Held: (2) That mere desertion does not amount to dissolution of union. Appeal dismissed with costs.

Cases cited:—

Mampeyi *v.* Rarai, 1937, N.A.C. (C. & O.), 148.

Qalindaba *v.* Mjilana, 1942, N.A.C. (C. & O.), 93.

Bobotyane *v.* Jack, 1944, N.A.C. (C. & O.), 9.

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

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

This is an appeal against a judgment of absolution in an action in which plaintiff sued his father-in-law for the return of the dowry paid for his customary wife, less the usual deductions.

It appears from the admissions in the pleadings and in the evidence that in 1946 the wife deserted plaintiff. He sued for her return and obtained a default judgment against defendant. After certain cattle had been attached the wife returned to plaintiff and the cattle were released. In May, 1947, plaintiff went to work on the mines leaving his wife at his kraal. He returned in September, 1949, and found her pregnant. A few days later she absconded. Plaintiff reported the desertion to defendant and searched for her. Being unable to find her he again sued defendant for her return. On 21st February, 1950, the Native Commisisoner entered judgment of absolution holding that plaintiff had not taken sufficient steps to trace his wife and produce her to her father. At the hearing of that case plaintiff mentioned that he had received a letter during November, 1949, from a relative, Nanto, who was working in Port Elizabeth, informing him that the woman was there. The letter was not produced and Nanto has died. Immediately after the absolution judgment and on the advice of his attorney plaintiff accompanied by one Julius proceeded to Port Elizabeth to fetch his wife. According to the evidence of plaintiff and Julius they, on arrival at Port Elizabeth, went to Korsten where Nanto lived and the latter then took them to the house of defendant's son, Mjadu, in New Brighton location where they found the woman. She

refused to return to plaintiff. They then appealed to the Police and a constable was detailed to accompany them. When they returned to Mjadu's house they found that the woman had disappeared. This was on a Saturday. They searched for her unsuccessfully that day and also on the following Sunday and Monday, the constable accompanying them on each occasion. They then returned home and plaintiff instituted the present action.

The steps a husband should take to recover his deserting wife before he can sue her dowry holder can be gathered from the following cases: In Mampeyi *v.* Rarai [1937, N.A.C. (C. & O.), 148] the native assessors stated "when a woman leaves her husband's kraal it is his duty to look for her first and when he finds her to take her to her people and she will then say whether or not she wishes to go back to her husband. It is essential for the woman to be produced to her people before the husband can claim the return of his dowry." In Qalindaba *v.* Mjilana [1942, N.A.C. (C. & O.), 93] the wife after leaving her husband's kraal had gone to her people's kraal and thereafter disappeared. Scott (President) said: "Having once located his wife at her people's kraal his duty was finished and it was then for the latter to take up the matter and it was not for plaintiff to go running all over the country to find her, particularly when there was evidence that she had gone away with her mother."

The opinion of the assessors in Mampeyi's case must not be taken literally. Obviously the husband would not be permitted to use force if his wife refuses to accompany him to her father's kraal. But it does appear that it is the duty of the husband in the first place to find his wife and *putuma* her. He will usually find her at her dowry holder's kraal, especially when she had some reasonable excuse for deserting. If he cannot find her he should report to the dowry holder who should then assist him in the search. When she is eventually found the husband should ask her to return and if she refuses he should try and persuade her to return to her dowry holder, so that she could state her reasons for deserting and her refusal to return to her husband. If the woman refuses to return to the dowry holder the husband should report this fact to the latter who will then be under an obligation either to restore the wife or refund the dowry. It sometimes happens that the wife deserts to the kraal of her father or some other close relative and then disappears. In such cases the father will have to refund the dowry if she cannot be found, because the father should have notified the husband that the woman was at his kraal so that the husband could *putuma* her. If he fails to *putuma* her and she subsequently disappears than the husband has only himself to blame and cannot recover the dowry. The underlying principle is that the matter primarily concerns the husband. It is only after the wife has refused to return to her husband that an obligation is cast on her father, on a report being made to him, to persuade the wife to return or to restore the dowry.

If, in the present case, the evidence of plaintiff and Julius to the effect that they found the woman at the house of her brother Mjadu, could be accepted then, undoubtedly, judgment should have been given in favour of plaintiff, provided they had reported her presence at Mjadu's house to defendant. But the Assistant Native Commissioner rejected their evidence. He found *inter alia* that it was highly improbable that they would have both gone to the Police Station when the woman refused to return to plaintiff. He considered that one of them would have remained on guard. He also held that it was improbable that a constable would have been spared for three consecutive days to help them in the search. We do not agree with the Native Commisisoner. They had no reason to suspect that the woman would again disappear, especially as she had a small baby and it is also well known that the Police afford strange natives every assistance to trace missing relatives.

Nevertheless there are discrepancies in the evidence of plaintiff and Julius which throw considerable doubt on their testimony that they found the woman at Mjadu's house. Mjadu denies it. He says that they did not come to his house and that his sister was never with him. Then again plaintiff says that on his return from Port Elizabeth he did not report to defendant that he had found his wife. This in itself disentitles him to institute the action even if he had found her with Mjadu.

It is contended on behalf of appellant that since the woman had twice deserted her husband she herself has repudiated the union by implication, that the union was thus dissolved and that appellant was therefore entitled to claim restoration of the dowry without at the same time claiming the return of the wife. This contention is untenable, for, as was stated in Bobotyane *v.* Jack [1944, N.A.C. (C. & O), 9] "Native Law does not recognise a dissolution of the union by mere desertion of the wife or husband, by abandonment, or even by bare repudiation, for these are all eventualities provided for by the *lobolo* cattle".

It is unfortunate that the constable was not called because his evidence would have clinched the matter, since Julius says that Mjadu, in reply to the constable, stated that his sister had left with her husband, Ntshilibe.

We do not know whether New Brighton is a municipal location. If it is, the woman would have required a lodger's permit. Apparently no attempt was made to obtain information from the municipal records.

In view of these unsatisfactory features in plaintiff's case we are not convinced that the Native Commissioner's judgment is wrong. The appeal is accordingly dismissed with costs.

For Appellant: Mr. F. Zietsman, Kokstad.

For Respondent: Mr. Elliot, Kokstad.

CASE No. 132.

MICHAEL MOKOATLE *v.* ERNEST PLAKI & ANO.

KOKSTAD: 13th February, 1951. Before J. W. Sleigh, Esq., President. Strydom and Thorpe, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Adoption—Heir—Institution of an heir in an heirless house is a public act and requires much formality—Probable that same formality is required for adoption of boy—Adoption of girl is regarded as a family and not a public matter.

The defendants disputed plaintiff's right to sue them for the customary fine for seduction and pregnancy of his adopted daughter on the ground that the usual formalities for adoption had not been observed.

Held: (1) That the adoption of a girl is regarded as a family and not a public matter and same formalities in regard to the adoption of a boy is not required.

Held: (2) That since the families of child's mother and the adoptive parent are agreed that the child was validly adopted, it did not lie in the mouths of defendants, who are strangers, to question its validity.

Appeal allowed with costs. Judgment of the Native Commissioner set aside and case remitted to Court below for further hearing.

Cases referred to and discussed:—

Komani *v.* Sigongo, 1940, N.A.C. (C. & O.), 167.

Nongqayi *v.* Mdose and Another, 1942, N.A C. (C. & O.), 34.

Salmani *v.* Salmani and Another, 1, N.A.C. (S), 33.

Tokwe *v.* Mkencele, 3, N.A.C., 118.

Sonqishe *v.* Sonqishe, 1943, N.A.C. (C. & O.), 6.

Appeal from the Court of the Native Commissioner, Matatiele.

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

The dispute in this appeal concerns appellant's right to claim the customary fine for the seduction and pregnancy of a woman, Maria. According to the uncontradicted evidence she is the illegitimate child of Mantwa, the daughter of the late Samuel. As far as the record goes Samuel had three sons and two daughters, namely Apolus, Timothy, Sello, Julia the wife of appellant, and Mantwa. When Maria was born about 1932 Samuel gave her to Julia to be brought up, as his own wife was dead. When Maria was about two months old Mantwa eloped with another man and Samuel then in the presence of his children and his cousin, Toloba, gave the child to Julia and her husband as their own and it was baptised as their child. None of appellant's relatives was present at the adoption, but he states that he notified them and his brother confirms this. Further Sello states that a report of the adoption was made to the sub-headman.

The Additional Assistant Native Commissioner held that the adoption was invalid because (1) appellant's relatives were not present at the adoption and had not been consulted and (2) the customary report had not been made to the Chief. He held that appellant had no title to sue either as adoptive parent or as custodian of the child, and dismissed the summons. The appeal is against the Native Commissioner's ruling that the adoption is invaild.

The Native Commissioner relies for his ruling on the decisions in Komani *v.* Sigongo [1940, N.A.C. (C. & O.), 167] and Nongqayi *v.* Mdose and Another [1942, N.A.C. (C. & O.), 34]. Those two cases are clearly distinguishable from the present case. In the first the heir of the natural father of an adulterine child (a boy) claimed that the child had been repudiated by the husband of its mother and that it was given by the Chief to its natural father. This Court did not, however, accept this evidence and found that the evidence was against the alleged adoption. In the second case the maternal uncle of the child took possession of it after the death of its mother, the father having predeceased the mother. When the child grew up she was seduced and the uncle sued the seducer. It was held that there was no evidence that the heir of the deceased husband had abandoned his rights to the girl and consequently the uncle had no title to sue.

In this Court it is contended that the formalities required in the adoption of a child are the same as are required in the institution of an heir.

In Salmani *v.* Salmani and Another [1, N.A.C. (S), 33] it was stated that " the institution of an heir in a heirless house is a public act which requires much formality. The relatives, even of a distant degree, and neighbours are assembled, a formal declaration is made and the Chief is notified ". This is so because the instituted heir generally ousts the legitimate heir. In order to avoid future disputes it is necessary that the utmost publicity be given to the institution of the heir. It is probable that the same publicity is required for the validity of the adoption of a boy (see Tokwe *v.* Mkencele, 3, N.A.C., 118) because such boy by his adoption, will acquire ordinary heritable rights in its adoptive parent's estate. But it is very doubtful whether the same formalities are required for the adoption of a girl.

When a father allocates his daughters to his sons—another form of adoption—it is regarded as a family and not a public matter [see Sonqishe *v.* Sonqishe, 1943, N.A.C. (C. & O.), 6]. In Nongqayi's case *supra* the native assessors stated:—

> "A child is given over but on certain conditions. If I want to give my child over to some one else I call my relatives and that man also has to call his relatives and then I give the child over in the presence of the parties. We then go to the Chief and report to him. When that has been done the child belongs to the person to whom it has been given and he would be entitled to any dowry and fines paid for the child if it is a female."

Now is must not be assumed that failure to observe these formalities renders the adoption invalid. It has been repeatedly held in this Court that where a party in an action alleges facts which are at variance with normal Native Custom and Practice, such facts must be proved by strong and convincing evidence. This is the position in the present case.

It is true that appellant's relatives were not present at the adoption, but they were notified and it is difficult to see what more could be expected of appellant. The report to the sub-headman was insufficient. He is not the headman much less the Chief, but failure to report to the Chief is of no consequence if we are satisfied that the adoption did in fact take place.

Samuel's heir is his grandson, Petlane the eldest son of Apolus. He was not present at the adoption. The probability is that he was at that time a minor. Nor did he give evidence at the trial as he was at the mines. We cannot assume that he will deny the adoption. Both Apolus and Timothy were married at the time of the alleged adoption and they would not have permitted appellant and his wife to baptise the child as theirs if they were not satisfied that it had been given to them in adoption. The fact that appellant and his wife went twice to Samuel to confirm the adoption strengthens, if anything, their case.

The position is that the families of both Samuel and appellant are agreed that the child was validly adopted, and it does not lie in the mouths of respondents, who are strangers, to question the validity thereof. Appellant, therefore, is the proper person to maintain this action.

The appeal is allowed with costs. The judgment of the Additional Assistant Native Commissioner is set aside and the case is remitted to the Court below for further hearing.

For Appellant: Mr. W. Zietsman, Kokstad.

For Respondent: Mr. Elliot, Kokstad.

CASE No. 133.

MBEMBE GXIBA *v.* **ROZAYO NOHOLOZA.**

UMTATA: 23rd February, 1951. Before J. W. Sleigh, Esq., President. Cornell and Mundell, Members of the Court (Southern Division).

Native Appeal Case—Marriage by Native Custom—A married woman cannot enter into a valid second customary union unless first union is dissolved—If marriage proved there is a presumption of continuance of an existing state of things—Onus—on defendant to rebut presumption—Death—Circumstances do not justify presumption of.

Plaintiff married M according to Native Custom. She deserted him about 28 years ago and he then disappeared. Thereafter she purported to marry defendant according to Native Custom and they have a daughter N. The dowry paid by plaintiff was

never restored. Defendant gave N in marriage and received dowry for her. Plaintiff's son and heir sued defendant for this dowry and obtained judgment. In an appeal from this judgment:—

Held: (1) That a married woman cannot enter into a valid second customary union unless her first union is dissolved either according to Native Custom or by the death of the first husband.

Held: (2) That once marriage is proved there is a presumption that it continued to exist and the onus is upon the opposite party to rebut the presumption.

Held: (3) That the circumstances disclosed in the case do not justify the presumption of death of plaintiff.

Appeal dismissed.

Cases referred to and discussed:—

Rex *v.* Fourie and Another, 1937, A.D., p. 43.

Ex Parte Heard, 1947 (1), S.A.L.R., at p. 239.

Appeal from the Court of the Native Commissioner, Tsolo.

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

The dispute in this case concerns the dowry of a girl, Nomamelika. Plaintiff absconded about 28 years ago and the action is brought by his son and heir, Makangeli, who obtained judgment for the dowry, viz.: 5 head of cattle valued at £50, 12 sheep valued at £24 and 8 goats or £16. From this judgment defendant appeals.

The case for plaintiff is that he married Mangcuse according to Native Custom, that she gave birth to Nomamelika after plaintiff had absconded, that defendant gave the girl in marriage, and received the dowry now claimed, and that he refuses to deliver the dowry to plaintiff's heir.

Defendant admits that he gave Nomamelika in marriage and received the dowry claimed, but states that the sheep and goats have not been deliverd but were paid by "word of mouth". He avers, however, that he married Mangcuse according to Native Custom, and that the girl is the issue of this union. He denies that plaintiff married the woman. He alleges that plaintiff rendered her pregnant and paid the usual fine in respect of the birth of Makangeli. There are thus three points in dispute.

The first question for decision is whether plaintiff married Mangcuse. Her father and brothers are either dead or have absconded. She herself denies the marriage and her mother, Nomite, supports her. They both say that she was rendered pregnant by plaintiff, who paid the usual fine. On the other hand her paternal uncles, Mcetyana and Myete are emphatic that 30 goats, 20 sheep and 2 horses, representing 7 head of cattle were paid as dowry. Mangcuse and Nomite seek to discredit these two witnesses. They state that Mcetyana is giving evidence for plaintiff because he is annoyed with Nomite, who is spending the phthisis allowance, which she receives, at the kraal of defendant. The Assistant Native Commissioner has not accepted the evidence of these two woman, and, in our opinion, rightly so. Mcetyana and Myete have nothing to gain by giving evidence for plaintiff.

It appears from the evidence that Makangeli grew up at Mangcuse's father's kraal and was registered for taxes in his name. It is contended that this raises a strong inference that plaintiff was never married to Mangcuse. It is not uncommon for young men to be registered under the surname of the head of the kraal at which they grew up, and, since Makangeli knew no other home, it is quite probable that, when he was registered for taxes (possibly by the headman), he was given the surname of his maternal grandfather. In the circumstances it would not be proper to draw the inference suggested. We are satisfied that the union between plaintiff and Mangcuse has been established.

The next point in issue is whether defendant also married the woman and, if so, whether she was free to marry. She, her mother, and defendant say that six head of cattle were paid as dowry for her to her late brother, in the presence of Meetyana. In support of their testimony there are the undisputed facts that defendant and Mangcuse have been living as man and wife since 1930 and that, since 1933 she has been registered for tax purposes as his wife. Apart from this, it is common cause that he is the natural father of Nomamelika. On the other hand Mcetyana and Myete say that no dowry was paid by defendent and Nomamelika states that he refused to provide her with clothes on the ground that she belonged to plaintiff. She undoubtedly has a grievance against defendant but this cannot be said of plaintiff's other two witnesses. The evidence of defendant, Mangcuse and Nomite is also not reassuring as their evidence, that defendant's first wife was living with defendant, is contradicted by defendant's other witness, Mangwanya, who says that she never saw the first wife at defendant's kraal. However, we shall assume for the moment that defendant did pay dowry for Mangcuse. Was she free to remarry?

In Native Law as practised at present, a married woman cannot enter into a valid second customary union, unless her first union is dissolved, either according to Native Custom or, by the death of the first husband.

Now, according to the evidence, plaintiff married Mangcuse while he was living with his father. After the birth of Makangeli, he went with his wife and child to a farm in the Maclear district. While living there, she deserted. He reported the desertion to her father, returned to Maclear and was never seen again.

The dowry paid by him for Mangcuse has not been returned. It is urged on behalf of defendant that there is an onus on plaintiff to prove that his union with Mangcuse still subsists, and it is submitted, that the evidence adduced on behalf of plaintiff, does not establish this. Plaintiff may have (so it is alleged) married another woman by christian rites or he may be dead. This is possible, but once the union has been proved, plaintiff has in his favour, the presumption of the continuance of an existing state of things. In Rex *v.* Fourie and Another (1937, A.D., at p. 43), de Villiers, J. A., said "the fact of the existence of a state of things at a given time is evidence of its existence at a later date". (See also *Scoble's Law of Evidence*, 2nd Ed., p. 24.) The onus was therefore on defendant to rebut this presumption. Defendant has not done so. There is not a tittle of evidence that plaintiff remarried. He may of course be dead, but are there circumstances from which this inference can be drawn? He married about 1917. Assuming that he was then 25 years of age, he would now be about 58 years old. In *Ex Parte* Heard [1947 (1), S.A.L.R., at p. 239], it was said "An order presuming the death of a person will not be granted merely because of long absence . . . nor will the fact that the person has suddenly disappeared necessarily be enough . . . The Court must take all the circumstances into account, and where these disclose the probability of death and the manner in which it occurred, death may be presumed, even although there has been a lapse of only a short period since the date of disappearance". Plaintiff was employed in agricultural work to which no particular risk is attached, and 58 years is not an old age. In fact at the time of the alleged marriage of defendant and Mangcuse plaintiff was comperatively a young man of about 38 years. It is improbable that he was dead at that time. These circumstances do not justify a presumption of death and Mangcuse was therefore not free to remarry. Consequently defendant's union with Mangcuse is invalid.

The final question to be decided is whether defendant is actually in possession of the sheep and goats. Defendant says that these have not yet been delivered, although he admits that he has received the cattle. He states that he attempted

to *teleka* Nomamelika for further dowry. He does not say what this dowry was. It could hardly have been for additional dowry over and above that already paid, as the girl was only married in 1948. Nor would he *teleka* her for delivery of the sheep and goats, as these were paid by "word of mouth" and were presumably pointed out to him. Nomamelika says that the sheep and goats were delivered first and that the cattle were delivered after she had been *telekaed*. This is more probable, because the 12 sheep and 8 goats would represent 2 head of cattle only which are quite inadequate as a first instalment of dowry entitling the husband to retain his bride, with whom he had eloped. We accept therefore the evidence that defendant is in posession of the sheep and goats.

The appeal is consequently dismissed with costs.

For Appellant: Mr. K. Muggleston, Umtata.

For Respondent: Mr. Fred Airey, Umtata.

CASE No. 134.

MZUVELILE ZAKADE & ANO. *v.* BENSON ZAKADE.

UMTATA: 26th February, 1951. Before J. W. Sleigh, Esq., President. Cornell and Mundell, Members of the Court (Southern Division).

Native Appeal Case—Appeals—Condonation of late noting—No prejudice—Application granted—Guardianship—Minor can sue his guardian for declaration of rights—Practice and Procedure—Judicial officer cannot refuse to hear litigant because he takes alternative remedy.

Plaintiff, a minor, duly assisted, sues his legal guardian for a declaration of rights in respect of certain property belonging to the estate of his late father, Z. Defendant claimed that he was the heir of Z. At the trial the Native Commissioner upheld a contention that a minor cannot sue his guardian unless the latter is first deposed and dismissed the summons. On appeal:—

Held: (1) That where a litigant has the choice of two courses he is entitled to take that which he considers most advantageous to him and the judicial officer cannot refuse to hear him.

Held: (2) That a minor is not barred from prosecuting against his guardian a claim for a declaration of rights.

Appeal is allowed.

Cases cited:—

Hofman *v.* Hofman, 1948, N.A.C. (C. & O.), 24.

Qina *v.* Qina, 1939, N.A.C. (C. & O.), 44.

Myuyu *v.* Nobanjwa, 1947, N.A.C. (C. & O.), 66.

Sikekela *v.* Kwetshube and Another, 5, N.A.C., 69.

Nobanjwa *v.* Myuyu, 1948, N.A.C. (C. & O.), 7.

Ximba and Another *v.* Mankuntwana, 1939, N.A.C. (C. & O.), 142.

Mlanjeni *v.* Macala, 1947, N.A.C. (C. & O.), 1.

Appeal from the Court of the Native Commissioner, Tsolo.

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

In this action plaintiff (now appellant), a minor duly assisted by a *curator ad litem*, sues his legal guardian for a declaration of rights as to certain seven head of cattle. He alleges that he is the heir of his late father Zakade Magwanya, that he inherited five of the cattle from his father, and obtained the remaining two from one D. Gudla as *ngoma*, and that respondent by implication claims the cattle as his own.

The defence is that respondent is the heir of Zakade.

When the case came to trial, respondent's attorney took the point that appellant has no right to sue his guardian. This point should have been taken by way of exception. But appellant's attorney agreed that, if this contention is correct, his client would have no right of action. The Court consequently dealt with this point before considering the issues raised in the pleadings.

The Native Commissioner reserved judgment and on 1/11/50 upheld respondent's contention and dismissed the summons. Against this judgment appellant entered an appeal on 28th November, 1950, on the ground "that the Magistrate erred in law and equity in dismissing the summons".

There are three flaws in the notice of appeal. It was noted late, it does not comply with Rule 10 (*b*) of Government Notice No. 2254 of 1928, and the Magistrate did not try and had no jurisdiction to try the case and no appeal from a Magistrate's judgment lies to this Court. An application for condonation is now made and it is opposed by Counsel for respondent solely on the ground that it was not timeously noted.

The reason for the delay in noting the appeal is that appellant's attorney was ill and not in his office when he received instructions to note the appeal and that he returned to his office after the time for noting had expired. In Hofman *v.* Hofman [1948, N.A.C. (C. & O.), 24] this Court held that the illness of an appellant's attorney is not sufficient ground for condoning the late noting. But the circumstances in the present case are exceptional. In Qina *v.* Qina [1939, N.A.C. (C. & O.), at p. 44], it was stated that the guiding factor as to whether or not condonation should be granted is the question of substantial prejudice to either side. Now in the present case the sole question raised in the pleadings is whether appellant or respondent is the heir of the late Zakade. The point whether a minor can sue his legal guardian will not dispose of this issue. Appellant does not seek to deprive respondent of the control of the stock. The latter can therefore suffer no possible prejudice if the application is granted. On the other hand, since respondent claims to be the owner of the stock, the potential prejudice to appellant is great, if he has to await the attainment of his majority when possibly vital witnesses are no longer available, the estate may have been dissipated or other conceivable wrongs may have been suffered by him.

The Native Commissioner in his reasons states: "that if plaintiff (appellant) considered that his guardian was abusing his trust, it was open to him to apply for the latter's deposition and, that, by refusing to hear his claim, the Court was not depriving him of his only right of recourse against defendant (respondent)". That may be so, but where a litigant has the choice of two courses, he is entitled to take that which he considers most advantageous to him and the judicial officer cannot refuse to hear him. In any case there is no evidence that respondent is dissipating the estate and it is extremely doubtful that a Court would depose respondent for exercising a right which he claims he has. For this reason the contention of respondent's Counsel that appellant must first depose respondent before he can sue him, must be rejected. For these reasons the application is granted.

It is obvious that the Native Commissioner's ruling that the appellant has no right of action against his guardian, is wrong. There are a number of cases in which a minor has sued his guardian [see e.g. Sikekela *v.* Kwetshube & Maponi (5, N.A.C., 69) and Myuyu *v.* Nobanjwa, 1947, N.A.C. (C. & O.), 66], and there are cases where the guardian, without being deposed, has been ordered to restore the cattle to the kraal of the minor heir [see Nobanjwa *v.* Myuyu, 1948, N.A.C. (C. & O.), 7]. No authority has been cited for the proposition that an heir cannot sue unless the guardian has been first deposed.

The Native Commissioner for his decision presumably relies on *Whitfield's S.A. Native Law* (*2nd Ed. p.* 262) where it is stated that "a minor himself cannot sue for estate property after the death of his father . . . any action in respect of estate property, in which a minor heir is interested, must be brought by the natural legal guardian". The learned author relies for this statement on the decision in Ximba and Another *v.* Mankuntwane [1939, N.A.C. (C. & O.), 142]. In that case the father had given his minor child to one Wilson to be brought up. After the death of the father the minor, duly assisted by Wilson, sued the defendant (a third person) for the dowry of his sister. The respondent took the point that Wilson was not the legal guardian of the minor—that one Hlalapi was—and that defendant was holding the stock with Hlalapi's consent. This Court upheld this contention and held, in effect, that Hlalapi was the proper person to bring the action, either in his representative capacity or as assisting the minor. That case, therefore, did not decide that a minor has no cause of action against his guardian for estate property. Indeed it is doubtful that the learned author intended to convey this. The estate property vests in the minor heir immediately on the death of his father and if the guardian infringes his right of ownership he is entitled to appeal to the Court for redress, assisted by a *curator ad litem*. We do not wish to convey that the minor has a right to interfere with the guardian's right of control, reasonably exercised.

It is correct that a minor has, in Native Law, no right of action against his father for delivery of movable property, but this is so because any property acquired by the minor accrues to his father [see Mlanjeni *v.* Macala, 1947, N.A.C. (C. & O.), 1]. He is however not barred from prosecuting against his father a claim for declaration of rights—see Sikekela's case *supra*—and if he can obtain a declaration as against his father, it is illogical to hold that he cannot obtain a similar declaration as against his guardian.

The appeal is consequently allowed with costs, the judgment of the Native Commissioner is set aside and the record of proceedings is returned to the Court below for trial of the issues raised in the pleadings.

For Appellant: Mr. K. Muggleston, Umtata.

For Respondent: Mr. Hughes, Umtata.

CASE No. 135.

WOLDINI QATA *v.* **KWALUKWALU NYUBATA & ANO.**

UMTATA: 26th February, 1951. Before J. W. Sleigh, Esq., President, Cornell and Mundell, Members of the Court (Southern Division).

Native Appeal Case—Adultery—Evidence—Corroboration of evidence of adultery essential only when man denies adultery on oath—Practice and Procedure—Absolution judgment should not be granted at close of plaintiff's case where there is a prima facie *case to meet.*

Plaintiff sued defendants for damages for adultery committed by first defendant with plaintiff's customary wife. The Native Commissioner entered an absolution judgment at the close of plaintiff's case on the ground that there was no "satisfactory corroboration" of the evidence of adultery.

Held: (1) Since defendant has not denied the adultery on oath the Native Commissioner erred in requiring corroboration of the woman's evidence.

Held: (2) That absolution judgment at the close of plaintiff's case should not be lightly granted.

Appeal allowed.

Cases cited:—

Komani *v.* Tyesi, 1, N.A.C. (S), 77.

Mdongeni *v.* Mgodwana, 1, N.A.C. (S), 93.

Appeal from the Court of the Native Commissioner, Umtata.

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

I shall refer to the parties as plaintiff and defendant to avoid confusion.

This is an appeal against an absolution judgment at the close of plaintiff's case in an action, in which he claims from defendants five head of cattle or their value £40 as damages for adultery committed by first defendant with plaintiff's customary wife, Nodanile, as a result of which she became pregnant. The second defendant is sued in his capacity as kraal head.

The Acting Native Commissioner in his reasons states "In actions of this nature it is established law that satisfactory corroboration of the evidence of such act or acts of adultery is essential." He is correct in saying that satisfactory corroboration of the evidence of adultery is essential, but he has overlooked the principle that such corroboration becomes essential only when the man denies the adultery on oath.

Grotius "Introduction of Dutch Jurisprudence (*Maasdorp's translation*) at page 324 is as follows: "A woman is not believed who says that a man has had connection with her, if he denies it, even though she should swear it in child-bed or otherwise: but, if he admits connection, the woman is to be believed in her identification of the father, even though she has had connection with others." *Groenewegen's Note* on this passage is: "But nevertheless he is bound to clear himself on oath, and to declare that he never had connection with her . . . and this takes place even though she has not sworn in child-bed, that the child is his". [See also Komani *v.* Tyesi, 1, N.A.C. (S), 77.] There is nothing to indicate that this *dictum* applies only to seduction cases.

In the present case the evidence of Nodanile is sketchy but there can be no doubt that she committed adultery, since she conceived while her husband was away at work in Cape Town, and first defendant has not denied on oath her evidence identifying him as the father of the child. The Native Commissioner, therefore, erred in requiring corroboration, let alone "satisfactory corroboration". If he believed the woman's evidence, as apparently he did, because he does not criticise her evidence, then he should have refused the application for absolution judgment.

The Native Commissioner's bald statement that the corroborative evidence was vague, indefinite, inadequate and unconvincing is unsatisfactory. He should have analysed the evidence and indicated why he considered the corroboration unconvincing. There is the evidence of Sigogotya who states that he "caught" first defendant. He was not even cross-examined on this evidence. In this Court, Counsel for respondent stated that the evidence of the "catch" related to another case beween the same parties and that the "catch" took place after the pregnancy in the present case had been reported. If this is so, then the record

should have disclosed it, but, in any case, this "catch" has corroborative value in the present case and, if it were disputed, the witness' statement should have been challenged in cross-examination. Then again there is the evidence of Notshizile, that she made numerous appointments for first defendant who paid her a *nyoba* fee. This evidence was not contradicted in any way and a reasonable man might well have accepted it. [See Ndongeni *v.* Ngodwana, 1, N.A.C. (S), 93.] There was thus a *prima facie* case for defendants to meet and absolution judgment, at that stage of the proceedings, should not have been granted.

In Ndongeni's case it was stated: "It has been repeatedly stated that when a case is brought before a Court, it is in the interest of justice that the matter should be brought to finality. The plaintiff should not be put to the expense of bringing a fresh action and the defendant should not be vexed with the same question. It follows, therefore, that an absolution judgment at the close of plaintiff's case, notwithstanding discrepancies, should not be lightly granted". I wish to emphasise this again because, apart from the expense incurred in connection with this appeal, not only might the delay in disposing of this case seriously inconvenience the parties in following their normal livelihood, but, also, plaintiff, if he eventually succeeds, might be prejudiced in executing his judgment, and the defendants put to further costs in defending what may prove to be a false claim against them.

The appeal is allowed with costs and the judgment of the Court below is altered to read "Application for absolution judgment is refused".

For Appellant: Mr. K. Muggleston, Umtata.

For Respondent: Mr. Hughes, Umtata.