1936 – 1939.

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SELECTED DECISIONS OF THE NATIVE APPEAL COURT

CAPE & O.F.S. DIVISIONS

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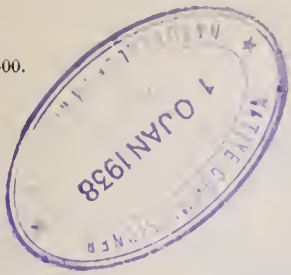

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(CAPE AND O.F.S.)

1936.

Volume 8.

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Selected Decisions

OF THE

Native Appeal Court

(CAPE AND O.F.S.)

1936

VOLUME 8.

CASE No. 1.

JOHN NOKOYO vs. JACKSON NOKOYO.

KINGWILLIAMSTOWN: 21st April, 1936. Before H. G. Scott, Esq., President, and Messrs. M. W. Hartley and J. H. Basson, Members of the N.A.C.

Practice: Noting Appeal—Attorneys have no authority to extend period for noting or to condone late noting, proper course is to approach Appeal Court by means of written application.

(Appeal from Native Commissioner's Court, East London.)

(Case No. 33 of 1935.)

Judgment in this case was delivered on the 4th November, 1935, and the appeal was not noted until the 27th November, 1935, two days after the period prescribed by Rule 6 of Government Notice No. 2254 of 1928 had expired.

Appellant's attorneys, being aware of this irregularity, wrote to the Assistant Native Commissioner on the 27th November, 1935, stating that they had communicated with respondent's attorneys, who agreed to the appeal being noted at the end of the then current week.

It is pointed out that the attorneys have no authority to extend the period for noting an appeal. That power is vested by the rule above quoted only in the Court of Appeal which may grant condonation of the irregularity on just cause being shown.

No written application has been filed in terms of Rule 19 of the Government Notice referred to above. The proper course to be observed by the appellant is to approach this Court by means of a separate written application, setting forth the grounds of the application, and the circumstances in which the omission to comply with the rules took place, so that this Court may judge whether the justice of the case would require it to exercise its powers in condoning irregularities.

The appeal is accordingly struck off the Roll.

CASE No. 2.

GRESHON TSORANA vs. EMILY RUNE.

KINGWILLIAMSTOWN: 21st April, 1936. Before H. G. Scott, Esquire, President, and Messrs. M. W. Hartley and J. H. Basson, Members of the N.A.C.

Prescription: *Where defendant pleads prescription, onus is on him to show that his special defence is covered by the provisions of Act No. 8 of* 1861.

Appeal: *Grounds—Lack of particularity—Rule* 10, *G.N. No.* 2254 *of* 1928.

(Appeal from Native Commissioner's Court, Kingwilliamstown.)

(Case No. 37 of 1935.)

The plaintiff claimed from defendant the sum of £4. 10s. in the following circumstances: She states that in 1926 she arranged to buy from defendant a house in Brownlee Location at Kingwilliamstown for the sum of £12. 10s., which she duly paid him, that subsequently also in 1926 she found that defendant had previously sold the house in question to one Sidney Zondani. Thereupon the sale was cancelled and defendant refunded her £8 and promised to pay the balance later. Late in 1928 or early in 1929, defendant admitted to plaintiff's husband and one George Tyamzashe that he owed this sum of £4. 10s., but asked for time to pay it as his wife was ill. This was granted. As he failed to pay he is being sued.

Defendant denies that he ever sold the house to plaintiff or that he refunded her £8 and promised to pay the balance of £4. 10s.

During the course of the case, defendant's attorney pleaded prescription.

The Native Commissioner entered judgment for plaintiff as prayed with costs and against this judgment an appeal has been noted on the ground—

(1) that the Native Commissioner erred in holding that the debt had not become prescribed by law and

(2) that the evidence was insufficient to justify the finding, or, alternatively, that the weight of evidence was in favour of defendant.

It is doubtful whether the first ground of appeal complies with Rule 10 of Government Notice No. 2254 of 1928. No objection was raised by respondent's attorney, and as both attorneys concerned appeared in the Court below and were thus well acquainted with the issues involved, the Court allowed it to be argued.

It is desired to emphasise, however, that one of the objects to be served by this rule is that this Court may be made aware beforehand of the points raised in an appeal.

The present case is an instance of the trouble and inconvenience which may be occasioned by an omission to comply with the rule and the Court wishes to issue a warning that it will in future, *ex mero motu*, take cognizance of the fact whether or not a Notice of Appeal complies with the Rules.

The Court cannot be expected to anticipate and prepare for a number of different points which may be raised on an incomplete notice of appeal.

In the Court below the defendant raised the plea of prescription but did not specify in what respect the claim was barred by prescription.

In argument before this Court, Mr Atherstone endeavoured to bring the claim in under four heads of section 3 of Act No. 6, 1861, namely:—

1st: That this was an action for money due for goods sold and delivered;

2nd: That it was for money paid by the plaintiff for the use of the defendant;

3rd: That it was for money had and received by the defendant for the use of the plaintiff; and

4th: That it was for money due for the purchase money of fixed property.

Now, it was accepted by both parties that the house in question, which is situated in Brownlee Location, Kingwilliamstown, is movable property, and consequently the claim under the 4th head must fall away.

Mr. Atherstone, in the course of his argument, stated that he was relying on this ground more strongly than on the others.

In regard to the claim under the first head, it may be said that this clearly was not a case of an action for goods sold and delivered, for while the "goods" may have been sold, they were never delivered, nor was the plaintiff the person who had sold the goods.

The claims under the other two heads do not need any comment, as it must be obvious that the action did not fall under either of them.

The position in this case appears to be very similar to that in Oberholzer *vs.* Baard, Wright & Co. (1920 C.P.D. 236), where Searle, J., in giving judgment, said: "The difficulty it seems to me that the appellant is in, is that he has not clearly shown to the Court any particular provision of the law whereunder this claim would be prescribed. The defence of prescription is a statutory defence. There is a statute, we know, and apparently the defendant intended to rely upon Act No. 6 of 1861, because he objected to those items which were more than eight years old, so he was clearly intending to rely upon section 3 of that Act, but I think he should have specifically referred to it."

In the same case it was laid down that the onus was on the defendant to satisfy the Court that his special defence was covered by section 3 of the Act.

In this case appellant has not shown that his defence is so covered, and, in the opinion of this Court, the special defence was rightly overruled.

In so far as the second ground of appeal is concerned, we are satisfied that the Native Commissioner's finding is fully supported by the evidence.

The appeal is dismissed with costs.

CASE No. 3.

KOMANI MANGA vs. MHLONTLO DYELE.

KINGWILLIAMSTOWN: 21st April, 1936. Before H. G. Scott, Esq., President, and Messrs. M. W. Hartley and J. H. Basson, Members of the N.A.C.

Judgment for return of wife within a fixed period, alternatively restoration of dowry paid—Death of wife before the fixed period—Effect.

(Appeal from Native Commissioner's Court, East London.)

(Case No. 77 of 1935.)

On the 29th July, 1935, Komani Manga (plaintiff) issued summons in the Assistant Native Commissioner's Court, East London, against Mhlontlo Dyele (defendant), in which he claimed delivery of his wife, Nojausi, or the restoration of the dowry paid for her. In his particulars of claim he alleged that dowry was agreed upon at eleven head of cattle with the express stipulation, however, that only ten head should be delivered prior to the "Umdudo" ceremony, the eleventh beast to be paid after that ceremony had been solemnized by the defendant, that thereupon Nojausi was handed over to plaintiff and became his wife and five children were born of the marriage, the ten head of cattle having been duly paid over to defendant, that Nojausi deserted her husband and had been at defendant's kraal since February, 1935.

In his plea defendant stated that the dowry was fixed at twelve head of cattle and one horse, of which ten had been paid, leaving a balance of two head and one horse, and denied that Nojausi had deserted her husband but that she was held by defendant under the Native Custom of "Ukuteleka" against payment of the balance of dowry.

In his reply to the plea plaintiff reiterated that the dowry was fixed at eleven head of cattle, of which ten had been paid, but that he had tendered three heifers without prejudice in order to induce defendant to solemnize the "Umdudo" ceremony.

In regard to the plea of "Ukuteleka" plaintiff said he was essentially correct in stating that Nojausi had deserted him as she left his kraal by herself and went to defendant's kraal, and when he went to "Putuma" her she said she desired the "Umdudo" ceremony to be hastened as the equipment therefor was being wrongly used towards the marriage ceremony of another daughter of defendant.

Before any evidence was led the Acting Assistant Native Commissioner suggested that as the point of difference at issue was so negligible the parties should attempt to come to some agreement. After a short adjournment, the attorneys for the parties intimated that an amicable settlement had been arrived at, and by consent the following judgment was entered:—

"For plantiff, for delivery of wife, Nojausi, within fourteen days, failing which restoration of ten head of cattle paid as lobola. Upon restoration of wife, plaintiff is ordered to deliver to defendant three head of cattle. Each party to pay own costs."

This judgment was delivered on the 20th September, 1935, but the woman Nojausi died on the 22nd *idem*, and a warrant of execution was issued on the 10th October, 1935, directing the Messenger of the Court to attach ten head of cattle plus 12s. 6d. for costs of issuing the warrant.

On the 15th October, 1935, the defendant's attorney gave notice of an application to set aside the warrant of execution on the ground that the judgment had been rendered void by the death of the woman Nojausi before the period of fourteen days specified in the judgment had elapsed, and the Assistant Native Commissioner ordered that the warrant be set aside with costs, and against this order an appeal has been noted on the following grounds, briefly stated:—

(1) That when judgment was given defendant was at fault in having plaintiff's wife at his kraal and not having returned her to plaintiff before the judgment on the 20th September, 1935.

(2) That as judgment was one with an alternative, as defendant was unable to fulfil the one part he must fulfil the alternative.

(3) That no good cause was shown for setting aside the warrant and that the Assistant Native Commissioner was not justified in implying a condition in the judgment that it was subject to the woman being alive.

(4) That the setting aside of the warrant was bad in law inasmuch as the judgment still stands, and in order to set aside the warrant an attempt should first have been made to set aside the judgment.

(5) That on the death of the woman the defendant could do nothing but obey the alternative judgment and restore the cattle, the woman having died at his kraal at his risk.

In so far as the first ground of appeal is concerned, we are not satisfied that the defendant was at fault. He alleged that he was detaining her under the custom of "Ukuteleka", which he was justified in doing if any more dowry was due—it is true plaintiff denied that any further dowry was due, but it is very significant that he does not definitely deny that the woman was under the "Teleka", and the fact that when he went to fetch her she said she wished the "Umdudo" ceremony performed shows that she was not a deserting wife; furthermore, if only one beast was due to defendant, it is strange that plaintiff should have tendered three heifers. His action in doing so lends colour to defendant's contention. In our opinion the appeal on the first ground must fail.

The second, third, and fifth grounds of appeal are closely related and may conveniently be dealt with together.

The defendant had been given the option of returning the woman or the dowry within fourteen days, and if the woman had lived and he returned her before the expiration of that period, he could have been compelled to do either one or the other. The death of the woman put it out of his power to return her and it is now sought to enforce the judgment in respect of the return of cattle. As far as we are aware, no similar case has previously been before this Court—the case most nearly approaching it is that of Baleni *vs.* Qosha (4 N.A.C. 201). In that case the plaintiff's wife had died after the summons claiming her return or that of her dowry had been served. The Native Appeal Court, concurring with the opinion expressed by the Native Assessors, held, that as the woman had borne two children, the plaintiff (appellant) had no claim to the return of the cattle unless he was prepared to abandon his right to the children in favour of his wife's people. This case was decided prior to the issue of Proc. No. 189 of 1922 abolishing the custom of "Ukuketa" on the death of the woman shortly after the marriage, and it does not assist greatly towards the elucidation of the point under consideration, and it becomes necessary to seek other sources of enlightenment.

Nathan, in his Common Law of South Africa (2nd Edition, p. 729), in dealing with the discharge of contracts, states:—

"The Roman Dutch Law writers have very little to say on the subject of impossibility of performance, and the principles regulating this subject have to be gathered from Roman Dutch Law. The Roman Dutch Law on this point has been expressly adopted by decision in South Africa in Hay *vs.* Divisional Council of Kingwilliamstown (1, E.D.C., 97). In that case, the decision in the English case of Taylor *vs.* Caldwell (3, B. & S., 826) was approved. . . . The case of Taylor *vs.* Caldwell adopted the principles of Roman Law, and these principles may be taken as being in full force in South Africa at the present time"; and at page 730, Pothier states the Roman Law on the subject very fully, and the Rules laid down by him (Obligations, Bugnet, §§ 649-670) are briefly summarised here. If, he says, the thing which is due upon contract ceases to exist, the contract is at an end", and at p. 733, "The next rule laid down by Pothier (§ 633), which is applicable in Roman Dutch Law is that the destruction or loss of the thing which is the subject-matter of an obligation does not put an end to the obligation, *where such destruction or loss takes place after the debtor's failure or default in performing his obligation on due date.*"

In the present case, the woman died before the arrival of the due date for the performance by the defendant of his obligation. In our opinion he was excused in regard to the alternative obligation, and consequently there was good cause for setting aside the writ, and the appeal must fail on these grounds also.

The fourth ground of appeal is, in our opinion, untenable. No possible ground could be advanced for setting aside the judgment, which was in order when it was pronounced, but that does not prevent the setting aside the warrant of execution based on that judgment for good cause which has arisen subsequent to the date of the judgment.

It is unreasonable to say that you cannot set aside a writ until you have set aside a judgment which it is clear could not be set aside. The ground of appeal also fails.

The appeal is dismissed with costs.

CASE No. 4.

JONAS JOSHUA vs. KLAAS MPONYA.

KINGWILLIAMSTOWN: 19th August, 1936. Before H. G. Scott, Esq., President, and Messrs. G. M. B. Whitfield and H. B. Myburgh, Members of the N.A.C.

Appeal—Practice—Late noting—Condonation granted.

(Appeal from the Native Commissioner's Court, Bloemfontein.)

In this case the Native Commissioner entered judgment for plaintiff on the 5th March, 1936, and ordered defendant to cede to plaintiff all defendant's right to the improvements on Stand No. 1503 referred to in the claim, and, failing compliance with the order within one month, payment of the sum of £90 as and for damages.

Defendant appealed to this Court on the 30th March, 1936, on the grounds that the judgment is against the weight of the evidence and that the plaintiff did not discharge the onus of proof resting on him.

The appeal not having been noted within 21 days after the date of the judgment in terms of Rule 6 of Government Notice No. 2254 of 21st December, 1928, appellant applied for the condonation of the irregularity on the grounds that

he verily and truly believed that the period of 21 days referred to in the Rule excluded Sundays and public holidays. This Court, in view of the fact that only a few cases have come before it from the Orange Free State, where, as a general rule, practitioners have not had opportunity of access to the decisions of this Court, accepts the explanation and grants the indulgence sought. The decisions of the Court now having been made available to the public, the relative governing rules will be strictly enforced, and in future similar laches to those occurring in this case will afford no excuse.

CASE No. 5.

LINDILE MAKINANA vs. GXOTIWE MAKINANA.

KINGWILLIAMSTOWN: 19th August, 1936. Before H. G. Scott, Esq., President, and Messrs. G. M. B. Whitfield and H. B. Myburgh, Members of the N.A.C.

Native Estate—Inquiry—G.N. No. 1664 *of 20th September,* 1929—*Irregularities—Procedure in Native Commissioner's Court—Appeal—Practice—Rule* 10, *G.N. No.* 2254 *of* 1928—*Grounds must be explicitly stated—Application to Amend grounds of appeal refused by Appeal Court.*

(Appeal from the Native Commissioner's Court, Albany.)

(Case 2 of 1936.)

The admitted facts in this case are that one Sam Makinana bought from one Engelaud Sokutu Lot No. 94, Fingo Location, Grahamstown, for £43. Sam Makinana died on 15th August, 1918, leaving no will, and the appellant is his only son and heir. The respondent is appellant's grandmother. At the date of Sam Makinana's death only £20 had been paid on account of the purchase price of the property, and since that date the balance of the purchase price (£23) and rates on the property (£23. 8s. 11d.) have been paid.

Mr. Green, of the firm of Smit, Wheeldon & Rushmere, attorneys, was appointed by the Assistant Magistrate representative to the heir, Lindile Makinna, on 17th February, 1936. On 28th February, 1936, Messrs. Smit, Wheeldon & Rushmere wrote to the Native Commissioner informing him that a claim had been lodged against the Estate on behalf of Gxotiwe Makinana in connection with certain payments made by her in respect of the immovable property and that she was holding the original deed of grant and other documents against payment of her claim and that Mr. Green, in his above capacity, had repudiated the claim and requested the Native Commissioner "by virtue of Proclamation No. 2257 dated 21st December, 1928, issued under Act No. 38 of 1927 to summon the parties concerned in order that the dispute may be determined". The reply to this letter was signed by the assistant magistrate and stated that it seemed necessary that the parties should appear before the Native Commissioner and suggesting that a suitable date should be arranged with the Clerk of the Court.

On the 17th March, 1936, the parties and their attorneys appeared in the Court of the Native Commissioner and, after hearing evidence, the presiding officer entered what he terms a judgment in favour of Gxotiwe Makinana for £44. 3s. 11d., with costs.

A perusal of the record discloses quite a number of irregularities. In the first place, a Native Commissioner having been appointed for the District of Albany, the assistant Magistrate, as such, had no authority to appoint a representative to the estate.

Secondly, the inquiry, being one in the Native Commissioner's Court, he was in error in signing his finding in his capacity as assistant magistrate. Thirdly, his finding cannot be described as a judgment. Sub-section (4) of section 3 of Government Notice No. 1664 of 1929 makes no provision for the enforcement of the Native Commissioner's finding except as regards the costs awarded.

The proceedings appear to have been regarded as an ordinary civil case, which, in the opinion of this court, is incorrect.

Fourthly, the reasons for the finding have not been signed by the presiding officer. Fifthly, it is not shown under what authority the assistant magistrate purported to hold the inquiry, but it would appear that he did so under the provisions of Part 1 of Government Notice No. 2257 of 1928 in response to the request by Messrs. Smit, Wheeldon & Rushmere. If this is the case, it is pointed out that Part 1 of Government Notice No. 2257 was repealed by Government Notice No. 1664 of the 20th September, 1929, under which new regulations were promulgated.

No objection has been raised in regard to any of these irregularities, but this Court draws attention to them for the future guidance of all concerned.

An appeal has been noted against the finding of the Assistant Native Commissioner on the following grounds: —

1. That the Assistant Native Commissioner was wrong in finding that the claimant and the duly appointed heir were not governed by the native law and custom and that they were detribalised.

2. That the Assistant Native Commissioner was wrong in stating that the provisions of Act No. 38 of 1927, as amended by Act No. 9 of 1929, gave magistrates a discretion as to whether native law and custom should apply in regard to disputes in connection with native estates.

3. That, alternatively, and only in the event of the above grounds not being upheld, that the Assistant Native commissioner failed to take into account the fact that the claimant with her family had lived on the property of the heir since 1917 free of charge and had, in addition, received substantial rents for the property, which set off her claim.

4. That in the circumstances the Assistant was wrong in granting judgment for the claimant for £44. 3s. 11d. with costs.

An exception to the notice of appeal has been lodged on the ground that it does not comply with paragraph (*b*) of Rule 10 of the Appeal Court rules (Government Notice No. 2254 of 1928) in that no grounds of appeal are stated in paragraphs 1, 2, and 4, and that as regards paragraph 3 of the notice the grounds are not set out clearly and specifically but are vague and embarrassing.

The first, second and fourth grounds of appeal do not comply with the rules above quoted, which requires that the grounds of appeal shall be stated clearly and specifically, except in the case where the appellant was not represented by a legal practitioner during the proceedings in the Native Commissioner's Court against whose judgment the appeal is brought, when it shall suffice to note an appeal against the judgment as a whole without specifying in detail the grounds of appeal.

Some of the objects to be served by this rule are stated in the case of Matikita Mkote *vs.* Bomani Mabindisa (1929, Native Appeal Court, 14).

It is not a compliance with the rule merely to say that the Assistant Native Commissioner was wrong in his finding without stating why he is wrong, except in the case of an appeal against a finding on the facts when it is sufficient to say that it is against the weight of the evidence and the probabilities.

The exception to the third paragraph of the notice of appeal remains to be dealt with.

In the opinion of this Court this ground of appeal does not comply with the rules as it is merely a statement of fact, vague in its terms and does not say why the Assistant Native Commissioner was in error. The inadequacy of this ground of appeal was evidently realized by appellant's attorney for he applied to have it struck out and substituted by the following: "That the judgment was against the weight of evidence".

Objection was taken to the amendment by the respondent's attorney.

Rule 19 of the Native Appeal Court rules requires that any application in connection with an appeal shall be in writing and shall be lodged with the Registrar of the Court not less than one clear day prior to the commencement of the session. This rule has not been complied with.

The application is a last minute attempt to rectify what was defective in the first instance and the Court is not prepared to allow the amendment.

Furthermore, on the merits the Court is of opinion that the appeal would have small chance of success.

The exception (or more properly the objection) is allowed and the appeal is struck off the roll with costs.

CASE No. 6.

BERTHA MBENDE vs. DINAH FETSHA.

KINGWILLIAMSTOWN: 19th August, 1936. Before H. G. Scott, Esq., President, and Messrs. G. M. B. Whitfield and H. B. Myburgh, Members of the N.A.C.

Native Estate—Before a widow can sue as sole heiress she must show that conditions enabling her to do so apply—Locus standi in Judicio—*Section* 23 (6) *of Act No.* 38 *of* 1927, *Act No.* 13 *of* 1934 *and Government Notice No.* 1664 *of* 1929, *section* 2 (*b*) *and* 2 (*d*).

(Appeal from the Native Commissioner's Court, East London.)

(Case No. 40 of 1936.)

Plaintiff, who is described as the widow of the late Joseph Fetsha and his sole heiress, as he died intestate, sued Bertha Mbenda and Dick Ntyongwe for an account showing how an amount of £30 received by them on behalf of the said late Joseph Fetsha had been disbursed and for payment of any balance remaining due.

To the summons objection was taken that plaintiff had no *locus standi in judicio* to recover the amount claimed, and, alternatively, that the issue of the summons was premature, as plaintiff had failed to make a demand before issue of summons.

First defendant filed a plea in which she admitted receiving the sum of £30, and attached a detailed statement showing that an amount of £31. 12s. 4d. had actually been expended. Second defendant filed a plea denying that he had ever had custody of the said sum of £30.

After hearing evidence, the Assistant Native Commissioner overruled both objections to the summons, and plaintiff then proceeded to give evidence, in which she denied the correctness of the account attached to first defendant's plea, except as to an amount of 10s. At the close of the evidence her attorney withdrew the case as against second defendant and closed his case. Defendant's attorney then intimated that he did not propose to call evidence, and also closed his case.

Judgment was then entered in favour of plaintiff for £29. 10s., and against this judgment an appeal has been noted against the ruling of the Assistant Native Commissioner in regard to the objections and also against the judgment on the claim.

Several grounds of appeal are set out, but in the view which this Court has taken of the case it is necessary only to deal with one, namely:—

> "That there is no evidence on record to prove that the late Joseph Fetsha died intestate as alleged in paragraph 1 of respondent's summons, and respondent has failed to prove that she had *locus standi in judicio*."

In his reasons for judgment, the Assistant Native Commissioner states that at the hearing of the objections the defendant's attorney intimated that he did not press the first objection but relied rather on the second. Apparently, however, he did not abandon the objection, as the Assistant Native Commissioner pronounced a ruling on it, and it now forms a ground of appeal.

Dealing with this ground of appeal, the Assistant Native Commissioner states: "Paragraph (1) of the summons sets out that the plaintiff is the widow of the late Joseph Fetsha and his sole heiress as he died intestate. In terms of sub-section (6) and (7) of section 23 of Act No. 38 of 1927 she was, on the face of the summons, the correct person to sue."

Sub-section 6 provides that in connection with any claim or dispute in regard to the administration or distribution of any estate of a deceased native the heir, or in case of minority his guardian, according to Native Law, if no executor has been appointed, shall be regarded as the executor of the estate, and sub-section (7) has the effect of ousting the jurisdiction of the Master of the Supreme Court in respect of the estate of a native who has died intestate.

It is true that sub-section (6) provides that the heir shall be regarded as the executor, but does the plaintiff show that she is the heir? Under the ordinary law of succession, a surviving spouse is not an heir *ab intestato* to her deceased husband, and it is only by virtue of Act No. 13 of 1934 that she could become sole heiress (assuming that the value of the estate is not more than £600) in cases where the regulations under Government Notice No. 1664 of 1929 provide that the property of a native shall devolve as if he is a European. If the marriage of plaintiff and the late Joseph Fetsha was by Christian rites, whether in or out of community of property, then his devisable property on intestacy would develop as if he had been a European [section 2 (*b*), Government Notice No. 1664 of 1929 and Act No. 13 of 1934 would apply], but if there was not such a marriage, the property would devolve according to Native Law and Custom [section 2 (*d*), Government Notice No. 1664 of 1929], in which case plaintiff would not be the deceased's heir.

Before plaintiff can sue as sole heiress she must show that the conditions enabling her to do so apply and this she has not attempted to do.

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

CASE No. 7.

KWILDINI SOFE vs. MANTYI CIBI.

KINGWILLIAMSTOWN: 19th August, 1936. Before H. G. Scott, Esq., President, and Messrs. G. M. B. Whitfield and H. B. Myburgh, Members of the N.A.C.

Agreement to pay dowry—Claim for balance of dowry on death of wife—Ukuketa Custom in Ciskeian Territories—Number of cattle returnable on wife's death.

(Appeal from Native Commissioner's Court, Komgha.)

(Case No. 14 of 1936.)

In the Court below the plaintiff (appellant) sued defendant (respondent) for the delivery of eight head of cattle and one horse or their value, £50, alleging that in 1934 his sister, Nombhuqu, was married to defendant, who promised to pay seven head of cattle and one horse as dowry for her; that the seven head of cattle, which have since increased to eight, were actually pointed out by defendant, but by mutual arrangement were allowed to remain with him; that the said Nombhuqu died about six months ago after bearing one child and defendant now refuses to hand over the dowry.

In his plea defendant admitted the marriage and the promise to pay the dowry mentioned, but states that only three head of cattle were pointed out and that there has been no increase. He denied that plaintiff is now entitled to any of the dowry cattle, save one due in respect of the child born, inasmuch as the said Nombhuqu, having died shortly after the marriage, no dowry is claimable and, if paid, is returnable in terms of Native Law and Custom. No evidence was led, but the following facts were admitted:—

That the marriage subsisted for about one year.
That one child was born of the marriage.
That plaintiff had no use of the dowry.
The claim for the increase was abandoned.

The Native Commissioner entered judgment in favour of plaintiff for one beast or its value, £5, and costs of suit, and against this judgment an appeal has been noted on the following grounds:—

(1) The time has arrived for withdrawal of recognition of the Ukuketa custom in the Ciskeian Territories, as the said custom is repugnant to civilized sentiments and has fallen into disuse and disrepute, and

(2) Even if the Ukuketa custom is still recognized in the Ciskein Territories, the award of one beast is absolutely inadequate.

In argument before this Court it was admitted that the custom of Ukuketa is still practised by the Ciskeian natives. In the Transkeian Territories this custom was abolished by Proclamation No. 189 of 1922. If the Ciskeian natives desire its abolition they should approach the legislature to pass the necessary legislation.

In regard to the second ground of appeal, reference to a long series of cases in the Transkeian Territories heard in the Native Appeal Court prior to the passing of Proclamation No. 189 of 1922 shows that the number of cattle returnable on the death of a wife shortly after marriage is dependent on the circumstances of each case and no definite scale has been laid down, but the tendency has been, more or less, to make an equal division.

In the present case plaintiff is suing for the amount of dowry which the defendant undertook to pay, but there is a dispute on the pleadings as to the number of cattle which were actually pointed out. Plaintiff says the number is seven while defendant says that it is three. The pointing out of the cattle would be regarded as an actual payment. The question arises whether plaintiff can sue for any balance of dowry due in view of the fact that defendant's wife is now dead.

In the case of Bunge *vs.* Ndlanya (1, N.A.C. 153), plaintiff sued for fourteen head of cattle, being balance of dowry due, which defendant had promised by written agreement to pay. Defendant pleaded that his wife had died shortly after marriage and, accordingly, unless she was replaced by another daughter, the contract lapsed.

The Magistrate gave judgment for the plaintiff, holding that the fact of the woman's death could not affect the defendant's liability under the agreement. On appeal to the Native Appeal Court the President in delivering judgment said:—

"After hearing arguments, the Court is of opinion that the payment of dowry is to secure good treatment for the wife and to support her should she return to her guardian. To uphold an agreement of the nature of the one now before the Court would reduce the matter of a native marriage to one of purchase and sale. . . when the bargain was made neither party would contemplate the death of the woman, consequently this case must be treated as an ordinary one and the agreement cannot be taken into consideration as it was practically cancelled by her decease".

With this view of the position this Court is in agreement. It will be seen then that a decision in the present case cannot be arrived at until evidence has been led to show what number of cattle were actually paid over "by word of mouth".

The judgment in the Court below is set aside and the record returned for evidence to be led on this point, for a finding to be given thereon, and for a fresh judgment to be entered bearing in mind what has been said above in regard to the division of the dowry.

The costs of appeal to abide the result in the Court below.

CASE No. 8.

ANDRIES MAKOLOBATE vs. EPHRAIM MOYANAGA.

KINGWILLIAMSTOWN: 19th August, 1936. Before H. G. Scott, Esq., President, and Messrs. G. M. B. Whitfield and H. B. Myburgh, Members of the N.A.C.

Claim for rent by parent on behalf of his minor children—Proof required that property in respect of which rent claimed is property of minors—Succession to intestate native estate where spouses married in community of property—Act No. 13 *of* 1934 *and Government Notice No.* 1664 *of* 1929.

(Appeal from the Native Commissioner's Court, Thaba 'Nchu.)

(Case No. 3 of 1935.)

The plaintiff, in his capacity as father and natural guardian of his six minor children, claimed from defendant the sum of £15, amended during the course of the hearing to £22. 10s. and subsequently to £24, for rent at £1. 10s. per month from 1st July, 1934, to 31st October, 1935, in respect of certain premises, consisting of two buildings, the property of the aforementioned minors, situate in the Thaba 'Nchu Reserve.

No formal plea was filed, but the following note appears on the record:—

> "Mr. Diepraan outlines defence and states it is a denial of amount claimed and a denial that an agreement was ever entered into. In reconvention we claim £43. 5s. 9d., being the cost of reconstructing the building. This amount is only claimed if it is found that the plaintiff is the proper claimant."

The following judgment was entered:—

> "Judgment for plaintiff on counterclaim—claim dismissed. Defendant in convention to pay costs of this action."

Against this judgment an appeal has been noted on the following grounds:—

1. That the plaintiff had no *locus standi* to sue.
2. That no agreement of lease was disclosed.
3. That the amount awarded was excessive.
4. That no abatement of rent was allowed in respect of the damaged building.
5. That the judgment is against the weight of evidence. The whole basis of the plaintiff's claim is that the property in question belonged to his children and it is necessary therefore to examine the evidence from this aspect before proceeding to deal with the question as to whether or not a definite lease was entered into and whether plaintiff is entitled to any rent, and, if so, how much.

The first witness called by plaintiff is Walhan Zacharius Fenyang, who says: "The property consists of certain dwelling-houses, and at present belongs to Monyanaga children. This property first belonged to Gorruyane. I refer to two houses in the Reserve. Later on these properties belonged to Lydia Monyanaga, a daughter of the late J. D. Gorruyane. The late Lydia Moyanaga was the wife of the plaintiff (on behalf of the children). On the death of Lydia these properties, according to Native Custom, belonged to the children. Prior to the death of the late Reverend Gorruyane, it was known that these properties belonged to Lydia Moyanaga. I knew personally that these properties were going to Lydia; of my personal knowledge I know that on the death of Lydia everything which belonged to him would pass to the children".

Plaintiff's evidence is as follows: "My children have two buildings in the Reserve which are occupied by the defendant. The one building did belong to Maasdorp. . . . The property in question became the property of my children in this way: In 1926 Gorruyane died. He told us before his death he had given Maasdorp another site, where Maasdorp is to-day residing. . . . After Gorruyane's death Maasdorp came to my wife and me, and we could see he knew about the transaction as the old man had told us. He told us the old man had bought that house and given him (Maasdorp) a separate site. He even said it was for £22, but that the amount had not been paid. He asked my wife and me what would happen now that death had intervened. I took out the £22 and handed it to Maasdorp. . . . On behalf of my wife I paid Maasdorp £22 for the house in question", and in cross-examination: "I did not claim this amount from the estate because Maasdorp told me he had spoken to the old man, and I bought it for my wife".

Maasdorp, who was called for the defence, states that Gorruyane asked him for this place and said he would give him another, but that before there was anything ("voor dat daar iets was") Gorruyane died, and consequently the sale was never completed. After Gorruyane's death, plaintiff came to him and bought the place on his own account for £5 and said nothing about his wife and children.

Plaintiff admits that Gorruyane left a will and that the properties in question were not mentioned therein and also that after Lydia's death he had her estate fixed up and that they did not figure in her estate.

Maasdorp's story that plaintiff bought the property for himself seems, therefore, to be the more probable one, and, in fact, the Assistant Native Commissioner does not find that the property was bought on behalf of plaintiff's wife. In his reasons for judgment he merely says that there is definite evidence that plaintiff bought the house in question.

Even assuming that the property had been bought for plaintiff's wife, then, in view of the fact that he was married to her by Christian rites in community of property and that Lydia left no will it would devolve, according to the Common Law, in terms of section 2 (*b*) of Government Notice No. 1664 of 1929, and the children would be entitled at most to only one half, the other half being the property of plaintiff by virtue of the marriage in community. But it is not clear that the children would be entitled to any of the property in view of the provisions of Act No. 13 of 1934 that on intestacy the survivor of two sponses married in community of property shall succeed to a child's share or to so much as together with the surviving spouse's share in the joint estate does not exceed £600, whichever shall be the greater amount. There is nothing on the record to show what the value of Lydia's estate was, and consequently it cannot be decided whether or not plaintiff would succeed to the whole of the property.

In any case, plaintiff sues on behalf of his minor children in respect of property which he alleges belongs to them, and he has failed to prove that fact. If the property does not belong to them, then they have no *locus standi* to sue. As pointed out above, at least one half of the property belongs to plaintiff, and in respect of that half he should have sued in his personal capacity and in his representative capacity as far as the balance is concerned, subject to proof of ownership in the children.

It was argued in this Court that, according to Baralong Custom as observed at Thaba 'Nchu, the children would succeed to their mother and the father would not have any rights in the property. This argument might have been of force if the estate had to be administered according to Native Law and Custom, but it has no substance where the administration has to be according to Common Law.

In the opinion of this Court, plaintiff has failed to prove that the premises are the property of his children and the appeal on the first ground must succeed. This being so, it is not necessary to consider the other grounds of appeal.

The appeal is allowed with costs, and the judgment in the Court below altered to one of absolution from the instance with costs.

CASE No. 9. 1947 (T & N) 65, 75

ELDA MAKUTO vs. JOHANNES FIHLA.

KINGWILLIAMSTOWN: 19th August, 1936. Before H. G. Scott, Esq., President, and Messrs. G. M. B. Whitfield and H. B. Myburgh, Members of the N.A.C.

Seduction—Evidence—Where defendent denies seduction he must do so on oath, not merely in Plea—Premature granting of absolution from the instance.

((Appeal from the Native Commissioner's Court, Middle Drift.)

(Case No. 2 of 1936.)

Plaintiff, a spinster and teacher at the Newazi school, in the district of Middle Drift, sued defendent, the principal teacher at the same school, for £100 as damages for seduction and pregnancy.

At the close of Plaintiff's case application was made for absolution from the instance and this was granted and the appeal is against that judgment.

In his reasons for judgment the Native Commissioner states that the plaintiff's uncorroborated evidence is regarded as insufficient to enable the Court to find in her favour.

Her evidence that she has been seduced is afforded the strongest possible corroboration by the birth of a child to her of which she has sworn that defendent is the father. If no evidence is brought to rebut this then there is sufficient evidence on which a reasonable man might give judgment for plaintiff.

The rule of law is that in paternity cases, where defendent denies the intercourse, his oath is to be preferred to the woman's unless there is evidence *aliunde* to corroborate her. This does not mean that defendent can deny intercourse in his plea and, when he finds that plaintiff has no evidence beside her own as to the actual act of seduction, ask for a judgment in his favour. His denial of the seduction must be *on oath* and the other side must be given an opportunity to cross-examine him.

In the opinion of this court, the grant of absolution from the instance at the close of plaintiff's case was premature.

The appeal is allowed with costs, the judgment in the Court below set aside and the case returned for further hearing.

CASE No. 10.

EDWARD NDEMA vs. SYDNEY NDEMA.

KING WILLIAMSTOWN: 18th August, 1936. Before H. G. Scott, Esq., President, and Messrs. G. M. B. Whitfield and H. B. Myburgh, Members of the N.A.C.

Native Estate—Inquiry—Section 3 (2); *Government Notice No.* 1664 *of* 20*th September*, 1929. *Application of section* 23 (2), *Act No.* 38 *of* 1927, *and section* 1, *Part II*, *of Government Notice No.* 2257 *of* 1928, limited to land in *Location held in individual tenure upon quitrent conditions by natives—Property of a* native female other than land *falling within purview of section* 23 (2) *of Act No.* 38 *of* 1927 must *be distributed according to Native Law and Custom.*

Native Female—Right of to earn and own property and to devise it by will.

Inheritance—Illegitimate son of unmarried woman cannot inherit any property his mother accumulated during her lifetime.

(Appeal from Native Commissioner's Court, Keiskama Hoek.)

(Case No. 2/5/2/1 of 1936.)

An inquiry was held by the Native Commissioner at Keiskama Hoek in terms of sub-section (2) of section 3 of the regulations promulgated under Government Notice No. 1664 of the 20th September, 1929, for the purpose of determining the person or persons entitled to Lots Nos. 289 and 303A on the Umtwako River, in the Keiskama Hoek district, registered in the name of the late Ellen Ndema.

The claimants were Sydney Ndema, a cousin of the deceased, and Edward Ndema, her eldest illegitimate son.

The Native Commissioner found that Sydney Ndema is entitled to the lots in question, and against this finding an appeal has been noted on the following grounds:—

"That the judgment is based upon an erroneous interpretation of the principles of Native Law and Custom to be applied in the circumstances disclosed in the Record of Proceedings.

(1) The regulations governing this inquiry make it incumbent upon the Court to apply Native Law and Custom to the distribution of this estate.

(2) According to pure Native Law and Custom (by which is meant Native Law and Custom before it became influenced and altered by contact with European civilisation and its consequences) a female cannot own property.

(3) That by reason thereof Native Law and Custom (as above) did not contemplate succession to the property of a female, and there is consequently no provision therefor.

(4) According to Native Law and Custom (as above), the ownership of an unmarried female and her children is vested in her guardian (or his heir).

(5) According to Native Law and Custom (as above), there can be no inheritance through a woman.

(6) That any rights which the guardian (or his heir) may have to property acquired by an unmarried female are acquired by virtue of the ownership as referred to in paragraph 4 hereof and not by virtue of succession to her estate and such rights, if any, exist during the lifetime of such female and/or her children.

(7) That the heir to such guardian cannot acquire any greater rights through such guardian than such guardian himself possessed.

(8) That such rights of ownership cannot be extended to landed property registered in the name of a female as such position has never been contemplated or provided for under Native Law and Custom and would be furthermore a definite interference with the Common Law rights of such female derived by her by virtue of the due act of registration of such titles.

(9) That the legal status of a native female has been modified and declared by Ordinance No. 62 of 1829 (Cape) and Proclamation No. 140 of 1885 (Transkei) whereby a native female reaches the age of majority at 21 years of age and which fact of majority in respect of the deceased has been duly established by the evidence.

(10) That by reason thereof, and upon grounds of public policy and natural justice, Native Law and Custom has been modified to the extent that a native female who has reached the age of majority may acquire and own property in her own right.

(11) That in the absence of any Native Law and Custom governing the succession to property of an unmarried female the Legislature under regulation No. 2257 of 1928 (Government Notice), Part II, section 1 has made express provision for succession to property falling within the purview of section 23 (2) of the Native Administration Act, No. 38 of 1927.

(12) That such land as falls within the purview of section 23 (2) of Act No. 38 of 1927 is the only kind of land which the Legislature contemplated would descend according to Native Law and Custom.

(13) That by implication and analogy, all lands succeeded to under Native Law and Custom should be governed by the same provision, which is furnished by the Legislature to provide for a contingency not contemplated or provided for under Native Law and Custom.

(14) That the Native Commissioner should, therefore, have awarded the land in accordance with the provisions of such Government Notice above referred to.

(15) That section 11 (1) of Act No. 38 of 1927 expressly limits the application of Native Law and Custom by the words—

> ' except in so far as it shall have been repealed or modified ',

and which provision supplied the Native Commissioner with legal authority to award the land as in paragraph 14 hereof.

(16) That section 11 (1) of Act No. 38 of 1927 expressly limits the application of Native Law and Custom by the words—

> ' provided that such Native Law shall not be opposed to the principles of public policy or natural justice '.

(17) That the Government Notice referred to in paragraph 11 hereof, and the provisions thereof, in so far as they relate to succession to land registered in the name of a female, are not opposed but are in accordance with public policy and natural justice.

(18) That any decision whereby the direct descendants of a female are deprived of their natural rights of inheritance to the property of their parent is definitely opposed to both public policy and natural justice.

Wherefore appellant prays that the judgment of the Native Commissioner may be set aside and that an award or judgment may be made in terms of Government Notice No. 2257 of 1928, Part II, section 1, or such other or alternative Order as to this Court may seem fit."

The essential facts, which are not disputed, are as follows: That in his Great House the late William Ndema, under whose will the late Ellen Ndema inherited the lots in question, had six sons, namely, (1) Dolombi, (2) Edward, (3) Alfred, (4) Transkei, (5) Samuel, (6) James; of these all except Samuel are dead.

Dolombi had only two daughters, Jessie and Ellen, and left no male issue. Edward died without issue. Alfred had two daughters and left no male issue. Sydney Ndema, the one claimant,is the eldest son and heir according to Native Law and Custom of Transkei. Samuel has no sons and James left two sons. That the lots in question are not ordinary native quitrent allotments in native location. That the late Ellen Ndema was never married either by Native Law and Custom or according to Christian rites, but that she had a number of illegitimate children, of whom Edward Ndema, the appellant, is the eldest. Ellen died without leaving any will.

At the outset of his argument, Mr. Cook, who appeared for the appellant, stated that he was prepared to admit that there was no dispute on the facts, that the late Ellen Ndema was never married, that Sydney Ndema (respondent) is the correct person to succeed to the late Ellen Ndema's father, that according to Native Custom inheritance to the estate of a male is not possible through a female and that the land in question does not come within the purview of section 23 (2) of Act No. 38 of 1927, nor is it land such as is referred to in

Part II of Government Notice No. 2257 of 1928. He stated, further, that the desire of the appellant was to obtain a clear cut decision whether the natural children of an unmarried female can succeed to her landed property.

In his very able reasons for judgment the Native Commissioner states: —

At the conclusion of the inquiry, the following finding was delivered: "That the person entitled to (1) Lot No. 289, etc., and (2) Lot No. 303A, etc., is Sydney Ndema, the heir according to Native Law and Custom of the said Ellen Ndema, and that in his capacity as such he is entitled to transfer of the said Lots Nos. 289 and 303A."

Against this finding an appeal has been noted on the grounds that the judgment is based upon an erroneous interpretation of the principles of Native Law and Customs to be applied in the circumstanees disclosed in the record of proceedings. Particulars of the grounds of appeal are set forth at length in the notice of appeal, but there would appear to be no need to deal with them in detail. It seems clear that the main contention of the appellant is that section 1 of Part II of the regulations published under Government Notice No. 2257 of the 21st December, 1928, should have been applied and the immovable property in the estate awarded in accordance with the provisions thereof. In other words, that the lots forming the subject of the inquiry should have been awarded to the appellant, eldest son of the deceased.

Section 1 of Part II of the regulations published under Government Notice No. 2257 of 1928 refers only to succession in terms of sub-section (2) of section 23 of the Native Administration Act, No. 38 of 1927, which reads as follows: "All land in a location held in individual tenure upon quitrent conditions by a native shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under sub-section (10)". Clause E of this sub-section merely gives the Governor-General power to make regulations prescribing tables of succession in regard to natives.

It seems clear that the application of sub-section (2) of section 23 of the Native Administration Act, and section 1 of Part II of the regulations published under Government Notice No. 2257 of 1928 is limited to land in a location held in individual tenure upon quitrent conditions by a native. It is doubtful if the Legislature ever intended, when making this special provision with regard to succession to ordinary quitrent allotments in native locations, to interfere with or in any way modify the general principles of succession according to Native Law and Custom. It is submitted that the object of the Legislature in making this special provision was to obviate the necessity of having to sell, sub-divide or transfer in undivided shares these small allotments in estates where the ordinary laws of intestate succession had to be applied. Difficulties were constantly arising owing to the absence of provision under which these small quitrent allotments could be dealt with under Native Law and Custom irrespective of the law under which the rest of a native's estate was being administered. The object of this special provision in the Native Administration Act was to remove those diffieulties. If the land which is the subject of this inquiry fell within the purview of sub-section (2) of section 23 of the Administration Act, paragraphs 1, 2 and 9 of the Table of Succession laid down in Part II of Government Notice No. 2257 of 1928 would be applicable and the appellant would be entitled to succeed; but it is definitely not such land, and I can find no authority for applying to it a special provision in the law which was intended solely for application to one particular class of land. I cannot agree that land falling

within the purview of sub-section (2) of section 23 of Act No. 38 of 1927 is the only kind or class of land which the Legislature contemplated would descend according to Native Law and Custom.

The inquiry in this matter was held in terms of sub-section (2) of section 3 of the regulations published under Government Notice No. 1664 of 1929. The deceased clearly does not fall under any of the classes described in paragraphs (*a*), (*b*) and (*c*) of section 2 of these regulations, and her property must, therefore, be distributed according to Native Law and Custom in terms of paragraph (*d*) of section 2, which reads: "If the deceased does not fall under any of the classes described in paragraphs (*a*), (*b*) and (*c*), the property shall be distributed according to Native Law and Custom." It will be noticed that paragraph (*d*) is imperative in its terms and directs that the property shall be distributed according to Native Law and Custom. It does *not* direct that the distribution shall be according to Native Law and Custom as modified. Section 2 does not distinguish between a native male and a native female. It simply refers to "a native" and the regulations published under Government Notice No. 1664 of 1929 nowhere direct that Part II, section 1, of the regulations published under Government Notice No. 2257 of 1928 shall be applied to the property of females. Native is defined in section 35 of the Administration Act as: "any person who is a member of any aboriginal race or tribe of Africa". The deceased Ellen Ndema, therefore, was a native within the meaning of the Act, and as the regulations governing the administration and distribution of native estates refer to "a native" without drawing any distinction between a male and female it is submitted that Native Law and Custom as ordinarily understood and applied by the native people themselves has been correctly applied in this case. There would appear to be no authority or justification, except in the case of an ordinary quitrent allotment in a native location, for departing from the recognised principles governing succession according to native Law and Customs merely because the deceased native happens to be a female. There may be a good deal in the contention that pure Native Law and Custom did not recognise any right in a female to hold property, and that, therefore, property belonging to a female could not very well be administered and distributed in terms of a law or custom which did not recognise in her any right to hold that property. I have myself, prior to the passing of the Native Administration Act of 1927, unsuccessfully employed that argument. Anyhow, whatever doubts may have existed before the Administration Act became law with regard to the application of Native Law and Custom to the property of native females, it is submitted that the position has now been clarified by that Act and the regulations framed under its provisions. In the circumstances, it appears to me to be quite clear that all property, other than land falling within the purview of sub-section (2) of section 23 of Act No. 38 of 1927, belonging to a native female which falls to be dealt with in terms of paragraph (*d*) of section 2 of the regulations published under Government Notice No. 1664 of 1929 must be distributed in accordance with ordinary Native Law and Custom."

With his reasoning we are entirely in agreement, and we concur that the property in this case must be distributed according to Native Law and Custom.

The Native Custom in a case such as this was stated by the Native Assessors without qualification in the case Silelo *versus* Mhlontlo (3 N.A.C. 127) where they said that "the illegitimate son of an unmarried woman cannot under Native Law and Custom inherit any property his mother may have accumulated during her lifetime. It would belong to her father, if alive; if dead, then to his lawful heir of the house to which she belonged".

It is correct that according to pure Native Custom no woman can own property, but the Native Appeal Court has held that a widow is entitled to retain in her own right property earned by her after her husband's death (Nolanti *versus* Sintenteni 1 N.A.C. 43 and Nosaiti versus Xangati 1 N.A.C. 50) and that the earnings of a spinster of full age are her own property (Nobulawa *versus* Joyi 5 N.A.C. 159). That being so, it cannot be disputed that during her lifetime such a widow or spinster could deal with that property in any way she wished, and could, provided it was not property which fell within the purview of sub-sections (1) and (2) of section 23 of Act No. 38 of 1927, devise it by will to whomever she pleased. In the present case, the late Ellen Ndema was at liberty to make a will bequeathing the property in question to anyone, even though such bequest might be contrary to Native Law and Custom in the same way as she acquired these very properties in a manner contrary to Native Law and Custom, i.e. under the will of her father.

Unfortunately, the late Ellen Ndema did not make a will, and consequently the provisions of section 2 (*d*) of Government Notice No. 1664 of 1929 came into effect and this lays down definitely that in such a case the property shall be distributed according to Native Law and Custom, and we cannot do otherwise than give effect to the clear language employed by the Legislature. To do otherwise, would be to usurp the functions of the Legislature, which this Court would not be justified in doing. The Native Custom is not in dispute, and while this may create hardship in individual cases, this Court does not consider that it would be justified in allowing that consideration to influence it in coming to a decision on the general question of succession by illegitimate children to the property of their mother.

It is true that section 2 of Government Notice No. 1664 of 1929 speaks of a native in the masculine gender, but there is nothing in that Government Notice or the enabling Act (No. 38 of 1927) to show that the Legislature intended that the Act and regulations should apply only to males, and, therefore, in considering the Government Notice referred to, words importing the masculine gender must be construed as including females (section 7 of Act No. 5 of 1910). In section 22 of Act No. 38 of 1927, dealing with marriages, reference is specifically made to "native male person", whereas in the following section (section 23) the word used is "native" without any qualification, thus making a clear distinction.

We are asked to set aside the judgment of the Native Commissioner and make an award in terms of Part II, Section 1, of Government Notice No. 2257 of 1928. We have no power to do so, for the regulations referred to apply only to land in a location held in individual tenure upon quitrent conditions, and the land now in question is not such land as is there referred to.

We are of opinion that the award made by the Native Commissioner is correct and the appeal is accordingly dismissed with costs.

CASE No. 11.

DASOYI NDEVU vs. NTSHOKOLO NGUZO.

KINGWILLIAMSTOWN: 3rd December, 1936. Before H. G. Scott Esq., President, and Messrs J. T. Boast and M. L. C. Liefeldt, Members of the N.A.C.

Adultery—Summons in original form claimed cattle as damages for—Amendment to allege cattle due by virtue of mutual agreement—Foundation of action altered—Plaintiff bound by Summons and cannot claim anything not specifically asked for therein.

(Appeal from Native Commissioner's Court, Lady Frere.)
(Case No. 20 of 1936.)

Plaintiff in the Court below claimed from the defendant five head of cattle or their value, £25, less £5, the value of one beast paid on account.

Defendant denied the adultery and the payment of one head on account.

The summons as originally framed claimed "payment of" five head of cattle as damages for adultery, but when the case came on for hearing plaintiff's attorney applied for an amendment to the summons by substituting the words "delivery in terms of a mutual agreement" for the word "payment".

After hearing evidence the Assistant Native Commissioner dismissed the summons with costs and an appeal has now been noted to this court on the ground that the judgment is against the weight of evidence or in conflict with such evidence.

In his reasons for judgment the Presiding Officer states:—
"It is not clear from the summons whether the plaintiff is relying on the alleged mutual agreement or on the adultery and pregnancy itself. Both aspects were, however, gone into and in arriving at my finding I considered the question of adultery and pregnancy first".

He then proceeds to deal with the claim first on the basis of adultery and then on the alleged agreement.

In the opinion of this Court the amendment applied for by plaintiff's attorney altered the whole foundation of the action from one based on the act of adultery and pregnancy to one based on an agreement and all the detailed evidence led with regard to the commission of acts of adultery was really superfluous. The plaintiff is bound by his summons and cannot be heard to claim anything not specifically asked for therein.

This claim must therefore be considered only from the point of view of the alleged agreement.

It appears from the evidence that this matter was first taken to the Headman of the location who after making certain investigations referred it to his Chief Valelo. The Chief after hearing evidence gave judgment against the respondent. In his own evidence he states "I held a Court and went into the matter—Defendant admitted that he had metshaed with the woman but he denied having rendered her pregnant. I asked him to name who had rendered her pregnant. He could not do so so I gave judgment against him. After this defendant went away with his party after having asked for time. He came back to me afterwards and admitted having caused the pregnancy of the woman and that he was paying a young black bull on account. I told him he had to pay five head—He asked for time as he had no cattle and he wanted to go to work so as to procure them. I agreed to this".

Further witnesses were called who gave substantially the same evidence as Valelo as to what took place at his Court.

The defendant (now respondent) in his evidence states:—
"The case was then taken to Valelo and I attended. I again denied the adultery and also metsha. Valelo gave judgment against me for 5 head of cattle. I replied I had no cattle. He told me to produce 'Ntlonze' to mark the judgment and I could then have as much as six years within which to pay. I gave due respect to Valelo and paid the beast as stated".

The alleged agreement upon which the appellant is suing is based on what transpired at Chief Valelo's Court.

One of the essentials of every contract is that the contract be voluntarily, seriously and deliberately entered into for some reasonable cause. The evidence shows that no mutual agreement was entered into between the parties and the plaintiff consequently cannot succeed on the summons as it stands.

The appeal is dismissed with costs.

CASE No. 12.

MESHACK MLAKALAKA vs. PHILEMON BESE.

KINGWILLIAMSTOWN: 3rd December, 1936. Before H. G. Scott, Esq., President, and Messrs. J. T. Boast and M. L. C. Liefeldt, Members of the Court.

Engagement—Misconduct of girl—Condonation by suitor—Effect of—Subsequent breach of engagement by suitor—Forfeiture of engagement cattle.

(Appeal from Native Commissioner's Court, Kingwilliamstown.)

(Case No. 37 of 1936.)

In the Court below plaintiff sued defendant for the return of seven head of cattle or their value, £35, paid by him in April, 1935, in contemplation of a marriage to be arranged between his son, Jeffrey, and defendant's daughter, Catherine, and alleged that in consequence of the seduction of Catherine by one Stanford Nojaholo, who paid two head of cattle as damages, Jeffrey refused to carry on with the marriage.

Defendant admitted the payment of the cattle and the seduction of Catherine, but pleaded that as Jeffrey had condoned the girl's misconduct and negotiations for the marriage to take place were carried on thereafter, he was not entitled at a later stage to break off the engagement for some reason not set forth in the summons, and he applied for a dismissal of the summons.

The Native Commissioner entered judgment for the plaintiff as prayed, with costs, and against this judgment an appeal has been noted on the following grounds:—

(1) "That the Native Commissioner having found on the evidence that defendant's plea of condonation and subsequent agreement to carry on with the marriage was substantiated, he erred in his application of the Law in holding that the proposed bridegroom could, without further good cause, reject his proposed bride and recover the cattle paid, for it is clear Native Law that if the man rejects the woman without good cause, he must forfeit any cattle he may have paid.

(2) That the judgment should therefore have been for defendant with costs."

From the evidence it appears that about April, 1935, plaintiff arranged for his son, Jeffrey, to marry defendant's daughter, Catherine, and paid seven head of cattle on account of dowry. At this stage Jeffrey was away at work. During March, 1936, plaintiff received a report from defendant that Catherine had been rendered pregnant by one Stanford Nojaholo, who had paid two head of cattle as damages.

Jeffrey returned from work about the end of March, 1936, and was informed of the position by his father. Plaintiff and Jeffrey both state that the latter immediately refused to go on with the marriage because of the girl's pregnancy, but the defendant called evidence which conclusively proved that

Jeffrey had condoned the girl's misconduct and was prepared to marry her. It is clear that after he was aware of her condition he continued to visit her and had intimate relations with her. Several letters were put in which Catherine says were written to her by Jeffrey. He denies having written these letters, but this Court is satisfied that he is not speaking the truth. In three of these letters Jeffrey refers to Catherine as his wife and in one of them mentions the fact that she is about to have a child, but in none of them does he indicate that he desired to break off the engagement because of her lapse.

The Native Commissioner finds that there was condonation by both plaintiff and Jeffrey, and the evidence fully supports his finding, but he gave judgment in plaintiff's favour, holding that such condonation does not deprive the plaintiff of his ownership in the cattle nor does it raise any fresh contract. In his reasons for judgment he says:—

"I have only succeeded in finding one case in which cattle were held to be not returnable on account of a fault by the bridegroom (William Nojiwa *vs.* Samuel Vuba, 1, N.A.C., 57), but in this case there has been no serious fault by the bridegroom. . . . As indicated above, the Appeal Court has held that the cattle are not returnable where a bridegroom has been guilty of a serious fault and I am not disposed to hold that they are not returnable in the absence of similar serious fault."

The Native Commissioner has evidently misread the judgment in the case of Nonjiwa *vs.* Vuga (supra). In that case the intended bridegroom had written to his intended bride that he was not prepared to go on with the marriage because he had misconducted himself with another girl. The intended bride was quite willing to go on with the marriage. In giving judgment the President of the Native Appeal Court said:—

"The engagement entered into was broken off, not mutually, but by the intended bridegroom, the plaintiff's son, by his letter of the 14th January, in which he says distinctly that, on account of misconduct with another girl he cannot fulfil his engagement, and this again repeated in his letter of the 28th January. Under these circumstances the plaintiff is not entitled to recover the stock paid on account of the dowry".

It is clear that the reason why the Court declared that the cattle paid were not returnable was *because plaintiff's son had broken off the engagement* and not because he had misconducted himself.

If there had been no misconduct on his part his mere refusal to proceed with the marriage would have entailed forfeiture of the cattle paid.

In the case of Lucani *vs.* Mbuzweni (2, N.A.C., 27) Lucani sued Mbuzweni for the restoration of eight head of cattle paid him on account of dowry in contemplation of a marriage arranged between plaintiff's son and defendant's daughter.

Plaintiff stated that he had arranged the marriage while his son was still at school, and paid the dowry, but his son on arrival home refused to ratify the arrangement, and on this ground he claimed his cattle back. Defendant pleaded that plaintiff's son had duly ratified the agreement, but later on broke off the engagement, and by his refusal to carry out the marriage the cattle were forfeited.

The Magistrate entered judgment for defendant and plaintiff appealed. In dismissing the appeal the President of the Court said:—

" In this case it is clear that plaintiff's son, Simon was a consenting party to the proposed marriage. When he was informed of it he expressed his approval, and after this approval the bulk of the dowry was paid. It is clear that the plaintiff's son broke off the engagement and that he did so without cause ".

In the case of Ngcobo *vs.* Msulube (2, N.A.C., 33) it was also held that where plaintiff had broken off the engagement without cause he was not entitled to the return of his cattle.

In all these cases it was held that where the failure to carry out the marriage agreement was due to the fault of the intended bridegroom, he had to forfeit the cattle paid. In other words he was mulcted in damages for the insult to the girl.

The Native Commissioner in his reasons for judgment also says that " to order the forfeiture of engagement cattle where the bridegroom has for some reason found it undesirable to proceed with the marriage would amount to a threat which is contrary to good morals ".

Where is the " threat " in making such an order? The engagement has been broken and the natural consequence of such breach is, according to Native custom, a forfeiture of the cattle paid. What the Court in effect says by making such an order is " You have been guilty of a breach of agreement and therefore, by your own custom, you cannot get your cattle back ". If the Court's order was " You must marry the girl or otherwise forfeit your cattle " that would constitute a threat, but that is not what the Court is asked to do. If the line of reasoning adopted by the Native Commissioner is correct, then our own Common Law is also " contrary to good morals " for it provides that a man who is engaged to marry a girl and who breaks off that engagement without just cause is liable in damages. This is almost exactly the position created by the Native custom under consideration, and we are of opinion that to order forfeiture of cattle in accordance with that custom would not be contrary to good morals.

The question to be decided in the present case is whether, in spite of condonation of the girl's misconduct by Jefferey, the plaintiff is entitled to recover the cattle paid by him. Now, it is quite clear that the plaintiff's son would have been entitled on discovery of the girl's misconduct to break off the engagement and the cattle paid would have been recoverable. He did not, however, adopt this course, but definitely condoned her offence and intimated that he was going to marry her.

Bristowe, J., in Nield *vs.* Nield (1908, T.S., 1113) said: " In Roman Dutch Law the effect of condonation is to extinguish the misconduct with all its legal results ", and Wessels, J., in Bell *vs.* Bell (1909, T.H., at P. 29) adopted the law laid down in Keats *vs.* Keats (28, L.J.Mat. Cas., p. 61): " Condonation means blotting out the offence imputed so as to restore the offending party to the position which he or she occupied before the offence was committed ". (See also Meyer *vs.* Meyer, 1935, E.D.L.D. 52.)

The cases above referred to dealt with condonation of matrimonial offences by one or other spouse but there seems to be no good reason why they should not apply equally to the present case.

In the case of James Binase *vs.* Papi Ngqase (4, N.A.C., 115), the principle of condonation was also accepted as applying to cases under Native Law.

The effect then of Jefferey's action was to wipe the slate clean as between themselves and to restore the girl to the position she was in prior to the commission of the offence.

That being so, plaintiff was not entitled to rely on that offence in his action for the recovery of his cattle. No other adequate reason for breaking off the engagement has been advanced and consequently plaintiff's son would be the party at fault and the cattle paid by his father would not be returnable.

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

CASE No. 13.

STEPHEN KUMKANI vs. ZIBI JOYI and J. P. S. ZIBI.

KINGWILLIAMSTOWN: 3rd December, 1936. Before H. G. Scott, Esq., President, and Messrs. J. T. Boast and M. L. C. Liefeldt, Members of the Court.

Wrongful arrest and false imprisonment—Where arrest and imprisonment admitted onus on defendants to establish reasonable cause—Arrest by peace officers without warrant —Acts Nos. 31 *of* 1917 *and* 26 *of* 1923.

(Appeal from Native Commissioner's Court, Middledrift.)

(Case No. 15 of 1936.)

The plaintiff sued the defendants for £25 damages for wrongful arrest and imprisonment. He alleged that on the 21st February, 1936, the defendants each, or both of them, arrested or caused him to be arrested and imprisoned in a certain hut at Dikidikana Location, in the District of Middledrift, detained the night under arrest with three others, and brought into Middledrift Police Camp on the 22nd February, 1936, where they were immediately released. Plaintiff further alleged that defendant acted maliciously, wrongfully and without sufficient or reasonable cause.

Defendants objected to this summons on the ground that they were wrongly joined as co-defendants in that there was no allegation in the summons that they were acting in concert or that they had community of interest, and, further, that they had separate defences.

Before this objection was heard, plaintiff's attorney applied for an amendment of the summons so as to allege that defendants were acting in concert and had community of interest.

The objection to the summons was overruled and the application for amendment of summons granted. First defendant filed the following plea:—

1. Defendant is the Headman for Dikidikana Location, Middledrift.

2. Defendant denies that he was acting in concert with second defendant or that they had community of interest.

3. Defendant denies each and all the allegations in plaintiff's summons and puts plaintiff to the proof thereof.

4. That on the date mentioned in the summons he was called upon by the native constable J. P. S. Zibi to render him certain assistance in the matter of the detention of the plaintiff and three others prior to their removal to Middledrift.

5. That in terms of the regulations framed under the Native Administration Act, No. 38 of 1927, he rendered such assistance, and in everything he did he was acting under the orders of the native constable Zibi.

6. That in doing so defendant was acting bona fide and without malice and in the best interests of plaintiff and his friends and with the full approval and sanction of the native constable.

7. Defendant denies any liability to plaintiff.

Second defendant's plea was as follows: " Defendant denies each and all the allegations in plaintiff's summons and puts plaintiff to the proof thereof ", and as an alternative plea—

(*a*) defendant states he is a native constable stationed at Middledrift:

(*b*) that on or about the 21st February, 1936, the defendant, acting upon the instructions of his superior officers, to wit, the sergeant in charge at Lekfontein, and the sergeant in charge at Middledrift, proceeded to investigate the alleged theft or mutilation of a certain ox, the property of one R. J. Slater, of Fort Wiltshire, Victoria East;

(*c*) that as the result of such investigations, there being reasonable grounds to suspect the plaintiff and others of having committed the crime of stock theft, or, alternatively, malicious injury to property, the defendant, acting within the scope of his authority as a constable in terms of section 26 (*b*) of Act No. 31 of 1917, detained the plantiff and others; and as it was late in the day, placed them in a hut belonging to the Headman, and next morning, still acting under instructions, took him with others to Middledrift Police Camp, where, after statements had been taken by the officer in charge, the plaintiff and his companions were allowed to return home;

(*d*) that in so detaining the plaintiff, the defendant was acting bona fide and without malice, and had reasonable cause for doing so, and did so with the full approval and sanction of his superior officers;

(*e*) that in the premises there is no liability attaching to defendant.

The facts of the case are not in dispute, and these are that a certain Mr. Slater lost a beast and on or about the 11th February, 1936, the carcass of a beast was discovered by one Kesayiya Mesani in the Keiskama River, which forms the boundary between Mr. Slater's farm and the Dikidikana Location, in which plaintiff resides.

On the matter being reported to the police, native constable Zibi (2nd defendant) was sent out to investigate the matter. In company with the Headman of the Location, Zibi Joyi (1st defendant), he interviewed plaintiff and his brothers. Plaintiff told them he and his brothers had seen the carcass in the river and had taken it out in the presence of Mr. Slater, who had given them some of the meat. Plaintiff and three others were taken to Mr. Slater, who confirmed the statement about having given them some of the meat. Second defendant then telephoned to the sergeant in charge of the Police post at Middledrift (Sergeant Raw). His own words are: " I then phoned Sergeant Raw and told him that there are four men who know something about the beast in the river. The sergeant told me to bring them to Middledrift. I told the sergeant it was late. He said I could keep them over and bring them in next morning. I took the men from Slater's to the Headman's kraal, where I locked them in the hut. I kept them there for the night and brought them in

next morning. . . In the present case the sergeant did not say I was to lock up the men. He told me to detain them. I did not search for bones. I made inquiries about plaintiff. No one told me that they had seen him in suspicious circumstances."

The two defendants locked plaintiff and three others in a hut at first defendant's kraal, and the next morning they were taken to Middledrift on foot. Plaintiff asked to be allowed to ride his horse but second defendant refused his request and made him walk with the others. Statements were taken from them by an European sergeant and they were immediately released without any charge being made against them.

First defendant says he suspected these men of stock theft because they had eaten of the meat of the beast and, according to native custom, they are not allowed to eat of such meat. Second defendant does not say of what offence he suspected these men. His evidence on this point is as follows:—

"I was suspicious because the natives had eaten of the meat. I am a native, and that gave me to suspect plaintiff and his brothers. Slater told me his servants had skinned the beast and that he had told them to give of the meat to these four men. . . . In native custom natives would not eat meat of that nature and in those circumstances. . . . My only reason for suspicion was that these men had eaten the meat. I thought they knew something about it."

The position shortly, then, is that plaintiff and three other men were detained on suspicion of having committed some crime not specified nor, apparently, were they informed what the charge against them was. They were locked up in a hut and detained for a night, and next morning were marched on foot to Middeldrift under police escort.

All the elements required to found an action for wrongful arrest and false imprisonment were present.

"The wrong of false imprisonment or arrest consists in the unjustifiable infliction of a restraint upon the personal liberty of another. Although the wrong of false imprisonment generally involves a wrongful assault, it does not necessarily do so; it must therefore be treated as a separate and distinct wrong. Since the essence of the wrong is the depriving another of his personal liberty, a person may be held liable for false imprisonment, although there has been no imprisonment in the ordinary sense of the term, nor any employment of actual force" (McKerron—Law of Delicts in South Africa, p. 100).

"For an action for false imprisonment or illegal arrest to lie it is not necessary that the defendant should act maliciously; it is sufficient that the arrest should be illegal. If he does act maliciously, that will be an element in the estimation of damages; but the mere false imprisonment or illegal arrest gives a right of action to the person arrested" (Birch *vs.* Ring, 1914, T.P.D., at p. 106).

In the case of false imprisonment the onus is on the defendant, who admits arrest, to establish reasonable cause. In the case of an alleged malicious prosecution the plaintiff must prove affirmatively that the defendant acted maliciously and without reasonable cause (Birrell *vs.* Fryer, 1926, E.D.L., at p. 287).

In the present case the arrest and imprisonment being admitted the onus is on the defendants to establish reasonable cause.

The reasonable cause set up by defendants for their suspicions is the fact that plaintiff and the other men had eaten of the meat which was given to them by Slater's servants on his instructions. But why should that make them suspicious? It did not have that effect on them in regard to Slater's own servants, who also ate of the meat.

They seem to have arrived at their conclusion by a process of inverted reasoning. The names of the four suspected men in question had been communicated to the defendants, the grounds for suspicion against them being of the flimsiest, namely, an abortive prosecution against plaintiff and others (not named) under East Coast fever regulations. The defendants then set out on their investigations. When they found that plaintiff and the others had eaten of the meat they say to them, in effect, " We previously suspected you, and now that you have eaten the meat, although it was given you, it shows that our suspicions were correct ". " If we had not suspected you there would have been no significance attaching to the eating of the meat ".

As already pointed out no such suspicion was created in the case of Slater's servants. The explanation of plaintiff and the two men who went with him to Slater's farm as to their reason for going there, namely, to hire grazing, is uncontradicted and must be accepted.

Slater admits they were at his farm, but he says he was too busy to see them. Their visit there would appear to have been quite innocent.

In speaking of the witness, Kasayiya Mesani, who was one of those arrested, the Native Commissioner says in his reasons for judgment: " The fact that this witness was in search of a red cow of his own and yet when he saw a red animal in the water he omitted to ascertain whether it was his own missing animal. (This sentence is evidently incomplete.) Instead, he went straight to Mr. Slater to report the finding of his (Slater's) animal.

" This fact coupled with the assumption that he was at least intimate with the plaintiff and his brothers who found occasion to visit Mr. Slater the next day, to my mind, is sufficient to give rise to a reasonable suspicion not only of this witness but of the plaintiff and his brothers who were detained with him ". Why should this be so? It seems a somewhat startling doctrine that because one is intimate with a man suspected of having committed a crime one should immediately also fall under suspicion in the entire absence of any evidence to indicate complicity. If this reasoning is logical why should not all the people with whom Kasayiya was intimate also have fallen under suspicion? The answer is given by the Native Commissioner when he goes on to say " This is quite apart from the fact that the names of the suspected men were given to Sergeant Raw by Sergeant Emmet ".

The reasoning seems to be then that, because the Police suspected these four men, without, be it noted, giving any grounds for that suspicion, the fact that three of them were intimate with Kasayiya, who acted in what is taken to be a peculiar manner, rightly also brought them under suspicion. Even assuming that the reasoning is correct, which we do not think it is, surely one must have more than that fact before going to the length of arresting a person.

It is contended that second defendant is protected by section 26 (*b*) of Act No. 31 of 1917. That sub-section provides that every peace officer empowered by Law to execute criminal warrants, is authorized to arrest without warrant every person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in the First Schedule to the Act included in which is Theft either at Common Law or as defined by Statute. If there is no reasonable suspicion there can be no lawful arrest. That one of second defendant's superior officers considers that there was no such reasonable suspicion is clear from the evidence of Sergeant Barnard for he says that the native constable (2nd defendant) had no power under Act No. 31 of

1917 to arrest. He contends, however, that under the Stock Theft Act the native constable had power to arrest the suspects and the Native Commissioner in his reasons for judgment states:—

"The Stock Theft Act provides for the arrest of persons suspected of stock theft without a warrant and this disposes of the allegation that the defendant's action was wrongful."

It therefore becomes necessary to inquire what are the powers of arrest conferred by the Stock Theft Act (No. 26 of 1923)). These powers are conferred by section 6 sub-section (1), of that Act. Sub-section (2) of section 6 deals with the power to search and has no application to the present case.

Sub-section (1) of section 6 of the Act reads:—

> "In addition to any powers of arrest conferred by any other law, any person may, without warrant, arrest any other person upon reasonable suspicion that such other person has committed the offence mentioned in section 1 or 3 of this act".

The offence mentioned in section *one* is that of being found in possession of stock or produce in regard to which there is reasonable suspicion that the same has been stolen and being unable to give a satisfactory account of such possession.

In this case the plaintiff was not found in possession of any stock or produce, and therefore he was not liable to arrest on suspicion of having committed an offence under section 1.

The offence mentioned in section 3 of the Act is that of entering any land enclosed on all sides with a sufficient fence or any kraal with intent to steal any stock or produce on such land or in such kraal.

There is no suggestion that plaintiff entered any such land or kraal with such intent and consequently he could not be arrested on suspicion of having committed an offence under this section.

It is clear then that the defendants are not protected by section 6 of Act No. 26 of 1923.

On the facts we are satisfied that there was no reasonable suspicion against the plaintiff of having committed any offence.

It is contended on behalf of first defendant that he was not acting in concert with second defendant, and that they had no community of interest, and, further, that he was acting under the orders of second defendant. These contentions are not supported by first defendant's own evidence. He says: Native Constable James came to me and informed me that Mr. Slater's beast had been found dead in the river. He asked me to assist him in investigating the matter.

I helped him. With him I interviewed plaintiff and his brothers whom I know well . . . We took plaintiff and his brothers to my kraal at a late hour. We locked them in one of the huts. In the morning the hut was opened and the men were brought to Middledrift by native constable James and myself . . . I assisted the native constable. I was satisfied that there were reasons. I was a party to the locking up of the men. I gave the hut willingly. The native constable actually locked them up but I agreed to it".

Nowhere in this evidence is there any suggestion that first defendant was acting under the instructions of second defendant. On the contrary, he fully identified himself with everything the latter did and he was therefore, equally liable with him for any wrongful act.

As regards procedure it has been laid down that a complainant may sue any of those who jointly injured him for the full damage caused by the injury; or he may bring his action against all of them as co-defendants, and enforce his judgment *in solidum* (Naude and du Plessis *vs.* Mercier, 1917, A.D., at p. 39). The plaintiff was therefore quite correct in bringing his action against both defendants jointly.

Having found that there was no reasonable suspicion against plaintiff of having committed any offence which rendered him liable to arrest without a warrant, it follows that the action of the defendants was wrongful and the Native Commissioner erred in entering judgment in their favour.

This Court might remit the case to the Native Commissioner to award damages, but we think we have all the facts before us which would enable us to come to a correct conclusion as to what damages should be awarded and there is no necessity to incur the additional expense which would be involved by remitting the case to the Native Commissioner (see Rini *vs.* Carr, 1921, E.D.L., 239).

The plaintiff has been a resident of the Dikidikana Location for over eighteen years, is well known to the Headman and is apparently of goed character. He was locked up in a hut with others for a night and was then marched under escort to Middledrift.

He does not appear to have been ill-treated in any way.

In the circumstances we think that the sum of £5 would be adequate damages to award in this case.

The appeal will be allowed, with costs, and the judgment in the Court below altered into a judgment for plaintiff for £5 and costs.

CASE No. 14.

MATYENI vs. SMAYILE.

Butterworth: 18th June, 1936. Before H. G. Scott, Esq., President, and Messrs. V. M. de Villiers and J. W. Sleigh, Members of the N.A.C.

Responsibility of kraal head—Where property is traced to native kraal and kraal head refuses to allow kraal to be searched he is liable for the value of that property—Native custom.

(Appeal from Native Commissioner's Court, Idutywa.)

(Case No. 2 of 1936.)

In the Court below plaintiff sued one Mase and her father, Matyeni, for certain articles, and in his particulars of claim stated that he is the heir of his late son Andries, whose widow first defendant is; that on the death of Andries first defendant went to the kraal of her father, second defendant, taking with her the articles in question, which were the property of the late Andries and to which he is entitled as heir; that the second defendant is therefore in possession of the said property and refuses to hand it over.

The Native Commissioner entered judgment in favour of plaintiff as prayed, with costs, and an appeal has been noted on behalf of the second defendant only on the ground that there is no proof that the articles in question ever reached his kraal, or that he at any time took or came into possession of them.

The Native Commissioner found as a fact, and with this finding we agree, that the first defendant actually removed a box containing the articles in question from the hut of the late Andries and took it to her father's kraal, and that the latter refused to have it opened when plaintiff's messengers came. If the evidence of plaintiff's witnesses that the box when taken by first defendant contained the articles in question is correct—and this apparently is not questioned in view of the fact that no appeal has been noted on her behalf—it seems obvious that those articles also arrived at second defendant's kraal, for Mase does not say that she got rid of them anywhere on the way.

It was argued before this Court that assuming that the articles were taken to second defendant's kraal by the first defendant, the former cannot be held liable unless it can be shown that he took possession of the articles and exercised control over them.

While this argument might be sound as applied to persons living under European conditions, it does not apply with as much force to natives living in native locations under ordinary native conditions, and the evidence required to fix liability on the kraal head is not so strong.

Under their own customs, if the spoor of any property lost or stolen is traced to a kraal and the head of the kraal is unable to take it further or refuses to allow his huts to be searched, then he is held liable for the value of that property.

In the present case, the second defendant, by refusing to allow the first defendant's box to be searched, obstructed the plaintiff's messengers in their search and thereby showed that he was aware the articles in question were in his daughter's box and that he was exercising control over them in his capacity of kraalhead.

The appeal is dismissed, with costs.

CASE No. 15.

MESHACK MKETSI vs. EDWARD MKETSI.

BUTTERWORTH: 18th June, 1936. Before H. G. Scott, Esq., President, and Messrs. V. M. de Villiers and J. W. Sleigh, Members of the N.A.C.

Costs—Where two or more issues are separate and distinct—each party to action should be awarded costs on the issue in which he succeeded.

(Appeal from Court of Native Commissioner, Tsomo.)

(Case No. 101 of 1935.)

In the Court below plaintiff claimed from defendant nine head of cattle or their value, £45, being dowry for his (Plaintiff's) sisters and for an account of the sum of £50 entrusted to him by plaintiff:

The Assistant Native Commissioner entered the following judgment:—

"For plaintiff for seven head of cattle or their value, £35, and costs; absolution from the instance in respect of remaining claims (i.e. dowry claims)".

An appeal has been noted against that portion of the judgment awarding seven head of cattle or their value, £35, to plaintiff on the ground that it is against the weight of evidence and also against the order awarding all costs to plaintiff on the ground that the claims were separate and distinct, and as plaintiff had failed on the first issue he should have been ordered to pay the costs of that issue.

In so far as the Assistant Native Commissioner's judgment in regard to the claim for an account of the sum of £50 is concerned, we are not prepared to say that he came to a wrong conclusion on the evidence and the appeal on that point must fail. It is pointed out, however, that the form of his judgment is incorrect. The claim was for money entrusted to defendant, and as the Assistant Native Commissioner found that this money had been handed to defendant and he had accounted for a portion of it only, he should have entered judgment for the full amount claimed less the amount accounted for.

No objection was taken in the Court below to the form of the judgment and this Court is not prepared to make any amendment as this might be to the prejudice of the defendant.

In so far as the costs of the action are concerned, we are of opinion that the Assistant Native Commissioner erred in not awarding defendant the costs of the claim in which the plaintiff failed.

The two issues were entirely separate and distinct, and in such a case the proper order is that plaintiff should be awarded costs on the issue in which he succeeded and defendant the costs of the issue on which he succeeded (Fripp *vs.* Gibbon & Co., 1913, A.D., 354.)

The appeal on the question of costs will be allowed and the judgment in the Court below amended by adding the words "with costs" after the words "absolution from the instance".

As far as the costs of appeal are concerned each party has succeeded partially and there will therefore be no order as to costs of appeal.

CASE No. 16.

NGONYAMA MDLOVU vs. MBALI MAVELATSHONA.

BUTTERWORTH: 18th June, 1936. Before H. G. Scott, Esq., President, and Messrs. V. M. de Villiers and J. W. Sleigh, Members of the N.A.C.

Application to rescind judgment—Order XIV—Proclamation No. 145 of 1923—Wilful default—Refusal to plead.

(Appeal from Native Commissioner's Court, Idutywa.)

(Case No. 14 of 1936.)

On the 17th January, 1936, plaintiff (respondent) issued a summons against Mfiti Mdlovu and Mpisekaya for five head of cattle or their value, £15, as damages for the seduction of his daughter by the first defendant, which resulted in a female child being born to her on or about 1st January, 1936. The second defendant was sued as kraal head of first defendant. In the plea it was specially denied that first defendant was an inmate of second defendant's kraal at the time of the alleged seduction, and it was stated that he had established his own kraal some years ago, but that during the early part of 1935, owing to his own kraal having fallen into disrepair, first defendant resided temporarily at the kraal of his brother Ngonyama (present appellant).

On the 6th February, 1936, a notice was sent Ngonyama informing him that on the 13th *idem* application would be made to the Court to join him as co-defendant in the action in terms of Order XXXII, Rule 8 (2), of Proclamation No. 145 of 1923.

This notice bore an endorsement by the Plaintiff that he had served it upon Ngonyama, who informed him that he would not appear, as he said he had nothing to do with the matter.

On the 13th February, 1936, notice was given to Ngonyama that he had been so joined and called upon him, if he wished to defend the action, to enter appearance within seven days after service of the notice upon him and thereafter within seven days to plead to the action. This notice, together with a copy of the particulars of plaintiff's claim, was served personally on Ngonyama by the Deputy-Messenger of the Native Commissioner's Court on the 20th February, 1936. On the 24th March, 1936, the case came on for hearing, when Mpisekaya appeared, but first defendant and Ngonyama were in default, no appearance to defend having been entered by Ngonyama. The summons against Mpisekaya was dismissed and judgment entered against first defendant and Ngonyama. On the 25th March, 1936, a warrant of execution was issued and was executed on the 31st March, 1936, when Ngonyama handed over to the Deputy-Messenger for attachment four head of cattle and thirty sheep, which he stated to be his own property.

On 16th April, 1936, Ngonyama gave notice that application would be made on the 21st *idem* for a recission of the judgment granted on the 24th March, 1936.

In the course of his evidence at the hearing of the application, Ngonyama stated that the first intimation he received that he was joined as defendant was when the Deputy-Messenger served on him a notice to that effect and that he then proceeded to interview the Clerk of the Court and told him he had nothing to do with this matter and denied his liability, and that he was then told to go home; that he took no further steps as he expected a messenger of the Court to come to him, presumably with a further notice. He stated, further, that he did not deliberately refrain from attending court in this matter.

The Clerk of the Court, whom Ngonyama interviewed, had been transferred in the meantime, but the native constable, who interpreted for him was called and his evidence is as follows:—

"Applicant came to see the Clerk of the Court and was told to file his plea within seven days, and he replied that he would not do so because he should have been sued first and not go from one to another as it was not the proper procedure and, further, that the young man never stayed at his kraal and that he was not prepared to make a statement in the matter. The case should proceed and he would see what to do after the decision. He was told to file a plea or judgment would go against him, and he replied in that case that he would see what happened and appeal. Because of this obstinacy and refusal to plead, the clerk left him alone and he went home. He was not told to go home. The clerk despaired and so left him alone. His attitude was obstinacy and ignorance.

The Native Commissioner held that Ngonyama was in wilful default and refused the application to rescind the judgment, and the appeal is against that judgment.

The evidence of the native constable above referred to clearly shows that Ngonyama was well aware what the case was about and obstinately refused to plead, having been informed what would be the result if he did not do so. He treated the process of the Court with contempt, and the attitude he took up appears to be that he thought the procedure adopted was wrong and that any order that was made would eventually be upset by a Higher Court:

In the case of Hendricks *vs.* Allen (1928, C.P.D., at p. 521), Gardiner, J., said: "If he knows what he was doing, and intends what he is doing, and is a free agent; if he knows he is neglecting the summons and intends to neglect the summons, then there is wilful default".

In the case of Manini *vs.* Komani (VI, N.A.C., 26), where the defendant had entered an appearance and was told by the Clerk of the Court to file his plea within seven days, which he failed to do, this Court held that the terms of Rule 1 (1) of Order XIV of Proclamation No. 145 of 1923 were imperative and declined to interfere with the judgment of the magistrate refusing to grant an application for the recission of a default judgment.

In the opinion of this Court the appellant was in wilful default and the appeal is dismissed with costs.

CASE No. 17.

XEGO NDIPANE vs. ALEXANDER LUZIPO.

BUTTERWORTH: 18th June, 1936. Before H. G. Scott, Esq., President, and Messrs. V. M. de Villiers and J. W. Sleigh, Members of the N.A.C.

Breach of engagement, due to girl's misconduct, entitles man to claim return of dowry cattle paid and the increase thereof—Where deaths of dowry cattle paid are not reported by payee, he is responsible to replace them—Spoliation—Damages, where claimed, must be proved—Costs of Appeal.

(Appeal from Native Commissioner's Court, Butterworth.)

(Case No. 101 of 1935.)

Plaintiff sued for the return to him of seven head of cattle, being four original cattle and three increase paid by him in respect of his engagement to Deliah, defendant's sister, which plaintiff alleges was broken off by her. The plea to the summons is unnecessarily voluminous and could with advantage have been framed more concisely. Broadly stated the material portion of the plea is to the following effect:—

The engagement and payment of four head of cattle are admitted, but it is contended that because the marriage was to be by Christian rites and it was plaintiff's duty to have it performed within a reasonable time instead of allowing seven years to elapse without doing anything, and this, coupled with certain instances of alleged neglect to go and see Deliah on the occasions when he returned from work, plaintiff's father falsely accusing defendant of poisoning his water supply, plaintiff spoliating certain cattle from defendant and his grandfather and failing to complete payment of dowry, and that during the time of his engagement to Deliah plaintiff paid dowry for another girl, disentitled plaintiff from recovering his dowry as his conduct amounted to a rejection of Deliah.

Defendant filed a counterclaim for £5 damages for the spoliation of the cattle.

The Assistant Native Commissioner entered judgment for plaintiff for the four original cattle paid and the increase or their value at £3 each, with costs, and for defendant in reconvention on the counterclaim with costs.

Against this judgment an appeal has been noted on grounds very closely following the wording of the plea and in regard to the counterclaim on the ground that the act of spoliation was a trespass in tort against the rights of property of plaintiff and entitled him to damages even if no special damage was proved and that the judgment was against the weight of evidence in that plaintiff in reconvention had proved actual damage.

The Assistant Native Commissioner found as a fact that there were three increase of the dowry cattle, no reports of the alleged deaths of dowry cattle had been made in accordance with custom, that the girl Deliah gave birth to an illegitimate child to one Wilson Tontshana, of Komgha District, on 8th February, 1936, and that the breaking off of the engagement was due to the misconduct of the girl and her subsequent pregnancy by another man, of which fact she advised plaintiff in July, 1935, and the payment of dowry for the other girl was made subsequent to Deliah breaking off the engagement.

With the Assistant Native Commissioner's finding on the facts we are not disposed to disagree, except in regard to the number of increase in the dowry cattle. The plea admits that there were two increase and plaintiff's evidence as to the third beast is unsupported.

There is no evidence that plaintiff was ever called upon to complete payment of dowry or to have the marriage solemnized, and his explanation of his reason for not visiting Deliah on his return from Capetown and for not pushing on the marriage arrangements is reasonable. The engagement having been broken off on account of the girl's misconduct the plaintiff is entitled to the return of the dowry cattle paid with their increase (M. Qanqiso *vs.* M. Mnqwazi, 4, N.A.C., 109).

The alleged deaths of dowry cattle not having been reported in accordance with custom defendant is responsible to replace them.

In regard to the counterclaim it is admitted that defendant in reconvention spoliated certain cattle from the kraal of plaintiff in reconvention but these were returned immediately on his receiving a demand therefor.

In his evidence plaintiff in reconvention claims damages because defendant in reconvention brought a lot of men and threatened him and says there were no other damages beyond two trips to Butterworth and the sum of £1 paid for the letter of demand.

There is no evidence that any threats were made and it is significant that no claim for damages was made when the letter of demand was sent. In the case of Leqeku *vs.* Nathtali Ntsie (3, N.A.C., 263), which was a spoliatory action in which damages were also claimed, the Native Appeal Court held that as no damages had been proved damages should not have been awarded.

In the case of Edwards *vs.* Hyde (1903, T.S., 381), where the plaintiff claimed damages for the unlawful detention of two pigs, Solomon, J., in delivering judgement said:—

"In my opinion it is impossible to lay down a rule which shall be applicable to all cases where an action for tort is brought by the plaintiff simply for the purpose of recovering damages, and he fails to prove that any damages have been sustained by him, then, in my opinion, as a general rule, the plaintiff's case must be taken to have failed and judgment should be given against him."

In the present case plaintiff brought an action simply for the purpose of recovering damages. The principles of the case of Edwards *vs.* Hyde (*supra*) would therefore apply, and consequently the Assistant Native Commissioner was correct in declining to award damages.

The appeal will be allowed to the extent that the number of increase awarded will be reduced to two, and absolution from the instance entered in regard to the third increase claimed.

The appeal in regard to the remainder of the judgment will bo dismissed. The order as to costs in the Court below will not be disturbed.

As the appellant has failed in the main issues in the case and succeeded only on a subsidiary issue he will be ordered to pay the costs of appeal.

CASE No. 18.

NTAMBULA GXARISA vs. SIQOKWANA MAGQOZA.

BUTTERWORTH: 29th September, 1936. Before H. G. Scott, Esq:, President, and Messrs C. R. Norton and E. F. Godfrey, Members of the N.A.C.

Animals—Injury by ox—Vicious propensities—Where owner knows of vicious propensities—Culpa on his part presumed and onus on him to rebut—Assessment of damages by Appeal Court.

(Appeal from Native Commissioner's Court, Willowvale.)

(Case No. 132 of 1936.)

The plaintiff claimed from the defendant the sum of £10 as damages for a colt which had been gored by defendant's ox and died as a result of its injuries, alleging that the defendant had wrongfully and negligently allowed the ox to be at large.

After hearing evidence, the Assistant Native Commissioner entered a judgment of absolution from the instance, and against this judgment an appeal has been noted.

The Assistant Native Commissioner found the following facts proved, and with his finding we are in agreement:—

1. That the defendant's ox did gore the plaintiff's colt.
2. That the plaintiff's horse did die as a result of these injuries.
3. That the defendant's ox had shown a predisposition to injure horses.
4. That defendant had instructed his herd boy to pay particular attention to this ox.

His reasons for entering an absolution judgment are set forth as follows:—

In this case there is no evidence as to the actual occurrence, the locality and the surrounding circumstances. The question as to the presence or absence of provocation is important, but the evidence is silent . . . The case of O'Callaghan *vs.* Chaplin (1927) A.D. 310, indicates that there is also a duty on the plaintiff to take due and proper care. Here again the evidence is silent."

As to the actual occurrence there is evidence to show that defendant's ox poked plaintiff's colt. As to the locality it is clear that the animals were on the common grazing ground.

As to provocation, the onus is on the defendant to show that there was provocation on the part of plaintiff or his colt.

In the absence of evidence it must be assumed that there was no provocation. As to the duty of plaintiff to take due and proper care, it seems to us that it is for defendant to show that plaintiff had not taken due and proper care.

In passing, it may be remarked that provocation or want of care on the part of plaintiff was not pleaded nor was he questioned on these points, consequently it would seem to have been assumed that there was no provocation or want of care.

The colt was at a place where it was lawfully entitled to be, and was there fatally injured by defendant's ox, which was known to have vicious propensities, and it was then the duty of the defendant to show why he should not be held liable in damages.

The record is silent as to whether this case was tried under Native Law or Common Law. Even if it was tried under the former the plaintiff is entitled to succeed.

The case of N. Makelcni vs. Ndlebe (3, N.A.C., 47) is very similar to the present case. There the plaintiff sued for damages for the death of his cow which had been gored or poked on the common grazing ground by a cow belonging to defendant, which was known to be vicious, the defendant having been previously informed that the cow had goring or poking propensities.

The Tembu assessors were asked to state whether damages would be allowed against the owner of a cow which was admittedly vicious but had not, so far as was known, actually killed another animal, for injury by such cow to other animals on the common pasture lands. The assessors stated that there was no case in which damages had ever been awarded under such circumstances.

If the cow is vicious its owner is told to cut off the tips of its horns, and if he neglects to do so he is held liable for damages subsequently done by it, and that it is the duty of a man owning a vicious cow to cut off the tips of its horns without being asked to do so.

In the present case the defendant admits that the ox in question had previously injured a horse belonging to a dipping foreman, who had suggested to him that he should cut off the tips of its horns but said he had not done so as he had not had the time owing to it being scoffling season. This is no excuse at all, for it would not have taken more than a few minutes to perform the operation. There is also evidence that on another occasion the ox had charged a horse but had not injured it owing to the interference of Sub-Headman Gobinamba.

As defendant knew of the vicious propensities of this ox he was clearly negligent at least in failing to cut off the tips of its horns.

Under the Common Law there are no fewer than four different actions by which compensation can be claimed for damage done by an animal:—

(1) The *actio de pauperie*, which is one based on ownership and not on *culpa* (see O'Callaghan *vs.* Chaplin, 1927, A.D. 310, and South African Railways and Harbours *vs.* Edwards, 1936, A.D. 3).

(2) the *actio de pastu* (damage done by animals trespassing);

(3) an action based on the Aediles Edict, which prohibited the keeping of certain animals in the vicinity of a public place; and

(4) an action under the *Lex Aquilia*.

The appropriate remedy for harm done by a domesticated animal falling outside the scope of the *actiones de pauperie* and *de pastu* is the Aquilian action. *Culpa* on the part of the owner or person in charge of the animal is the basis of liability. In the case of harm done by a domesticated animal known to have vicious propensities, *culpa* will be presumed, but in all other cases the onus of establishing *culpa* rests on the plaintiff who alleges it (McKerron: The Law of Delicts in South Africa, p. 177).

As already pointed out, defendant knew of the vicious propensities of his animal and *culpa* on his part is therefore presumed, and it is for him to rebut that presumption, which he failed to do, and, in fact, he appears to have realized that he was at fault for he went to plaintiff and asked for pardon and made an offer of compensation which the plaintiff refused, as it was ridiculously inadequate

The appeal will be allowed with costs.

It is clear that the plaintiff has suffered damage and in order to save further expense this Court will assess the amount. The evidence as to the value of the colt is not very satisfactory, being stated variously to be £5, £6, and even £8.

Bearing in mind that according to plaintiff's own evidence it was less than a year old at the time it died and that it was only an ordinary native horse, this Court is of opinion that a fair valuation would be £2.

The judgment in the Court below is accordingly altered to one in favour of plaintiff for £2 and costs of suit.

CASE No. 19

HENRY MLANDU vs. WILLIAM PETER MLANDU.

KOKSTAD: 5th February, 1936. Before H. G. Scott, Esq., President, and Messrs. R. Welsh and J. J. Yates, Members of the N.A.C.

Appeal—Late noting—Calculation of time—Sundays and public holidays not excluded—Except where last day of period falls on Sunday or public holidays—Rule 3 (2), *Order* 1, *Proclamation No.* 145 *of* 1923, *superseded by G.N. No.* 2254 *of* 1928, *section* 5, *Act No.* 5 *of* 1910.

(Appeal from Native Commissioner's Court, Mount Fletcher.)

(Case No. 90 of 1934.)

In this case judgment in the Court below was delivered on the 16th March, 1935, and the appeal was not noted until the 8th April, 1935, and was struck off the roll at the last sitting of this Court on the ground that Rule 6 of Government Notice No. 2254 of 1928 had not been complied with.

Application is now made to have the case restored to the roll on the ground that the noting of the appeal was done within the period of twenty-one days as required by Order XXIX Rule 2 (1) of Proclamation No. 145 of 1923, in that

during the period 16th March, 1935, to 8th April, 1935, there were four Sundays which are to be excluded in calculating the period of twenty-one days, as provided for in Order I, Rule 3 (2) of Proclamation No. 145 of 1923, and that consequently this Court was in error in striking the appeal off the roll.

The same point was raised in the case of Sajini Wela *vs.* Kongolo Mtekeli [1933, Native Appeal Court (C. & O.), 24], when the Court said:—

"It has been repeatedly laid down by this Court on numerous occasions, as far back as 1929, when this Court was constituted, that the rule relied on [i.e. Rule 3 (2) of Order I] by the applicant and which concerned a Court no longer in existence, has been superseded by the corresponding rule in Government Notice No. 2254 of 1928."

It has also been laid down repeatedly that in computing the period of twenty-one days prescribed by Rule 6 of Government Notice No. 2254 of 1928, regard must be had to section 5 of the Interpretation Act, No. 5 of 1910, and that Sundays and public holidays are not excluded, except where the last day of the period falls on a Sunday or public holiday, in which case that day is excluded.

In addition to the grounds set out in the application, applicant's attorney urged that the appeal should be restored to the roll on the ground that applicant had a good case and should not be allowed to suffer because there had been a genuine misconception of the rule on the part of his attorney.

In so far as the merits of the case are concerned, this Court is of the opinion that applicant would have small chance of success.

In regard to the plea that there had been a misconception of the rule, this Court is not satisfied that there has been such a misconception of the rule as would justify the granting of the privilege sought. The decisions in regard to the rule relied on were delivered some seven years ago, and it is considered that ample time has elapsed to enable practitioners to make themselves acquainted with them.

The application is refused.

CASE No. 20.

MAPOTIYELA VATSHA vs. MQALI MFENENDUNA.

KOKSTAD: 5th February, 1936. Before H. G. Scott, Esq., President, and Messrs. R. Welsh and J. J. Yates, Members of the N.A.C.

Dowry—Pledging of daughter to meet claim for further dowry—Where dowry paid for girl to person to whom she was pledged he is proper person to be sued should she desert husband—Husband cannot sue pledgee for return of dowry cattle in order to hand them over to third party.

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

(Case No. 73 of 1935.)

In the Court below the plaintiff (appellant) claimed from defendant (respondent) five head of cattle and fourteen goats or their value, £35, and in his particulars of claim stated that he married one Ninake, daughter of Mabala Duma, by Native Custom and paid to defendant, with whom she was living, and with whom the marriage was arranged, the stock

mentioned above as dowry, that in 1934 Ninake went to her father's kraal and as she did not return he went to fetch her, when Mabala informed him that he was detaining her until he received the dowry which had been paid to defendant, and plaintiff now claims that defendant is obliged to return the dowry to him so that he may hand it over to Mabala and obtain the return of his wife.

In his plea defendant admits receipt of five head of cattle and thirteen goats, but denies his liability to return them either to plaintiff or Mabala on the ground that in 1917 Mabala eloped with defendant's sister Henase and paid three head of cattle on account of dowry; thereafter the girl Ninake was born to them, and when defendant demanded further dowry from plaintiff, who intimated his inability to comply with the demand and accordingly pledged Ninake as security for the payment of the further dowry demanded and handed her over, and he states that was the reason why she was living at his kraal at the time her marriage was arranged. As no further dowry was paid by Mabala, defendant contends he is entitled to the dowry paid for Ninake in terms of the agreement referred to above.

In his replication plaintiff denies the agreement for the pledge of Ninake, but contends that even assuming there was such an agreement he was not a party to and had no knowledge of it and cannot be bound thereby.

Before leading evidence the parties agreed that the two questions to be determined were (1) whether a pledge of a girl was effective and (2) whether there was such a pledge. The Native Commissioner ruled that a pledge of a girl was legitimate and evidence was then led in regard to the pledge.

The Native Commissioner entered judgment for defendant with costs, and against this judgment an appeal has been noted on these grounds:—

1. That defendant had failed to discharge the onus of proving the alleged pledge of Ninake as security for further dowry and consequently that plaintiff was entitled to judgment in his favour and
2. That the judgment was contrary to Native Law and Custom in that the late Henase died before dowry was paid for Ninake, and consequently defendant was not entitled to claim and retain as his property her dowry for further dowry in respect of the late Henase.

Application has been made to this Court to add the following two additional grounds of appeal:—

3. That the Native Commissioner's ruling that the agreement of pledge relied upon by the defendant whereby Mabala Duma purported to pledge his daughter, Ninake, to defendant was legal is wrong in and contrary to law in that such agreement partook of and was tantamount to a sale or barter of human beings and as such was illegal and *contra bonos mores* and could not afford any defence to plaintiff's claim.
4. That even assuming such agreement of pledge was legal, plaintiff could not be held bound thereby seeing that he was never advised of same at the time he paid dowry for his wife Ninake.

The first additional ground of appeal being on the question of illegality and the second on a point which was raised in the Court below, and as respondent does not object, this Court, following the practice laid down by previous Appeal Courts, grants the application.

On the facts we are of opinion that the evidence supports the Native Commissioner's finding that defendant had proved the pledge to him of the girl Ninake and therefore the appeal on the first ground fails.

The second ground of appeal was not pressed before this Court. In view of the fact that the agreement in regard to Ninake's dowry was made before Henase's death, we are of opinion that her subsequent death cannot have the effect of cancelling that agreement and that the appeal on this ground must also fail.

In the case of Mbelingo *vs.* Daniel (2, N.A.C., 122), in which the circumstances were very similar to those in the present case it was held: that it is quite in accordance with Native Custom for a man who is unable to pay the dowry demanded for his wife to enter into an agreement to pledge a daughter as security for that dowry and to hand her over to the pledgee (see also the cases of Konzapi *vs.* Mehlenkoma, 2, N.A.C., 38, Mbonja *vs.* Mbonja 4, N.A.C., 54, Mkantshwa *vs.* Kusa Ndulnka, 4, N.A.C., 170, and N. Rangayi and Another *vs.* F. Mzondo (4, N.A.C., 252). It is true that in cases of Sidubedube *vs.* Jeremiah Rune (4, N.A.C., 169) and S. Ndabankulu *vs.* D. Pennington (4, N.A.C., 171), it was held that the acquisition of rights in a girl by a stranger either by agreement or by purchase was an immoral contract and could not be enforced.

The underlying principle in all the cases quoted appears to be that a contract whereby a man acquires rights in the dowry of a girl is not immoral, but where the rights are acquired in the girl herself then the contract is immoral. In the present case the defendant, who is the girl Ninake's uncle, acquired rights in her dowry not over her person, and she was merely handed over in security. The pledge in the first instance was made by the grandfather of the girl in her father's absence and the latter denies any knowledge of it, but we are satisfied that he confirmed the arrangement as alleged by defendant, and that view is supported by the fact that her father (Mabala) took no steps for nearly eighteen years to recover her.

Coming to the fourth ground of appeal.

The plaintiff admits that when he married Ninake he was aware that her father was alive, and it is very unlikely, therefore, although he denies it, that he knew of the arrangement that had been made with regard to her dowry, otherwise he would not have paid the cattle to defendant. The question of the previous pledge does not arise in so far as he is concerned; that is a matter between Mabala and defendant. His action is for the return of his wife or the dowry paid for her, and he could have brought that action against the person to whom he paid the dowry, but, in the opinion of this Court, he could not sue defendant to hand over the cattle in order to pass them to someone else in the absence of any allegation of fraud or misrepresentation or that he had paid them to defendant on a mistake of fact.

The appeal on the third and fourth grounds of appeal must also fail.

The appeal is dismissed with costs.

CASE No. 21.

NDUKWANKULU NTANJANA vs. SIFO SINDANI.

Kokstad: 5th February, 1936. Before H. G. Scott, Esq., President, and Messrs. R. Welsh and J. J. Yates, Members of the N.A.C.

Practice and procedure—Native Commissioner's Courts—Transkeian Territories—Power to grant ex parte *orders—An order final in effect cannot be granted without notice to Respondent: Rule* 3 (2), *Order XXI, of Proclamation No.* 145 *of* 1923.

(Appeal from the Court of Native Commissioner, Matatiele.)

(Case No. 277 of 1935.)

This was an *ex parte* application for a spoliation order. In his affidavit in support of the application, applicant alleged that he was in peaceful and undisturbed possession of a certain dun-coloured cow and calf; that about 5 p.m. on Wednesday, the 25th September, respondent wrongfully and unlawfully and against his consent and wishes forcibly deprived him of possession of the said cow and calf, and he applied for an order by the Court directing that the said cow and calf be attached by the Messenger of the Court from respondent or any other person in whose possession it might be found and returned to applicant and that respondent be called upon on a date to be fixed by the Court to show cause why this order should not be made final with costs.

This application was made on 17th October, 1935, and endorsed on the application is the following:—

"Order granted as prayed.

(Sgd.) J. H. O'Connell
A.A. Magistrate
Matatiele.
24/10/35."

but on the 17th October, 1935, Mr. O'Connell, in his capacity as Clerk of the Court, issued an order instructing the Messenger of the Court to take the cattle from the respondent or any other person in whose possession they might be found and to return them to applicant pending such further order as the Court might make and calling upon the respondent to show cause on 24th October, 1935, why the order should not be made final. As the record stands the Clerk of the Court issued this order before the Court had made any such order and it would seem, therefore, that the Clerk of the Court had no authority for his action. No objection was taken in the Court below, and possibly the date on the order was a clerical error.

On the return day fixed by the Clerk of the Court the respondent's attorney was unable to proceed and the hearing was postponed to 26th October, 1935. On the 25th October, 1935, respondent, in applying for the discharge of the order, filed an affidavit in which he stated:—

1. That he eloped with Mtwakazi, daughter of Mnyameni, as he wished to marry her and she agreed, stating that she was being forced to marry Sehlahla, who had paid dowry to Mnyameni.

2. Mnyameni fetched Mtwakazi and marriage was offered and agreed to, respondent depositing five head of cattle, including the two in question, with Mnyameni as earnest cattle.

3. That the ownership in the cattle remained with respondent and Mnyameni had no right to sell or dispose of them in any way but merely to hold them as earnest cattle pending marriage.

4. That when the stock was left with Mnyameni he immediately sent the applicant to take Mtwakazi along with the dun cow and calf to Sehlahla, the animals being sent as a fine paid by respondent and due to Sehlahla.

5. That, seeing his cattle had been obtained from him by fraud and being in the unlawful possession of applicant and being driven away illegally, he followed them up and took them from applicant as he had every right to do to prevent them being handed to Sehlahla, they having been handed to Mnyameni for one purpose and he was using them for another.

6. That as the alleged spoliation took place on 25th September, 1935, and the date of the application was 17th October, 1935, applicant was not entitled to relief by way of writ or order.

The Assistant Native Commissioner confirmed the order with costs, and an appeal has been noted against both the *ex parte* order and the order confirming it on several grounds, which, broadly stated, were as follows:—

1. That respondent's uncontradicted affidavit that the cattle were paid to Mnyameni as earnest cattle and were being used by him for another purpose justified him in retaking possession of them.

2. That the applicant in obtaining the *ex parte* order did not disclose all and full facts; and

3. That the application was not timeously made.

On the appeal coming before this Court, application was made to file the following additional grounds of appeal:—

4. That the Native Commissioner's Court had not the jurisdiction to grant the order made.

5. That the circumstances disclosed by the applicant did not warrant the original order in the form in which it was given nor its subsequent confirmation.

6. That the Assistant Native Commissioner was not justified in granting an order other than one of a restraining nature even if the applicant was entitled to any order at all.

The respondent not objecting, the Court, following previous decisions of this Court, granted the application.

An objection was filed by respondent to that portion of the notice of appeal against the *ex parte* order on the ground that it was an interlocutary order and not a final and definitive sentence but this was withdrawn.

In the case of Mamadwalaza Stepula *vs.* Zibana Stepula (1931, N.A.C., 27) the applicant, alleging himself to be the owner of certain stock in the possession of the respondent, obtained an *ex parte* order directing the Messenger of the Native Commissioner's Court of Matatiele to forthwith attach and seize the stock in the possession of the respondent and hand it over to the applicant. The order went on to call upon the respondent at a later date to show cause why such order should not be confirmed.

It will be seen that the form of order made was in precisely similar terms to that made in the case now under consideration, but the circumstances in Stepula's case appear to have been different as, so far as the report of the case goes, there was no allegation that respondent had spoliated the stock from the applicant.

In Stepula's case this Court, in giving judgment, said: "It becomes necessary to inquire upon what authority the original *ex parte* order was made. The jurisdiction of a Native Commisioner in civil suits is laid down in section 10 of Act No. 38 of 1927. This section is general in its terms, and to ascertain the extent of its application in the Transkeian Territories assistance can be derived from the Rules of Procedure applying to Native Commissioner's Courts. These rules are contained in the Second Schedule to Proclamation No. 145 of 1923, and are identical with the rules applying to Magistrate's Courts in the Territories. Order XXI provides for the granting of interdicts, and from this it may be inferred that the terms of section 10 of Act No. 38 of 1927 include the right to grant an interdict."

The right, therefore, to grant an interdict being derived from Order XXI, the terms of that Order must be adhered to. Rule 3 (2) of that Order reads as follows:—

"Every order made *ex parte* (other than an order for the arrest of any person or an interdict by summons for rent under section 31 or an order for attachment for rent under section 32 of the Proclamation) shall call upon the respondent to show cause against it at a time stated in the order which shall not be a less time after service than the time allowed by these rules for appearance to a summons, unless the Court shall give leave for shorter notice":

It would seem then that a Native Commissioner may only issue an *ex parte* order calling upon the other party to show cause on a fixed date why the order should not be granted and that he cannot make an order final in effect without such notice. It was, however, strongly urged on behalf of respondent (in Appeal) that the case of Mans *vs.* Marais, (1932, C.P.D., 352) was authority for such an order. The headnote to this case reads:—

"A Magistrate's Court has power, under Act No. 32 of 1917, to grant a final *mandament van spolie* on motion and its jurisdiction is not limited to granting such an order *pendente lite*." Reference to the full report of the case quoted shows that the headnote is misleading.

In that case one Marais applied *ex parte* to the Magistrate for a *mandament van spolie*. The magistrate granted a rule *nisi* calling upon Mans to show cause why he should not be ordered to return certain sheep to Marais, the rule to operate as an interim interdict. On the return day Mans appeared to show cause but the magistrate ordered him to return the sheep to Marais. Against this order Mans appealed on the ground that the magistrate's decision was wrong on the merits, and that in any event he could not grant an absolute order or motion, but only an order *pendente lite*. In giving judgment on appeal, Gardiner, J., said:—"The question remains whether the magistrate had jurisdiction to grant an order in the form set out above or whether an order could be granted only *pendente lite*", and after discussing the cases of Williamson *vs.* Smythe (1928, C.P.D., 322), Coe *vs.* Boehner, Ltd. (17, P.H., F. 53), and Adonis *vs.* Sisele (1931, C.P.D., 274), in which it was decided that a magistrate had no jurisdiction to grant a *mandament van spolie* where no action in the Magistrate's Court was pending or contemplated, came to the conclusion that a magisrate's jurisdiction was not limited to granting spoliation orders *pendente lite*. This case, however, is not authority for saying that a magistrate has power to grant an order *ex parte* depriving a person of property in his possession and causing it to be handed to someone else. That the rules of the Magistrate's Court (which also apply to Native Commissioner's Courts in the Transkeian Territories) must be followed is clear from the following passage in the judgment in Mans' case (*supra*): "Now a *mandament van spolie* in the form of a rule *nisi* may be granted by the magistrate *ex parte*".

The jurisdiction of Magistrate's Courts in regard to *ex parte* orders is clearly laid down in the case of Sehoeman *vs.* Beavon, N.O., and another (O.P D., November, 1932, 20, P.H. L.33) which draws a distinction between Superior and Inferior Courts.

In that case a magistrate (apparently *per in curiam*) granted an interdict on the *ex parte* application of the second respondent without calling upon the applicant to show cause. It was held that the interdict granted by the magistrate was null and void *ab initio* and the Court in giving judgment said:—

"Though Superior Courts have a jurisdiction to grant temporary interdicts *ex parte* in urgent cases without notice to the affected person, the Courts of Magistrates have no such power.

Section 30 of Act No. 32 of 1917 empowers Magistrates' Courts in general terms to grant interdicts against persons and things. The effect of Order XXII, Rule 3 (*a*) is clearly to exclude the rights to grant interim interdicts without previous notice or rule *nisi* being served on the party respondent."

Rule 3 (2) of Order XXI of Proclamation No. 145 of 1923 (which is the corresponding order to that in Act No. 32 of 1917) does not exclude *mandamenten van spolie*, and therefore, the judgment in Schoeman's case (*supra*) would apply.

We have come to the conclusion, therefore, that the order made by the Assistant Native Commissioner is irregular and went beyond the scope of his authority. The order not being a lawful one in its original form could not be made final at any later stage.

The appeal must succeed on grounds three and four of the notice of appeal. In the circumstances it is not necessary to consider the other grounds of appeal.

The appeal will be allowed with costs, and the judgment of the Court below altered to one discharging the order with costs.

CASE No. 22.

NOMPADU FANI vs. SULU MGALELI.

KOKSTAD: 28th May, 1936. Before H. G. Scott, Esq., President, and Messrs. J. Addison and G. Kenyon, Members of the N.A.C.

Practice and Procedure—Default judgment—Application to rescind—Failure by defendant to file his plea within time prescribed by Rule 1 (1), *Order XIV, Proclamation No.* 145 *of* 1923—*Want of particularity in application for recission of default judgment—Record returned for affidavits—Application to rescind refused—Rule XIV, Proclamation No.* 145 *of* 1923.

(Appeal from Native Commissioner's Court, Umzimkulu.)

(Case No. 162 of 1935.)

This is an appeal against a refusal by the Assistant Native Commissioner to grant an application by the defendant for a recission of a default judgment granted on the 25th January, 1936, and for leave to enter appearance and defend the action.

Summons was issued on the 13th December, 1935, and defendant entered an appearance to defend on the 27th December, 1935. On the 20th January, 1936, notice was served on defendant's attorney to file a plea within 48 hours, otherwise application for judgment would be made by plaintiff in terms of Rule 3 of Order IX of Proclamation No. 145 of 1923. No plea having been filed, application for judgment in default of plea was made on the 25th January, 1936, and default judgment was entered against defendant on the same day. It may be remarked here that the order under which a judgment in default of plea may be granted is Order XIV, Rule 1 (4), not Order IX. No objection was taken in this Court or in the Court below to the notice to file a plea having quoted the wrong order, but this Court

would impress upon practitioners and judicial officers the necessity for being careful in these matters, as a failure to comply strictly with the rules and orders may lead to unnecessary costs being incurred.

On the 20th February, 1936, within the period laid down by Rule 1 (1) of Order XXVIII of Proclamation No. 145 of 1923, defendant made application for a recission of the default judgment, and in the course of his application stated that he was not in wilful default and had at all times intended to defend the action, that after instructing his attorney to enter appearance to defend, he went to Durban in order to collect funds and it was only upon his return from Durban that he ascertained that the judgment had been granted against him. Applicant also set out the grounds of his defence to the action.

No affidavits in support of the application were filed, and this Court is therefore unable to judge whether or not defendant's excuse for failing to file a plea is a good one.

In the cases quoted before this Court by the appellant's attorney, it would seem that the courts have always been guided by what has been in the mind of the defaulting party.

The state of defendant's mind cannot be gathered from the meagre information contained in the application for recission.

The record will be returned to the Court below for affidavits to be obtained from—

(1) the applicant explaining when he left for Durban, how long he was detained there and why, when he returned to Umzimkulu from Durban, when he first went to see his attorney after his returu, and whether he was aware that a plea had to be filed within seven days of entry of appearance, and

(2) Mr. Attorney Jennings as to whether he informed defendant of the necessity for filing a plea within seven days after entry of appearance.

After these affidavits have been obtained the record is to be returned to the Registrar of this Court at Kingwilliamstown for inclusion on the roll for the next sitting of this Court at Kokstad.

Postea.—Affidavits made by appellant and his legal adviser in terms of the order made by this Court on 28th May, 1936, have now been filed.

In his affidavit appellant states that on 27th December, 1935, he instructed his attorney to enter appearance to defend and that he was then informed that it was necessary for him to file a plea within seven days, failing which he ran the risk of having judgment entered against him; that on 28th December, 1935, he proceeded on foot to Durban with the object of obtaining funds, that he remained there until the 9th January, 1936, trying to raise money but was unsuccessful, and that he then returned home, where he arrived on 13th January, 1936; that thereafter he was laid up for some time and while he was still ill heard that judgment had been entered against him; that as soon as he was able he went in to Umzimkulu and instructed his attorney to take steps to have the judgment rescinded, having in the interim been successful in obtaining funds locally for the purpose.

The affidavit of Mr. Jennings, the attorney who entered appearance to defend on behalf of appellant, is that he informed appellant, who had no funds, that he was not prepared to act unless he was provided with funds and, furthermore, unless this was done within seven days, within which period the plea to the summons had to be filed, he

(appellant) ran the risk of having default judgment granted against him; that defendant is an uneducated and illiterate native.

The appellant's affidavit is unsatisfactory. He alleges that he was ill on his return from Durban but gives no indication of what actually was the matter with him, apparently he was not too ill to see about collecting funds locally, and the fact that he was able to do so seems to suggest that there was no necessity for the trip to Durban. Apart from this his defence to the action does not appear to be bona fide.

The summons alleges that some years ago plaintiff (respondent) married one Mamnge, daughter of one Fani, and paid dowry for her, that defendant (appellant) is the eldest son and heir of Fani, who is dead, that thereafter plaintiff paid defendant a beast, two goats and 10s., as further dowry, that during plaintiff's absence at Johannesburg one Nobani committed adultery with Mamnge and defendant recovered from him five head of cattle as damages, which it was agreed between plaintiff and defendant should be retained by the latter as further dowry, that Mamnge has deserted plaintiff and returned to defendant with four children of the marriage.

In his application for a rescission of the default judgment, appellant does not deny that he is the eldest son of Fani nor does he deny the allegations of payment of further dowry to him. If these allegations are correct then he is the proper person to be sued.

It appears from his affidavit that Mashiyana, the person he contends should be sued, is his son. If that is so how can Mashiyana be heir of Fani while he (appellant) is alive?

Rule 1 (1) of Order XIV of Proclamation No. 145 of 1923 requires that a plea must be filed within seven days of the date of entry of appearance and as appellant failed to comply with this rule, the requirements of which he was made aware of, the Assistant Native Commissioner, in the opinion of this Court, was correct in refusing to grant the application for a rescission of the default judgment.

The appeal is dismissed with costs.

CASE No. 23

HORACE H. D. NOLUTSHUNGU vs. JACOB NIKIWE.

KOKSTAD: 28th May, 1936. Before H. G. Scott, Esq., President, and Messrs. J. Addison and G. Kenyon, Members of the N.A.C.

Lease between natives—Cession to European—Locus standi in judicio *of plaintiff—Point not taken in Court below cannot be raised for first time on appeal—Rejection of admissible evidence—Pleading—Payment must be pleaded —Rule* 2 (5), *Order XIV, Proclamation No.* 145 *of* 1923.

(Appeal from Native Commissioner's Court, Matatiele.)

(Case No. 163 of 1934.)

Plaintiff (appellant) sued defendant (respondent) in the Court below for £20 arrear rent in respect of defendant's tenancy of portion of the farm Hebron.

There were two further claims for confirmation of a rent interdict and for a declaration of rights and an order declaring a certain cancellation of lease void and of no effect, but these were withdrawn, leaving only the claim for rent to be dealt with.

The original of the lease between the parties was put in, which provided that the lessor (plaintiff) let to the lessee (defendant) that portion of the farm Hebron, part of the farm Vermiljoenskuil purchased by the lessor from the Estate of the late Mrs. L. Pamla, as described in deed of sale dated 2nd February, 1932, entered into by the said Estate and the lessor, and which had been inspected by the lessee. The lease was for a period of six years from 7th October, 1932, at an annual rental of £40, payable half yearly, namely £20 on 7th April, 1933, and thereafter £20 on 7th October and 7th April in each and every year.

The conditions of the lease material to this case are as under:—

(1) That the land hereby let shall be enclosed with a stock-proof fence in good order and repair by the 31st December, 1932, and thereafter lessee shall keep same in good order and repair and stock proof, in which condition the fence is to be returned to the lessor at the expiration or termination of this lease. Further the lessee shall keep the dam situate on the land hereby leased in good order and repair, in which condition he shall return it to the lessor.

(3) No ground situate above the level of the dam, not already cultivated or broken up, shall be put under cultivation but shall be used entirely for grazing.

(5) That should either party commit a breach of any of the terms or conditions of this agreement, and the failure of the lessee to pay any half-yearly rent upon the due date thereof shall be considered a breach, the other party shall have the right to forthwith cancel this lease . . . (the rest of this clause is immaterial to this case).

This lease was signed by plaintiff on 3rd November, 1932, and by defendant on 20th December, 1932, and was agreed to subject to the consent of Mr. C. W. Gray being obtained.

In reply to the summons defendant pleaded:—

2. Defendant puts plaintiff to the proof that Mr. C. W. Gray consented to the lease and that such consent was communicated to the defendant.

4. Defendant avers that the fence (farm?) not having been enclosed by a stock-proof fence by the 31st December, 1932, he was justified in terms of section 1 and 5 of the agreement in cancelling the lease, and prayed for the dismissal of the claim for rent and the cancellation of the lease.

In reply to the plea plaintiff states: As to paragraph 2 of plea plaintiff joins issue as to the onus of proof and states:

> Defendant occupied the property at all relevant times in terms of the lease which has always been acted upon by both parties, defendant claiming cancellation of the lease himself in terms of clause 4 of his plea, and the question whether C. W. Gray consented or not is now irrelevant to the issue.

Apart from this the onus is upon defendant to prove in the circumstances that the condition had not been complied with and plaintiff denies that it has not been complied with.

As to paragraph 4 of plea plaintiff denies that defendant is justified in refusing to pay the rent on the ground that he cancelled the lease on the following grounds:—

(*a*) Defendant himself agreed to the non-compliance of clause 1 of the lease.

(*b*) Under clause 5 of the lease it is stipulated that the right to cancel the lease on breach thereof should be forthwith exercised—and defendant failed to so exercise his right—if entitled to do so.

(*c*) Defendant continued in occupation up to the 7th April, 1934 (date up to which rent is claimed in summons), and the date of his belated attempt to cancel is thereafter on 10th April, 1934, when such rent as is sued for is overdue.

The Acting Assistant Native Commissioner entered a judgment of absolution from the instance with costs at the close of plaintiff's case, and against this judgment an appeal has been noted on the following grounds:—

1. That on the pleadings and on the unrebutted evidence led by the plaintiff he was entitled to judgment—defendant having been proved by the lease put in to have leased the farm and contracted to pay the rent claimed and by the oral evidence led to have actually enjoyed the occupation of the premises so leased for the period for which rent is claimed—and plaintiff having further answered and rebutted the only defences raised by the defendant on which he endeavoured to excuse himself from liability for paying the rent for his occupation of the farm.
2. That whether defendant sought to deal with Pamla in the latter's individual capacity or not, Pamla was the man under obligation to plaintiff to fence the farm leased, and defendant himself having successfully pursuaded Pamla not to carry out the fencing required by the lease defendant cannot in law take any advantage of plaintiff in the circumstances. Further, however, it is proved by the uncontradicted evidence of record that Pamla was the agent of the plaintiff throughout.
3. That the conditions of the later written agreement regarding the fencing made between defendant and Pamla was relevant evidence and thus plaintiff was entitled to have it on record.

Only after the appeal had been noted was it noticed by the Acting Assistant Native Commissioner that the lease in this matter had been ceded to Messrs. Seymour and Seymour, a firm of European attorneys, and before this Court an objection to the hearing of the appeal was filed on the grounds that (*a*) The appellant had no *locus standi in judicio* in the suit, and (*b*) That the Native Commissioner's Court for the District of Matatiele has no jurisdiction for the following reasons:—

1. That the appellant at all times material to this suit was not the legal holder of the written agreement of lease entered into between the parties hereto and upon which the appellant bases his claim.
2. That this fact was not disclosed to the respondent until after the Additional Assistant Native Commissioner had delivered judgment in this suit, and in proof thereof respondent firstly refers this Honourable Court to the original summons which is filed of record in this suit and the annexure thereto, and secondly attaches hereto marked "A" the copy of the original summons which was served upon him in this suit and the annexure thereto.
3. That by endorsement on the said original agreement of lease entered into between the parties hereto dated the 22nd day of February, 1934, the appellant ceded all his rights, title and interest in and to the said agreement of lease to "Seymour & Seymour", who are the attorneys of record for appellant.

4. That the said Seymour & Seymour at all times material to this suit were the legal holders of the aforesaid agreement of lease and were the only person or persons entitled to sue or be sued in connection therewith as the holders thereof or lessors thereunder.

5. That the said Seymour & Seymour are not natives within the meaning of Act No. 38 of 1927, and consequently the Native Commissioner's Court for the District of Matatiele, held at Matatiele, would not have jurisdiction to hear or try the suit should the said Seymour & Seymour appear as plaintiffs or defendants therein ".

This objection was withdrawn, but notice was given that the same points would be raised on the hearing of the appeal and on the same grounds.

When the summons was originally served on defendant a copy of the lease, but without the cession, was attached thereto, and it would seem that when the original lease was handed in in the Court below it was not inspected closely and that the fact of the cession did not come to the notice of defendant's attorney.

The lease was, however, open for his inspection and he could have ascertained this fact and could then have objected to the summons in terms of Rule 2 (2) (*h*) of Order XII of Proclamation No. 145 of 1923. This he did not do and, in the opinion of this Court, in the absence of information whether or not he was aware of the cession, cannot raise the point for the first time on appeal.

The question as to whether the Native Commissioner's Court had or had not jurisdiction is one which can only be decided when information is placed before the Court as to whether the cession was completed by the handing over of the ceded document to the cessionaries and whether the cession was still in force at the date of the action.

In his reasons for judgment the Acting Assistant Native Commissioner stated that it was incumbent upon the plaintiff to prove the indebtedness to him by defendant in the amount he alleges in his statement of claim, but that he had failed to discharge this onus as there is no evidence on record to show that defendant is indebted to him in any sum whatever.

According to the lease put in, the rental of the farm was £40 per annum payable half-yearly, namely £20 on the 7th October and 7th April in each and every year, and the amount claimed is for the period 7th October, 1933, to 7th April, 1934. If the defendant contended that he had paid the amount he should have pleaded this in terms of Rule 2 (5) of Order XIV of Proclamation No. 145 of 1923, and as he did not do so there was no necessity for plaintiff to prove that the rent claimed had not been paid. The allegation of fact in the summons as to the amount of rent claimed was not inconsistent with the plea and consequently Rule 3 of the Order XIV did not apply.

In the opinion of this Court the Acting Assistant Native Commissioner erred in granting absolution from the instance at the close of plaintiff's case.

In regard to the third ground of appeal, we are of opinion that the Acting Assistant Native Commissioner was also incorrect in holding that the agreement with regard to the fence between defendant and Pamla was inadmissible.

The only evidence on record is that Pamla was plaintiff's agent in connection with the leasing of the farm, and it is clear that defendant regarded him as such for when he complained in March, 1933, about the non-erection of the fence he communicated with Pamla and not plaintiff.

The appeal will be allowed with costs, the judgment of absolution from the instance with costs is set aside and the case returned for further hearing. It will then be competent for the defendant, if so advised, to apply for an amendment of his plea with regard to the title of plaintiff to sue and as to the jurisdiction of the Court.

CASE No. 24.

JOHN LETELE vs. ANNIE MOSES.

KOKSTAD: 26th May, 1936. Before H. G. Scott, Esq., President, and Messrs. J. Addison and G. Kenyon, Members of the N.A.C.

Practice and Procedure: Irregularity in noting Appeal—Grounds of Appeal not stated—Section 10 of G.N. No. 2254 of 1928—Plea—Bare denial of liability unsupported by details not admissable.

(Appeal from Native Commissioner's Court, Matatiele.)

(Case No. 134 of 1935.)

The plaintiff, a widow, sued defendant for nine head of cattle, or their value at £5 each, and in her particulars of claim stated:—

(1) Defendant married Constance, daughter of plaintiff, promising to pay plaintiff twenty-six head of cattle as dowry in respect of the marriage under Basuto Custom, and paying plaintiff seventeen head of cattle on account, leaving a balance of nine unpaid and overdue.

(2) Defendant lived with Constance for many years and ultimately, about 20th October, 1933, wrongfully purported to reject her, refusing to have anything more to do with her.

(3) Plaintiff is entitled to the balance of nine head of cattle from defendant.

The defendant's plea was as follows:—

(1) That he admits paragraph 1 of the summons, save and except that he denies that he owes any balance of dowry.

(2) That he rejected plaintiff's daughter Constance, and forfeited the dowry he had paid to the date of the rejection.

(3) That he denies that he is indebted to plaintiff for the cattle claimed in the summons or any other cattle.

On the case coming on for hearing, the defendant's attorney admitted paragraph 1 of the summons but claimed that the balance is not due because of the rejection.

Plaintiff's case was then closed without any evidence being called

The following note then appears on the record:—

"Mr. Eagle calls the defendant.

Mr. Seymour objects to defendant being called to say why he rejected plaintiff's daughter.

Mr. Eagle agrees not to call defendant."

The attorneys for the parties then addressed the Court and thereafter judgment was entered for plaintiff as prayed, with costs.

Against this judgment an appeal has been noted on the following grounds:—

(1) That the judgment is wrong and bad in law.

(2) That the defendant tendered evidence as to his reasons for the rejection by him of the plaintiff but no opportunity was afforded him to give such evidence.

It has frequently been laid down in the Superior Courts and this Court that to say a judgment is wrong and bad in law without stating in what respect it is bad in law is not a sufficient compliance with the rule requiring an appellant to state his reasons for appeal clearly and specifically. The appellant's attorney in this Court stated that he did not intend to argue this ground of appeal realizing that it was not in order. The first ground of appeal is struck out.

In regard to the second ground of appeal Mr. Eagle has filed an affidavit the material portions of which are as follows:—

"3. That I desired to call defendant as a witness to lead evidence as to his reasons for rejecting the plaintiff but Mr. Seymour, attorney for plaintiff, objected to my calling such evidence on the ground that there was nothing in the pleadings filed of record, to warrant the leading of such evidence."

"4. That thereafter upon my being asked by the presiding Native Commissioner whether I had anything to say to Mr. Seymour's objection, I stated that I had nothing to say."

"5. That the presiding Native Commissioner then suggested that the case should proceed without my leading any evidence."

"6. That I verily believed and was under the impression at the time that the presiding Native Commissioner had upheld Mr. Seymour's objection, and that I could not call the defendant to lead evidence.

"7. That I now understand that the presiding Native Commissioner had the impression that I agreed not to call the said evidence and accordingly suggested that the case should proceed.

"8. That I verily believe that both myself and the presiding Native Commissioner were under a misapprehension at the time and that a genuine mistake occurred."

In reply to this affidavit the Assistant Native Commissioner states that he understood Mr. Eagle to intimate that he agreed not to call the defendant, but in view of the affidavit it appears there was a misapprehension, but whether on Mr. Eagle's part or on his it is impossible for him to say.

There scarcely seems to have been any room for misunderstanding on Mr. Eagle's part for, when the Assistant Native Commissioner called upon the parties to address the Court, he must have realized what the position was and could have asked the presiding officer whether it was to be understood that Mr. Seymour's objection had been upheld, instead of which he accepts the position and proceeds to argue.

But assuming that it can be taken that Mr. Seymour's objection was upheld, can it be said that it was wrongly upheld?

The defendant had admitted all the particulars of plaintiff's case and contented himself by making the bald statement that he denied owing any balance of dowry. In Court his attorney stated that the contention was that the balance was not due because of the rejection but gave no other grounds for resisting the claim. If defendant contended that he had good grounds for rejecting the plaintiff's daughter he should have detailed these in his plea, but as the plea stood he could not call such evidence and an objection thereto would have been rightly upheld and he would have been in the same position as he is now.

If, as Mr. Eagle states, he was under the impression that the objection had been upheld and he had appealed against that ruling, his appeal must have failed.

While there may have been a misunderstanding between the judicial officer and defendant's attorney, no prejudice has actually been occasioned to defendant.

It would be farcical to send back the record to give defendant an opportunity of attempting to lead evidence which he is not entitled to lead.

The appeal is dismissed with costs.

CASE No. 25.

SHADRACK MZOZOYANA vs. KALLANG SEKHOSANA.

KOKSTAD: 29th May, 1936. Before H. G. Scott, Esq., President, and Messrs. J. Addison and G. Kenyon, Members of the N.A.C.

Damages—Landlord not liable for acts of tenant unless expressly or impliedly authorised—Where principal is sued for acts of Agent summons must allege implied authority—Magistrate's Court has no jurisdiction in case between native and native.

(Appeal for Native Commissioner's Court, Matetiele.)

(Case No. 153 of 1935.)

The claim in this case was for £20 damages for the unlawful ploughing of plaintiff's land by defendant during the period 1924 to 1931.

Judgment was entered in favour of plaintiff for £7. 10s., and against this judgment an appeal has been noted.

The facts are that plaintiff is registered owner of a portion of the farm Glen Alfred and defendant part owner of the adjoining farm, Tramore, which is held by him and his two brothers in undivided shares. Both farms are situated in the Matatiele District. The piece of land in dispute has been ploughed by the Mzozoyana family for many years and there appears to have been a long standing dispute about it between the present parties and their predecessors. As far back as 1924 the defendant leased a portion of the farm Tramore to one Wilkinson, who had on it as manager a Mr. Shrosbree, who ploughed the land in dispute, but when plaintiff claimed it he reported to defendant who asked him to leave it, which he did without reaping any crop. There is no evidence to show who reaped the land. After Wilkinson, one October Jantjies leased a portion of the farm and ploughed the portion of land in dispute for three years. He gave evidence for the plaintiff and says that at no time during his occupancy was any complaint made to him about his ploughing the land. The plaintiff alleges that one Mantoes ploughed the land for two years after October Jantjies, but Mantoes denies that he ploughed the particular piece of land in question and says he only ploughed up to the boundary of Tramore. Both Shrosbree and Jantjies say that the portion of the farm they were leasing was indicated to them by plaintiff from the river boundary, and it would seem that they may have made a mistake in ploughing the piece in question, for it is clear that plaintiff never actually pointed it out as being land that they could plough. Both Shrosbree and Jantjies say that defendant pointed out the boundary of the farm from the river and Shrosbree says that he took it that the land was part of Tramore.

In these circumstances it is very doubtful whether defendant could be held liable for their trespass on plaintiff's farm, for by virtue of the contract of lease the landlord does not become the agent of the tenant nor does the tenant become the agent of the landlord so as to bind him with third parties without his authority. A landlord does not become responsible for the acts of the tenant without proof of authority, express or implied, having been given by the landlord to do such acts. (Wille: Landlord & Tenant, pp. 24 and 25). The conduct of the landlord may, however, in certain cases constitute the tenant an agent for whose acts he would be liable; thus, if after he has knowledge of wrongful acts committed by the tenant on the premises leased, the landlord maintains his relationship with the tenant by continuing to accept rent from him, such conduct may constitute implied authority to do the acts complained of (*ibid*, p. 25).

In so far as Shrosbree is concerned it is clear plaintiff has no cause of complaint as against defendant, for immediately he drew attention to the fact that he was ploughing land on plaintiff's farm, the matter was reported to defendant who told him to leave it alone and he did so. In so far as Jantjies is concerned it is proved that plaintiff never complained to him or to defendant.

In so far as Mantoes is concerned, the evidence is contradictory as to whether or not he ploughed the land in question, and in any case defendant could not be held liable for his actions because the evidence shows that he was ploughing on behalf of William Mzozoyana and not defendant.

Even assuming that defendant could be held liable for the actions of Shrosbree and Jantjies, this action is not based on any implied authority by defendant for them to use plaintiff's land. If that were so, that allegation should have been made in the summons. The summons claims damages from defendant, alleging that he entered upon and ploughed the land and there is no evidence whatever that he did so.

In the opinion of this Court the Acting Native Commissioner was not justified in entering a judgment for plaintiff on the evidence.

The appeal will be allowed with costs, and the judgment in the Court below altered to one of absolution from the instance with costs.

The summons in this matter was issued in the Native Commissioner's Court, but both the judgment and the reasons for judgment are signed by the presiding officer in his capacity as acting magistrate. There has consequently been no judgment in the Native Commissioner's Court, and the acting magistrate would have no jurisdiction in a case between native and native.

The point has not been raised in this Court, and possibly the presiding officer signed as acting magistrate in error and this Court is, on this occasion, prepared to let the matter pass. It is, however, desired to impress upon judicial officers that they should be careful to see that the capacity in which they are trying a case is correctly stated.

CASE No. 26.

LEQAQA MOKETUSE vs. DIAMOND RAMOTHOLE.

KOKSTAD: 26th May, 1936. Before H. G. Scott, Esq., President, and Messrs. J. Addison and G. Kenyon, Members of the N.A.C.

Dowry—Mohoo Custom among Basuto—Agreement to pay dowry can be enforced after death of intended bride—Procedure—Absolution judgment should not be granted when prima facie *case made out by plaintiff.*

(Appeal from Native Commissioner's Court, Matatiele.)
(Case No. 93 of 1935.)

Plaintiff claimed from defendant ten head of cattle or their value, £5 each, being balance of dowry, and in his particulars of claim stated:—

(1) Plaintiff's daughter, Clementina, married by Native Custom Maieme as his first wife in about June, 1933.

(2) Botha parties lived in Basuto Locations and are subject to Basuto Custom.

(3) Defendant, who is the father of Maieme, bound himself under Basuto Custom to pay dowry for Clementina, the number of which is fixed according to the said Custom and/or agreement at the same number.

(4) After Clementina had lived with Maieme as his wife and, after payment of one elopement horse and one dowry beast, she died. According to Basuto Custom in the circumstances plaintiff is entitled to payment of a further ten head of dowry cattle from the defendant.

(5) Apart from his obligation under Custom, defendant agreed to pay the said ten head of cattle and is bound by his promise.

The plea was as follows:—

1. Paragraph 1 of particulars is denied; Maieme twalaed Clementina and she was duly returned to plaintiff and one head of cattle and one horse were paid as Twala fee.

2. Paragraph 2 is admitted.

3. Paragraph 3 is denied.

4. Plaintiff returned the girl to defendant's kraal after the Twala fee had been paid pending arrangements for a marriage, but the girl was sick, and in the third month was returned to plaintiff's kraal, where she died.

5. Defendant denies any custom whereby plaintiff is entitled to a further ten head of cattle, nor did plaintiff, apart from any such customs, promise to pay a further ten head of cattle.

Judgment of absolution was entered at the close of plaintiff's case, and against this judgment an appeal has been noted on the following grounds:—

Plaintiff established his case in that—

(1) on the unrebutted evidence of record it was proved that Clementina and Maieme were married according to custom in that, after payment of live stock to her father, the plaintiff, by Maieme's father, the defendant, and upon dowry being promised by defendant and upon marriage being agreed upon, she and Maieme lived as man and wife at defendant's kraal with the consent of her father.

(2) In view of the above, defendant is bound to pay plaintiff ten head of cattle in that (*a*) according to Basuto Custom they are due to him or (*b*) defendant—having supplemented his agreement to pay dowry during Clementina's lifetime by a definite promise after her death to pay a fixed number of ten head—is bound in law to fulfil his agreement to pay ten head.

According to plaintiff's evidence defendant's son, Maieme, eloped with his (plaintiff's) daughter. Thereupon he went to defendant, who desired marriage, to which plaintiff agreed. Defendant paid one horse for the elopement and it was arranged that the girl should stay at the defendant's kraal and live with

Maieme as his wife. Plaintiff demanded dowry and defendant agreed to pay. The girl then stayed with Maieme for three months when she got ill, and defendant asked him to take her back. Plaintiff did so and she died, and defendant thereafter paid plaintiff a beast " reporting the death of the girl ".

Plaintiff alleges that defendant agreed that he was going to pay ten head of cattle in addition to the horse and reporting beast and that before the Chief Motheo he admitted his liability for these cattle.

It is claimed that the ten head of cattle are payable under the Hloho Custom.

In his evidence Lekorane Lekwatle, who was a member of Chief Sibi's Court when the case was tried states:— " Plaintiff was claiming ten head of cattle as dowry for his daughter " and in cross-examination " This was claimed under Basuto Custom. According to our Custom one must pay ten head. It is not ' Matsitiso ' or ' Siento . It is the Hloho Custom . . . The custom under which the ten head of cattle are claimed is not one where ten head are claimed after death. According to our custom ten head must be paid before he pays anything else. They are dowry cattle. The ten head are part payment of the dowry and he must pay ten head before there can be any marriage."

In the present case it is clear that there was no marriage according to Basuto Custom and that the negotiations had only reached the stage of an engagement.

This Court is of opinion that plaintiff has not proved that the custom referred to as " Hloho " is practised among the Basuto, and if his claim had depended solely on that custom would not have been prepared to interfere with the judgment in the Court below, but the claim is also on the ground that both before and after the death of the girl, Clementina, defendant agreed to pay the ten head of cattle claimed. There is evidence that when plaintiff sued before the Chief Motheo Sibi, the defendant admitted his liability and agreed to pay the number of cattle demanded, and also that before this case he agreed to pay. This evidence stands uncontradicted and until that is done must be accepted.

In the opinion of this Court the plaintiff has made out a *prima facie* case which defendant must rebut.

The judgment of absolution from the instance was prematurely granted.

The appeal is allowed with costs, the judgment in the Court below set aside, and the case returned for further hearing.

CASE No. 27.

DANIEL B. MAGADLA vs. ISIAH HAMS.

Kokstad: 26th May, 1936. Before H. G. Scott, Esq., President and Messrs. J. Addison and G. Kenyon, Members of the N.A.C.

Where parties have not abandoned Native Custom.—Native Law should apply in cases peculiar to Native Custom.—Practice: Amendment of judgment—by Judicial Officer a week after delivery thereof—Irregularity, Section 36 (3) *Proclamation No.* 145 *of* 1923, *provides only for correction of patent errors.*

(Appeal from Native Commissioner's Court, Mount Ayliff.)
(Case No. 167 of 1935.)

The plaintiff claimed from defendants, jointly and severally, three head of cattle or their value, £15, as damages for the seduction of his daughter, Lulama, by the first defendant.

Second defendant was sued as kraal head of number one. First defendant had not been served with a copy of the summons and did not appear.

Second defendant filed a plea in which he denied that he was kraal head of first defendant and further denied liability on the ground that all the parties to the suit are Christianized natives who do not conform to Native Custom, and that plaintiff by virtue of his Christian marriage has contracted himself out of Native Custom, and defendant therefore contends that any action of this nature is repugnant to public morals and should be tried according to the Common Law and not according to Native Custom.

Certain evidence was led, and the Acting Assistant Native Commissioner then held that the case should be tried under Common Law, and on the 20th February, 1936, dismissed the summons with costs.

A week after delivering this judgment the Acting Assistant Native Commissioner made the following note on the record:—

> "Judgment amended to judgment for defendant No. 2 with costs, in terms of section 36 (3), Proclamation No. 145 of 1923."

The section of the Proclamation under which the Acting Assistant Native Commissioner purported to act provides that the Court may correct patent errors in any judgment in respect of which no appeal is pending. In making the amendment the Acting Assistant Native Commissioner has converted into a final judgment one which was not final in its nature. The judgment first entered was quite correct in view of his finding that the case should be tried under Common Law and there was no *patent* error in it to be corrected.

The appellant's attorney has not objected to the amending of the judgment, but this Court desires to point out the irregularity for the future guidance of the Acting Assistant Native Commissioner.

To come to the decision of the Acting Assistant Native Commissioner that the case should be tried under Common Law. In his reasons for judgment he says, "According to the evidence adduced the Court finds that all the parties before the Court are Christians and civilized natives and do not observe Native Customs even though plaintiff has accepted 'lobola' for a daughter and No. 2 defendant's father paid 'lobola' for No. 2 defendant's wife.".

According to the evidence the following facts appear as regards the plaintiff. That he was educated up to Standard V, acted as interpreter to an Attorney for ten years, married by Christian rites, paid dowry for his wife and also received dowry for his one married daughter; that his house is furnished after the European style, he follows also other Native Customs apart from the payment and receipt of lobola, he resides in a tribal native location where land has been allotted to him and pays the taxes of an ordinary native.

The second defendant, who also lives in a native location, says he is a Minister of the Methodist Church, is a Christian and civilized, and does not pretend to observe any Native customs at all, yet he admits that when he married he paid dowry for his wife. Beyond his bare statement that he does not observe native customs there is not a word of evidence as to the manner in which he lives nor of anything else which would go to show that he is removed out of the sphere of Native Law. In fact the contrary is indicated by the fact that when the seduction was reported to him he followed out the usual Native Custom of arranging for a meeting of the complainant's people and first defendant's people, i.e. himself. In Edmund Ntikinca *vs.* Xamxam Mzilikazi (3, N.A.C., 250) the President of the Native Appeal Court said:

"It does not necessarily follow that because defendant was educated and baptized and married in a Christian Church that he has abandoned all Native methods of life and customs.".

In these circumstances this Court is not prepared to say that sufficient proof has been furnished that either plaintiff or second defendant have abandoned Native Customs.

The Acting Native Commissioner says, however, that he feels bound by the decisions in the cases of Tumana *vs* Smayile & Another (1, N.A.C., 207), Mboniswa *vs.* Gasa & Another (1, N.A.C., 264), which were confirmed by Nqanoyi *vs.* Mangoloti Njombeni (1930, N.A.C., 13).

In the first of these cases it was shown that the parties had abandoned Native Customs and modes of life and were living each on his own farm. The summons moreover included a claim which is not known to Native Law. In the second case it was shown that the second defendant, whom it was sought to make liable for the torts of his son, was a deacon of the Church of England and had abandoned Native Customs, and, further that his son was not living with him at the time he committed the tort.

In the third case the claim was one for money lent, a transaction entirely foreign to Native Custom. An objection was taken that the claim was prescribed by Act No. 6 of 1861. The objection was upheld and the summons dismissed. On appeal to the Native Appeal Court it was urged on behalf of the appeal that a Native Commissioner's Court had absolute discretion to apply either Roman Dutch Law or Native Law, but this contention was rejected by the Appeal Court, which held that the discretion given to a Court of a Native Commissioner by section 11 of Act No. 38 of 1927 is not an absolute discretion, but that the true construction to be placed on this section is that the Common Law of the Union should primarily be applied and Native Custom only invoked in matters peculiar to Native Custom falling outside the principles of Roman Dutch Law.

At first sight it would appear that this judgment laid down that in *every* case Roman Dutch Law should primarily be applied, but we are of opinion that that is not the true meaning of the judgment, for it must be remembered that the Court was there dealing with a transaction which was not peculiar to Native Custom, but was one common to the daily affairs of European and Native alike, and that in those circumstances it was not proper to apply Native Custom. The judgment, however, particularly states that in cases peculiar to Native Custom Native Law should apply.

The action by which a kraal head is sued for the torts of an inmate of his kraal is one which can only be brought under Native Custom and has no counterpart in Roman Dutch Law.

It was strongly urged before this Court that in the case of Mboniswa *vs.* Gasa & Another (*supra*) it was held that the second defendant was not amenable to Native Law. But that is not so. The Court merely intimated that it was doubtful whether he was so amenable and the decision went in favour of the second defendant on the ground that the first defendant was not an inmate of his kraal. This case cannot therefore, be taken as laying down definitely that a man in the position of the second defendant is not amenable to Native Law. Moreover, as already pointed out, it has not been satisfactorily proved that he has abandoned Native Customs.

In the opinion of this Court the Acting Assistant Native Commissioner erred in deciding that this case should be tried under the Common Law.

The evidence as to the first defendant being an inmate of second defendant's kraal is inconclusive.

The appeal will be allowed with costs, the judgment in the Court below will be set aside and judgment of absolution from the instance with costs entered.

CASE No. 28.

ABNER PIENAAR vs. TSUFU TSUFU.

KOKSTAD: 12th October, 1936. Before H. G. Scott, Esq., President, and Messrs. J. Addison and G. Kenyon, Members of the N.A.C.

Arable Allotment—Unsurveyed Districts—Allotment of land by Chief with alleged condition that cropgrowing thereon should be reaped by previous occupier who had no certificate of occupation—Imposition of condition not proved—Unconditional certificate of occupation issued by magistrate to allottee entitles him to crops growing on land covered thereby.

(Appeal from Native Commissioner's Court, Matatiele.)

(Case No. 160 of 1935.)

Plaintiff sued defendant for delivery of eight bags of mealies or payment of their value, alleging that for many years he had, with the consent of the late Chief Samuel Sibi, used the land or lands which were allotted to his parents but no certificate of occupation had been issued to him (plaintiff) in respect of the land or lands; about seven years ago defendant was allotted a land abutting on the lands used by plaintiff, and he and defendant occupied and used their respective lands until December, 1934; in December, 1934, an allotment of land was made and a certificate of occupation was granted to him; this allotment did not include the total area which had been allotted to plaintiff's parents, and a portion of the land which had been used by him until the date of allotment was allotted to defendant and added to the allotment previously made to him; this portion of land was allotted to defendant, however, subject to plaintiff's right first to reap the mealies which had been planted by him on this portion; notwithstanding the rights reserved to plaintiff to reap his mealie crop on this portion of land defendant, on or about 18th May, 1935, removed plaintiff's mealie crop and refuses to return it.

Defendant pleaded that the late Koma Tsufu used a piece of land and died about 1930 and the land reverted to the location; in 1931/32 defendant used the land and in 1933 part of the land was claimed by plaintiff and defendant abandoned that portion (which is not the portion now in dispute); in 1933 the defendant still used the portion now in dispute; in 1934 defendant ploughed the portion in dispute and sowed it and plaintiff wrongfully reploughed and resowed it: then the portion was allotted to defendant unconditionally from 22nd December, 1934, and he denies that plaintiff has any right to the crop:

The Additional Assistant Native Commissioner entered judgment in favour of plaintiff for four bags of mealies, or their value at 16s. a bag, and costs.

Against this judgment an appeal has been noted on the following grounds:—

First Ground.—The land in question was not allotted to defendant conditionally to plaintiff reaping the crop then attached to the soil in that the certificate of occupation in favour is unconditional: Further, defendant's rights cannot be questioned while such certificate exists.

Ground two.—In the event of the first ground not being upheld, defendant states that even if it was stipulated by the Headman that defendant's allotment was conditional to plaintiff's right to reap the crop, such a stipulation is of no binding affect in that (*a*) plaintiff in fact had previously no right to reap—the land was never his, or (*b*) the headman had no right to impose the condition or (*c*) it was not proved that the magistrate issuing the certificate to defendant knew of or imposed the condition.

Ground three.—In the event of the previous grounds not being upheld, the defendant states that it was not proved of record that the Headman did impose the condition upon defendant—the weight of evidence and probabilities are in favour of defendant in that *inter alia* the recorded evidence discloses that every adverse witness to the defendant (including the Headman called by the defendant in the interest of justice, either contradicted himself or was contradicted by another such witness and in this way such witnesses gave contradictory on every relevant fact at issue and that after such confusion of evidence and/or after such unreliable evidence, the testimony of defendant to the effect that he himself believed and understood that he was given the crop on the land in question (D on plan) which was admittedly allotted to him and that the plaintiff was given the crop on portion C on plan which belonged to the location should be accepted.

Ground four.—The crop awarded was excessive in that it was out of all proportion to the land in question and/or in excess of that gathered by defendant.

In this Court appellant's attorney relied very strongly on the first ground of appeal and contended that as defendant had received an unconditional certificate of occupation, evidence of any conditions not endorsed thereon was irrelevant.

For the respondent it was contended that even though the conditions do not appear on the certificate of occupation there is nothing to prevent a person applying to have his rights endorsed thereon.

In regard to this argument it is sufficient to say that no application has been made to have such endorsement made.

Plaintiff has called evidence to show that when a dispute arose over this land the Chief instructed that the crop growing on the land should be reaped by plaintiff and thereafter the land was to be given to the defendant.

The native constable, who was dealing with land matters, is said to have been present and to have heard the Chief's decision.

In giving evidence, however, the native constable says he did not hear the Chief's decision but was only told by him that he had awarded the crops to plaintiff's wife. He says, further, that on his return to Matatiele he made a written report to the magistrate. If conditions had been imposed it is only reasonable to suppose that he would have made mention of it in his report, and yet we find that an unconditional certificate of occupation was issued to defendant on 22nd December, 1934.

On the 18th May, 1935, as a result of a complaint by defendant that plaintiff's wife was taking mealies from the land, the assistant magistrate held an inquiry and decided that plaintiff was entitled to reap the crops planted by him under genuine mistake on defendant's side of the boundary. At this inquiry the native constable previously referred to was not called nor did the Chief himself give evidence. Further, there is nothing to show that the certificate issued to defendant was produced.

If it had been produced it is doubtful whether the assistant magistrate would have given a decision which, in effect, set at nought a document issued by his superior officer.

In the opinion of this Court the defendant having an unconditional certificate of occupation is entitled to the crops growing on the land covered by that certificate.

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

CASE No. 29.

HENRY SIBANDA vs. SELINA DLOKWENI.

KOKSTAD: 10th October, 1936. Before H. G. Scott, Esq., President, and Messrs. J. Addison and G. Kenyon, Members of the N.A.C.

Interpleader—Widow's rights to estate property for maintenance—No right as against creditors of heir of her late husband.

(Appeal from Native Commissioner's Court, Matatiele.)

(Case No. 136 of 1935.)

In the Court of the Native Commissioner, Matatiele, Henry Sibanda obtained judgment against Mzanywa Ndlokweni for eleven head of cattle, one horse, and an Mqobo beast, or their collective value, £45. A warrant of execution was issued and eight head of cattle, one plough, four yokes and chain, nine strops and two reims were attached in execution of the judgment. The stock and other articles were claimed by Selina Dlokweni (Respondent) as not being liable to execution on the ground that she has, under Native Custom, the right of possession of such stock and/or the life usufruct or life use thereof and is entitled to be maintained therefrom, or from the proceeds thereof.

The Assistant Native Commissioner declared the property not liable to execution and the appeal is against that judgment.

The facts are that Selina Dlokweni is the widow of the late Matikita, to whom she was married by Christian rites on the 14th February, 1912. As the marriage took place subsequent to the coming into effect of Proclamation No. 142 of 1910, it was out of community of property. The defendant in the original case (Mzanywa) is the eldest son of this marriage, and he married the daughter of present appellant and a certain number of cattle were paid as dowry.

Sibanda obtained judgment against him as stated above for the balance of dowry due and the property now in dispute was attached.

It is admitted that the property in question belongs to the estate of the late Matikita, of which Mzanywa is the heir, and the only question to be decided is whether Selina has a right to retain it as against creditors of her son. As between herself and her son there is no doubt that she would

be entitled to claim that the property should be kept for her maintenance at the kraal of her late husband or at some other kraal with the approval of her guardian during such time as she resided at such kraal.

A good deal of evidence was lead to show that Selina had abandoned her husband's kraal by going to live in the Mount Fletcher District. While this evidence may have been of importance in any action between her and her son it is quite irrelevant in an action between her and the creditor of her son.

The Assistant Native Commissioner has held that because Selina has not abandoned or waived her rights under Native Custom the property is not liable to execution. This appears a somewhat novel proposition. If Mzanywa had contracted a debt, say, with a trader and the property he inherited from his father is attached in satisfaction of a judgment given in respect of that debt, could the widow be heard to say that it was not liable to attachment because of her rights to be maintained under Native Custom? Certainly not. Why then should she be successful because this debt is one of another nature?

The practice of referring to the widow's rights in estate stock as a "usufruct" is unfortunate, as it tends to obscure the true position. As was said in the case of Henrietta Luke *vs.* Michael Luke (4, N.A.C., 133), "The term 'Usufruct' has no equivalent in Native Law, and it is to be regretted that it was ever imported into reported judgments of this Court". Her rights are as between her and the heir to her late husband's estate for maintenance but they cannot override the claims of creditors of the heir. If the heir does not adequately support her she has an action against him to compel him to do so and may even be granted an order by the Court to have certain of the estate cattle placed at the kraal where she resides for her support, but she has in no sense any dominium in those cattle and cannot dispose of them without consulting the heir.

A perusal of the reasons for judgment shows that the Assistant Native Commissioner has approached the case from the wrong angle and has dealt with it as though it were one between mother and son, and the rights of the execution creditor have not been considered at all.

The view the Assistant Native Commissioner has taken can be gathered from the following passage in his reasons for judgment when dealing with the allegation that Selina had voluntarily handed over the stock to Henry Sibanda:—

"A widow has no power to dispose of the property without the consent of the heir. There must be consultation between them. There was no communication between the widow and the heir. The heir might have preferred to have allowed his mother, for whose support he is responsible, to remain in possession of the stock. It is true that upon his return home towards the end of 1935 he was quite prepared to ratify his mother's action, but only because he himself was to benefit. It is obvious from his evidence that his mother's well-being is a matter of small concern to him."

If the heir is satisfied his mother's action in disposing of estate stock, the mere fact that he was to benefit seems an inadequate reason for the Court to refuse to acknowledge that ratification merely because there had been no prior consultation.

If there was ratification then the transaction was perfectly in order. Again, why should the fact that his mother's welfare was a matter of small concern to the heir be allowed to defeat the claim of a third party who had legally attached property belonging to the man against whom he had a judgment?

In the opinion of this Court the Assistant Native Commissioner erred in holding that if the widow had not abandoned her rights to the estate property she was in a position to insist upon her rights even against a third party.

The appeal is allowed with costs, and the judgment in the Court below altered to "The nine head of cattle, one plough, four yokes, one chain, nine strops, and two reims all declared executable with costs."

CASE No. 30.

MXASHANA MNIKA vs. MESATYWA MBEDLA.

KOKSTAD: 10th October, 1936. Before H. G. Scott, Esq., President, and Messrs. J. Addison and G. Kenyon, Members of the N.A.C.

Practice—Interpleader—Objection to summons Order XII Rule 2 (2), *and XXV, Rule* 2 (1) *of Proclamation No.* 145 *of* 1923—*Failure to furnish Messenger with specific grounds upon which property claimed not fatal—Further particulars—Postponement—Costs.*

(Appeal from Native Commissioner's Court, Matatiele.)

(Case No. 177 of 1936.)

In the Court below appellant issued an interpleader summons claiming that certain five head of cattle, a mare and foal, which had been attached under a warrant of execution issued on a judgment in the Native Commissioner's Court at Matatiele in the case of Mesatywa Mbedla *vs.* Diamond Msuki, were not liable to execution on the ground that they were his (claimant's) property

Objection was taken to the summons on the grounds that Order No. XXV 2 (1) had not been complied with and that the summons did not agree with the letter addressed to the Messenger.

The objection was upheld with costs and the summons dismissed.

Against this ruling an appeal has been noted on the following grounds:—

1. The summons did comply with the order quoted.
2. The summons did agree with the letter to the Messenger (the fact that the summons claimed one head of cattle less does not amount to a disagreement and respondent was not prejudiced).
3. In any case particulars were available and tendered of record and no prejudice was suffered by respondent.

In the letter addressed to the Messenger, the appellant's attorneys required the release of six head of cattle and two horses attached by him on the ground that these were the property of Mxashana Mnikwa and not liable to attachment.

Rule 2 (1) of Order XXV of Proclamation No. 145 of 1923 requires a claimant to lodge with the Messenger of the Court a statement of the grounds upon which it is claimed that the property taken in execution is not executable. A statement that the property attached is not liable to execution because it is the property of the claimant may not be a strict compli-

ance with the rule in question but it seems unreasonable to hold that, because full details of the manner in which the property was acquired were not furnished to the Messenger, the claimant should be entirely barred from establishing his claim. Rule 2 (2) of Order XXV expressly provides that upon the hearing of the application the provisions of clauses (4) and (5) of Rule 1 of the Order shall *mutatis mutandis* apply, the person taking out the summons being for this purpose considered to be the claimant. Clause 5 (*a*) of Rule 1 of this Order provides that the Court may order any such claimant to state orally or in writing, on oath or otherwise, as to the Court may seem expedient, the nature and particulars of his claim, and there seems to be no good reason why that course should not have been followed in the present case, especially as particulars were tendered in Court.

If a postponement became necessary owing to the failure to file full particulars in the first instance an order requiring claimant to pay the costs occasioned by this omission could have been made.

While it does not form one of the grounds of appeal, it is pointed out that the objection taken in this case is not one of those set out in Rule 2 (2) of Order XII of the Proclamation as being the only objections which may be taken to a summons.

The appeal will be allowed with costs, the order in the Court below upholding the objection is set aside and the case returned to be heard on its merits.

In order to obviate any difficulty arising because of the wording of Rule 2 (1) of Order X of Proclamation No. 145 of 1923, leave will be granted to respondent to apply for further particulars within a reasonable time.

CASE No. 31. 1947. (T & N) 35-37

MKENKE MNGQANTSIYANA vs. MAQOBONGO KYIBI.

KOKSTAD: 12th October, 1936. Before H. G. Scott, Esq., President, and Messrs. J. Addison and G. Kenyon, Members of the N.A.C.

Damages—Adultery—Plea of bona fide marriage—Ownership of adulterine children—Tender of dowry cattle after issue of summons—Effect.

(Appeal from Native Commissioner's Court, Mount Ayliff.)

(Case No. 185 of 1935.)

In this case plaintiff in the Court below claimed from defendant (*a*) a declaration of rights in respect of certain three children alleged to have been born of an adulterous union between defendant and plaintiff's wife, (*b*) delivery of the said children, and (*c*) payment of three head of cattle or their value, £15, as damages for defendant's alleged adultery with his wife.

The Assistant Native Commissioner entered judgment in favour of the plaintiff as follows:—

1. Plaintiff is declared to be the guardian of the children Situte, Nomasama and Nozitanda, born of the adulterous union between defendant and plaintiff's wife, Maratyana.

2. Defendant is ordered to deliver the eldest child, Situte, to plaintiff, and plaintiff is entitled to all future cattle which may become payable in respect of the girls, Nomasana and Nozitanda, for dowry, damages or otherwise, after payment by plaintiff to defendant of the customary maintenance beasts.

3. Defendant to pay to plaintiff three head of cattle or their value, £15. for damages for adultery with plaintiff's wife, Maratyana.

4. Plaintiff is entitled to the costs of this action, which costs are to include special and travelling allowances not to exceed £3. 3s.

Against this judgment an appeal has been noted on the following grounds:—

1. That the evidence shows that the plaintiff had deserted his wife for a considerable period of time and that the plaintiff knew that his wife had left his kraal and also that she had married the defendant many years ago, and that he (defendant) had paid dowry for her, but plaintiff took no action and allowed the defendant to continue to reside with the woman Maratyana as man and wife and to beget children.

2. That the evidence shows that during plaintiff's absence his dowry was tendered back to him; that his father-in-law has always been willing to return to him his dowry and that, again, after the commencement of the proceedings in this case, further attempts were made to return plaintiff's dowry.

3. That the evidence further shows that Maratyana, at the time she married the defendant, had deserted plaintiff's kraal with the definite intention of never returning thereto, in which attitude she still persists.

4. That under the foregoing circumstances, according to Native Law and Custom as applying to the parties in this case, plaintiff's marriage must be deemed to have been dissolved and that the whole of the judgment given by the Assistant Native Commissioner is therefore contrary to law and is also against the weight of the evidence.

5. That by paying dowry for Maratyana and cohabiting with her under the above circumstances, the defendant contracted a legal and valid customary union with the said Maratyana and cannot now be deprived of his rights in the children of that Union.

6. That under the foregoing circumstances the defendant has not committed adultery and is not therefore liable in any damages to the plaintiff.

From the evidence it appears that some thirteen years ago plaintiff married one Maratyana, daughter of Ratyana, and paid six head of cattle as dowry for her—Maratyana lived with plaintiff for about two years and bore him one child. Plaintiff then proceeded to work at the Nyati Collieries leaving his wife and child in charge of his brother, Macumba.

She remained at this kraal for about three years and then returned to her father, but came back the following year for the purpose of reaping crops.

During her stay at her father's kraal she met defendant, who paid eight head of cattle as dowry for her and she bore him three children.

Defendant admits that at the time he paid dowry for Maratyana he knew that she was married to plaintiff, but says he was informed by Ratyana that that marriage had been dissolved, and further that Maratyana informed him that she had been deserted by plaintiff.

Ratyana states that defendant had been living with Maratyana for two years before he paid dowry, and during that time she had two children by him. He says also: "Before defendant's marriage to Maratyana I did not take steps to have plaintiff's marriage dissolved because I was waiting for plaintiff's return. I tendered cattle to plaintiff's people. I tendered no specific number of cattle because plaintiff was away."

It was only after plaintiff's return last year and after he had taken action before the Headman and issued summons in this case that Ratyana made an attempt to return plaintiff's dowry cattle.

According to his own evidence he took no steps to dissolve the marriage with plaintiff, and as defendant admits that he knew that Maratyana was a married woman at the time he paid dowry for her, his alleged marriage was illegal and under Native Custom all children born to Maratyana are the property of plaintiff

It is contended that as plaintiff had taken no steps to obtain the return of his wife he was not entitled to damages, but in the opinion of this Court, in the circumstances of this case, the delay was not unreasonable, and there is nothing to show that plaintiff was aware that his wife was living with another man. As soon as he returned from work and found out what the position was he commenced proceedings against the defendant.

This Court considers that the judgment of the Assistant Native Commissioner was in accordance with Native Custom and the appeal is dismissed with costs.

CASE No. 32.

MALAPPO HOFFMAN and Two Others vs. JOHN DUBE and H. DUBE.

KOKSTAD: 12th October, 1936. Before H. G. Scott, Esq., President, and Messrs. J. Addison and G. Kenyon, Members of the N.A.C.

Interpleader—Sale of property by person not authorised to sell does not pass dominium to purchaser and property may be vindicated by true owner.

(Appeal from the Native Commissioner's Court, Mount Fletcher.)

(Case No. 79 of 1936.)

An objection has been lodged in this Court to the hearing of the appeal on the ground that the notice of appeal filed by appellants does not comply with Rule 10 of the Native Appeal Court Rules, in that the notice of appeal is a long and incoherent document in which the grounds of appeal are not stated clearly and specifically, and consequently that it is difficult, if not impossible, to ascertain therefrom the precise grounds of appeal.

The objection is overruled, this Court being of opinion that the document, while not as artistically drawn as it might have been, is yet sufficiently clear to enable one to ascertain therefrom the grounds of appeal.

This was an interpleader action arising out of the Case Simon Dube *vs.* Harriet Dube, in which the latter obtained judgment on a claim in reconvention in the Native Appeal Court, sitting at Kokstad, for the delivery to her of five head of cattle, one horse, five sheep and 6s. 9d. value of wool sold, or their collective value, £37. 16s. 9d., all being property in the Estate of the late Andries Dube, of which she had been appointed sole heiress and executrix by will. The action in the Court of the Native Commissioner, Mount Fletcher, was commenced on the 18th November, 1934, but the hearing was postponed from time to time and judgment was not delivered until the 6th December, 1935, and the Native Appeal Court judgment was delivered on 6th February, 1936. On the 26th April, 1935, while the case was still pending in the Native Commissioner's Court, Simon Dube sold four cattle to a trader, Mr. P. C. Thurnau, who in turn sold them to the present claimants. These cattle were attached by the Messenger of the Native Commissioner's Court under a writ issued as a result of the judgment of the Native Appeal Court and the present interpleader action was thereupon entered.

The respondents in the Court below led evidence to show that the cattle in question were stock belonging to the Estate of the late Andries Dube. At the conclusion of their case the attorney for the claimants applied for the cattle to be declared not executable on the ground that the respondents were estopped from following up the cattle as they tacitly consented to the sale by Simon Dube, and that Simon had authority from one Nelani, to whom Simon alleged the stock belonged, to sell them.

The inconsistency of the defence is at once apparent. For if the stock belonged to Nelani the consent of John and Harriet Dube, whether expressed or implied, was of no consequence.

If the claimants relied on that consent to support the claim of estoppel, then they must be taken to have accepted the position that the stock in question was estate stock.

The Assistant Native Commissioner held that estoppel did not operate in this case, and evidence was then led on behalf of claimants. Simon Dube and his brother Mgobozi Dube both state that the cattle in question are the progeny of a heifer given to one Nelani in 1918 by Andries Dube, and that he agreed to this sale.

The Assistant Native Commissioner did not believe this evidence and declared the cattle executable with costs, finding as a fact that they were estate cattle and that Simon Dube had sold them without consulting his mother (Harriet Dube), well knowing that they were estate cattle in respect of which an action was pending.

Against this judgment an appeal has been noted on the following grounds:—

(1) That in November, 1934, an action started between Simon Dube against John Dube and Harriet Dube. In this action Harriet Dube was joined as plaintiff in reconvention, and she claimed from Simon Dube *inter alia* five head of cattle or payment of their value, £25, as property belonging to the estate of her late husband, Andries Dube, to whom she was executrix testamentary and sole heir under his will. Judgment in this action was given by the Native Appeal Court on the 3rd day

of February, 1936, in favour of John Dube and Harriet Dube against Simon Dube for five head of cattle or payment of their value, £25.

(2) On the 18th February, 1936, a writ of execution was issued on the judgment of the Native Appeal Court, and amongst other cattle attached the five head of cattle forming the subject-matter of the present dispute were attached while in the possession of the appellants.

(3) That on the 20th April, 1935, Simon Dube, who had remained in possession of the estate of the late Andries Dube, sold the cattle forming the subject matter of this dispute to P. Thurnau, a trader, and John Dube knew of this sale on the 21st April, 1935, i.e. the following day. Harriet Dube also knew of this sale and tacitly consented thereto, and it is submitted that neither did anything to warn P. Thurnau that these cattle formed the subject-matter of an action nor did they warn appellants who, in turn, purchased the cattle from P. Thurnau during April, 1934, and that the Assistant Native Commissioner erred when he held that John Dube and Harriet Dube were not estopped from claiming that the cattle were executable.

(4) There is a conflict between the evidence of P. Thurnau and that of John Dube, and it is submitted that the evidence given by P. Thurnau is correct.

(5) That in any event, even if estoppel does not operate, it is clear from the form of the original action and from the judgment of the Native Appeal Court that Harriet Dube and John Dube did not sue Simon Dube in a vindicatory action nor in an action for a declaration of rights in regard to the property belonging to the estate of the late Andries, but elected to sue Simon Dube personally for five head of cattle or their value, £25, and it is submitted that the respondents, John Dube and Harriet Dube, cannot now attach property genuinely sold by Simon Dube and being in the possession of the appellants at the time when the writ was executed.

(6) That the Assistant Native Commissioner should therefore have declared the stock non-executable with costs of suit.

The first two grounds of appeal merely set out the history of the case and need no comment beyond the fact that the judgment of the Native Appeal Court was in favour of Harriet Dube only, John Dube not being a party to the claim in reconvention.

It may be inferred from the third and fifth grounds of appeal that the contention that the cattle in question are the property of Nelani has been abandoned, and that it is accepted that they are stock belonging to the estate of the late Andries Dube.

The defences now relied upon are estoppel and abandonment by Harriet Dube of her vindicatory rights.

In regard to the first defence, the allegation in the evidence is that John Dube consented to the sale to Thurnau. Thurnau tells us that all that John Dube asked was whether he had bought four heifers from Simon Dube and that he said nothing about there being a Court case pending in connection with them.

John Dube says he told Thurnau that there was a case pending and that he was not to sell them. The Assistant Native Commissioner had these witnesses before him and accepted the evidence of John Dube. We see no reason for disagreeing with him on that point and the appeal on the ground of estoppel must fail.

It was very strongly argued before this Court that, even if it is held that Simon Dube had sold the stock without authority, the fact that Harriet Dube had claimed certain stock or their value and had issued a writ in that form indicated that she had abandoned her vindicatory rights and consequently the sale by Simon immediately became valid. Reliance was placed on the following passage in Mackeurtan's Law of sale of Goods in South Africa (p. 12): "It is equally clear that the property of a third party may be subject of a sale, for so long as the seller delivers to the purchaser and protects his possession it is immaterial whose property it was at the date of sale."

The important part of this passage is in the words "and protects his possession". If the seller does not do that, then the sale is not valid and the purchaser may be evicted by the true owner, and the purchaser's remedy would be against the seller only.

Maasdorp in his Institutes of Cape Law (3rd Edition, Volume II, p. 63) states that one of the essentials required by our law in order to effect a valid transfer of ownership is that the transferor be the owner of the thing, or be in a position or have authory to dispose of the ownership, and at p. 64 he says: "Delivery made by a person who is not the owner, nor authorised by express mandate or authority to act for the owner, is ineffectual to pass the ownership, but if the transferror should afterwards acquire the ownership, such ownership will at once vest in the transferee."

It is contended that because Harriet Dube in the form of writ she issued gave Simon Dube the option of delivering the stock or paying its value, the sale by him of the four heifers immediately became valid and the property in them passed to the present claimants That contention would have been perfectly sound if Simon had paid to Harriet Dube the value of the heifers, but he has not done so, and consequently he has failed to protect the claimants in their possession, which is one of the requisites for the validity of the sale. Not having acquired the ownership himself he cannot pass it on to anyone else. The ownership, therefore did not vest in Mr. Thurnau, and he could not pass on any better title than he himself had.

As the ownership in these cattle did not pass to the claimants it follows that the Assistant Native Commissioner's decision that they are executable is correct and the appeal is dismissed with costs.

1938 (T+N) 241, 255.
1939 - 95
1943 - 24.

CASE No. 33.

BERNICE MOSHESH vs. NKOEBE MOSHESH.

KOKSTAD: 12th October, 1936. Before H. G. Scott, Esq., President, and Messrs. J. Addison and G. Kenyon, Members of the Native Appeal Court.

Native Estates—Jurisdiction of Native Commissioner's Court to hear and determine disputes regarding administration and distribution of—Sections 10 (1) *and* 23 (4) *of Act No.* 38 *of* 1927.

(The judgment on the facts is immaterial.)

(Appeal from the Native Commissioner's Court, Matatiele.)

During the course of the argument in this case one of the members of the Court drew attention to the case of Ida Mohulatsi *vs.* Phanuel and Ben Mohulatsi [1932, N.A.C. (N. & T.), 56], in which it was held that a dispute or question arising out of the administration or distribution of an estate

falling to be administered according to Native Law, or where the deceased had been married by Christian rites and died intestate, must be dealt with by a Native Commissioner in his administrative capacity and not by judicial proceedings in a Native Commissioner's Court.

In the course of its judgment the Court said: —

"It follows, therefore, that neither a Chief's Court nor a Native Commissioner's Court has jurisdiction to determine a matter which falls within the purview of sub-section (4) of section 23 of the Native Administration Act."

As the matter is one of jurisdiction, this Court requested the attorneys concerned in the present case to argue it and is greatly indebted to Mr. Zietsman for his able and interesting address.

This Court having considered the available authorities is of opinion, for reasons to be given later, that sub-section (4) of section 23 of Act No. 38 of 1927 does not oust the jurisdiction of a Native Commissioner's Court to hear and determine any dispute or question which may arise out of the administration or distribution of any estate in accordance with Native Law.

Postea.—In the case of Ida Mohulatsi *vs.* Phanuel and Ben Mohulatsi [1932, N.A.C. (T. & N.), 56], the matter came before the Chief in the first instance in the form of an application by one Ida Mohulatsi, who claimed to be the heir to the Estate of her late father, Joseph Mohulatsi, for the delivery to her of the assets in that Estate by her uncle, Phanuel Mohulatsi, in whose possession they were.

During the proceedings certain claims were advanced against the estate by Phanuel and Ben Mohulatsi and by one Nicodemus. The Chief delivered a certain judgment, which was taken on appeal to the Court of the Additional Native Commissioner, which proceeded to hear and determine the various issues *de novo*. The matter was then taken on appeal to the Native Appeal Court, which held that neither the Chief's Court nor the Native Commissioner's Court had jurisdiction to determine any matter which falls within the purview of sub-section (4) of section 23 of the Native Administration Act on the ground that the sub-section referred to provided that any such matters should be decided by the Native Commissioner in his administrative capacity and the jurisdiction of his Court was entirely ousted.

The effect of this decision is that in no case where there is a dispute in regard to the administration or distribution of such an Estate as is referred to, even where claims are made against the Estate by third parties, may the parties seek redress in the Native Commissioner's Court, thus depriving them of their ordinary Common Law rights. This is a very drastic alteration in the law and, in our opinion, it would require to be shown very clearly that the legislature intended such a deprivation to be effected before it can be held that that was its intention. In the case of Casserley *vs.* Stubbs (1916, T.P.D., 310) it was laid down that a statute must either explicitly say that it is the intention of the legislature to alter the Common Law, or the inference from the statute must be such that the Court can come to no other conclusion than that the legislature did have such an intention.

The decision of the N.A.C. (T. & N.) is based on the wording of sub-section (4) of section 23 of Act No. 38 of 1927, which provides that any dispute or question which may arise out of the administration or distribution of any estate in accordance with Native Law shall be determined by the Native Commissioner subject to an appeal to the Native Appeal Court.

If the wording of this sub-section entirely ousts the jurisdiction of the Native Commissioner's Court, then an impossible position might arise and grave injustice ensue. No provision exists whereby a Native Commissioner acting administratively can enforce any finding he arrives at, and, consequently, a successful party under such finding would have no means of enforcing his rights. He could not bring any action for enforcing the finding of the Native Commissioner before the Native Commissioner's Court, for the decision in Mohulatsi's case emphatically closes the door of that Court to him. He could not take the matter to any of the Superior Courts, for an appeal lies only to a Native Appeal Court, and if he were successful there there is still no provision for enforcing the judgment. He would therefore be entirely without any remedy and this could not have been intended. Moreover it is a common principle of interpretation that the legislature must not be deemed to have intended to do an injustice or to create an impossible position.

What is to happen if the Native Commissioner refuses or neglects to hold a full inquiry? A case to illustrate this point is not difficult to visualize. An estate has to be administered in accordance with Native Law and Custom—a dispute arises as to who is to succeed to portion of the estate, and one of the parties lays his claim before the Native Commissioner and the latter, without holding a full inquiry, informs him that he has no claim. In these circumstances is it right that he should be debarred from seeking redress in the only Court open to him and so leave him without a remedy?

The judgment in Mohulatsi's case does not confine the matters which must go before a Native Commissioner in his administrative capacity to cases of dispute between parties immediately interested in the distribution of the Estate, but extends also to claims of whatever nature against the estate by third parties, thus taking away from them also their inherent rights under Common Law.

Section 10 (1) of Act No. 38 of 1927 provides for the constitution of Courts of Native Commissioners for the hearing of *all civil causes and matters* between Native and Native only, but excludes from the jurisdiction of that Court certain specified matters which do not include disputes in regard to Native Estates.

If it had been intended to exclude such disputes, it is to be expected that that intention would have been clearly expressed. As a matter of fact, there are certain sections in Act No. 38 of 1927 where the Legislature has deprived the ordinary Courts of jurisdiction in Native cases, but where this is the case it is done by express words. For example: Sub-section (4) of section 17 provides that as from the date of the constitution in any area of a Court of Native Commissioner under the Act a Magistrate's Court shall cease to have jurisdiction in that area in respect of any civil suit arising under section 10 of the Act and section 18 confines appeals from a Native Commissioner's Court to the Native Appeal Courts, except under certain special circumstances. Section 34 of Act No. 8 of 1912 is another instance where a Statute ousts the jurisdiction of the ordinary Courts in favour of the specially constituted Water Court, but the Legislature was careful to do so in clear and specific language.

If the decision in Mohulatsi's case is correct it is patent that sections 10 (1) and 23 (4) of the Act are in conflict, for it lays down that the last-named sub-section takes away a right which the first-named preserves, i.e. the right which every citizen of the State has to appeal to the Courts of the Land for the redress of his grievances.

" It is a well established rule in the construction of Statutes that where an Act is capable of two interpretations that one should be preferred which does not take away any existing rights, unless it is plain that such was the intention of the Legislature " (Solomon, J. A., in Transvaal Investment Co., Ltd., *vs.* Springs Municipality, 1922, A.D., at p. 347. See also Dadoo *vs.* Krugersdorp Municipal Council, 1920, A.D., 552; Chotabhai *vs.* Union Government, 1911, A.D., at p. 31; and Smith *vs.* Clark, 1935, A.D., at p. 228).

In the case of the Principal Immigration Officer *vs.* Bhula (1931, A.D., pp. 334 and 335), it was laid down that it is an elementary principle of construction of Statutes that Parliament will not be presumed to take away any acquired rights.

The intention to do so must be expressed or very clearly implied. In the same case it was held that where there are two sections of an Act which seem to clash, but which can be interpreted so as to give full force and effect to each, then such an interpretation is to be adopted rather than one which will partly destroy the effect of one of them.

If the interpretation put upon section 23 (4) of Act No. 38 of 1927 is adopted, it follows that the effect of section 10 (1) in respect of any dispute affecting the administration or distribution of a Native estate is entirely destroyed. As was said in Bhula's case (*supra*) the Legislature is presumed to be consistent with itself.

If section 23 (4) takes away the rights conferred by section 10 (1) then there would be inconsistency.

In the course of its judgment in Mohulatsi's case the Court said:—

" It will be noted that the sub-section refers specifically to the Native Commissioner and not the Native Commissioner's Court, whereas sub-section (5) relating to claims and disputes arising out of the administration of any estate of a deceased Native, where any party to such a claim or dispute is not a Native, specifically provides that such shall be decided in an ordinary Court of competent jurisdiction.

It seems clear, therefore, that ' Native Commissioner ', as used in sub-section (4) means the Native Commissioner acting in his administrative capacity and not the Court of the Native Commissioner.

This conclusion is placed beyond doubt by the provisions of section 2 (3) [the section intended to be referred to is evidently 3 (3), for that is the section which empowers the Native Commissioner to determine the issue] of the regulations for the administration of Native Estates framed under section 23 of the Act and published under Government Notice No. 1664 of 1929, which lay down that in the case of a dispute the Native Commissioner shall summon before him the parties and such witnesses as *he may consider necessary* and shall summarily and without pleadings determine the issue; and also by the special provision for appeals contained in the concluding portion of section 23 (4)."

No one can quarrel with the correctness of the conclusion arrived at by the Court that the term " Native Commissioner " in section 23 (4) means the Native Commissioner in his administrative capacity and not the Court of the Native Commissioner, but where we, with respect, disagree with our sister Court is that that conclusion necessarily excludes the jurisdiction of the Native Commissioner's Court

Section 23 (4) provides one means of settling the disputes or claims in question, but there is no presumption that because a statue provides a special remedy for the infringe-

ment of a right conferred by the statue that other remedies are thereby necessarily excluded (Coetzee *vs.* Fick and Another, 1926, T.P. D., 213).

In the Case of Muggleston *vs.* Young (1919, C.P.D., 170) it was held that notwithstanding the interpleader procedure laid down by the Magistrate's Court Act, No. 32 of 1917, a claimant is not deprived of his Common Law right to sue the Messenger for the return of his property. Read in the light of these decisions it seems clear that the remedy open to a Native to invoke the aid of the Court of a Native Commissioner set up by section 10 is not excluded by the special provision for the settlement of disputes regarding Native Estates by the Native Commissioner in his administrative capacity in section 23 (4) of the Act.

It is to be noted also that section 3 (2) of Government Notice No. 1664 of 1929 provides that whenever it shall appear to a Native Commisioner that it is necessary, in connection with any property in an estate falling to be administered according to Native Law and Custom, that an inquiry should be instituted to determine the person or persons entitled to such property, he *may* call before him any person who may be able to furnish information in regard to the proper distribution of such property and, after hearing such persons as *he may consider necessary*, shall give directions for the distribution thereof. This section is clearly permissive and not imperative.

The discretion lies with him as to what number of witnesses and which particular witnesses he is going to hear and the parties have no control over him in that respect. The Native Commissioner may take the initiative in instituting an inquiry, but he is not bound to do so. It is only in the case of a dispute or question arising that the provisions of section 3 (3) of the regulations come into operation, and this lays down the manner in which the inquiry is to proceed. The Native Commissioner has a certain duty imposed upon him and he is told how to go about that duty.

" Where the prescriptions of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons, who have no control over those entrusted with the duty, without promoting the essential aims of the Legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words, as directory only." (Maxwell, on the Interpretation of Statutes, 7th Edition, p. 321. See also Driel *vs.* de Bruyn, 1918, O.P.D., 23.)

It would seem then that the use of the word " shall " in line three of sub-section (4) of section 23 of Act No. 38 of 1927 is merely directory imposing a public duty on the Native Commissioner, and section 3 (3) of Government Notice No. 1664 of 1929 instructs him how to go about that duty.

But it does not follow that because provision is made for an administrative inquiry that the parties to a dispute are bound to submit that dispute to such inquiry. There is no provision in the regulations for compelling the parties to submit to an inquiry.

In the absence of such provision either party surely has the right to demand that the matter shall be submitted to the decision of the appropriate Court.

Bearing in mind the various decisions of the Superior Courts to which reference has been made, we are of opinion that, while it was the intention of the Legislature to secure the expeditious and efficient administration and distribution of the property in a Native Estate by as simple and inexpen-

sive a procedure as possible, it was not the intention of that body by making regulations in that respect to close the doors of a Native Commissioner's Court to any Native litigant save only in those matters excepted by section 10 of Act No. 38 of 1927 and that, as a consequence, a Native Commissioner's Court has jurisdiction to determine a matter falling within the purview of sub-section (4) of section 23 of the Native Administration Act (Act No. 38 of 1927).

CASE No. 34

JOHN and HARRIET DUBE vs. SIMON DUBE.

KOKSTAD: 12th October, 1936. Before H. G. Scott, Esq., President, and Messrs. J. Addison and G. Kenyon, Members of the N.A.C.

Interpleader—Duty of Native Commissioner is to decide whether or not property attached is executable and not whether warrant of execution is valid—Institution of interpleader proceedings is admission of validity of writ.

(Appeal from Native Commissioner's Court. Mount Fletcher.)

(Case No. 80 of 1936.)

In 1934 Simon Dube brought an action in the Court of the Native Commissioner, Mount Fletcher, against John Dube for certain grain, bullets and a wallet. Harriet Dube was granted permission to intervene as co-defendant and in a counterclaim claimed from Simon Dube, *inter alia*, delivery of certain five cattle, one horse, and eighteen sheep belonging to the estate of the late Andries Dube, of which she was sole heiress by will.

The Native Commissioner dismissed the claim in convention with costs and granted absolution from the instance with costs on the counterclaim. An appeal and cross-appeal were noted to the Native Appeal Court, and that Court on the 6th February, 1936, dismissed the appeal of Simon on the claim in convention and allowed the appeal on the counterclaim and ordered defendant (Simon Dube) to deliver to Harriet Dube, to be held by her pending the appointment of an Executor to administer the Estate of her late husband, five head of cattle or their value, £25, one horse or its value, £10, and five sheep or their value, £2. 10s., and 6s. 9d. value of wool of sheep.

On 18th February, 1936, a warrant of execution was issued for £54. 12s. 9d. in respect of the judgment debt and costs and certain fourteen head of cattle were attached by the Messenger of the Court at various kraals

Simon Dube has now issued an interpleader action as agent and representative of the undermentioned claimants:—

Alton Mtchengu, in respect of 1 black and white heifer.
Nelani Mpeta, in respect of 1 red heifer tollie

Mbizo Dube, in respect of 1 red cow, white along back; 1 red and white heifer.

Mgobozi Ngcaza, in respect of 1 brown heifer.
Makeke Mphakachane, in respect of 1 black and white tollie.

The respondents proceeded to lead evidence, and at the close of their case the attorney for claimants applied that the cattle be declared not executable on the ground that the judgment of the Native Appeal Court was for five head of cattle and not for thirteen head, and further that the judgment was not for five specific head of cattle, and that Harriet Dube could therefore not vindicate these cattle. The respondent's attorney contended that the cattle should be declared executable as, apart from the judgment for five head of cattle, the respondents incurred heavy expenses in connection with the original case and all cattle disposed of by Simon Dube could be attached to satisfy the judgment including the costs.

The Assistant Native Commissioner declared the cattle not executable with costs and gave the following reasons:—

Facts found proved:

(1) That the respondents obtained judgment in the Native Appeal Court on 3rd February, 1936, against Simon Dube, amongst others, for five head of cattle or their value, £25.

(2) That on this judgment a writ of execution was issued on the 18th February, 1936, and amongst other cattle attached the six head forming the subject-matter of the present dispute were attached.

(3) That on 8th April, 1936, this Court in Case No. 79/36, against which judgment an appeal has been noted, declared certain four head of cattle to be executable. According to the evidence of Deputy-Messenger, Elijah Nqodi, one beast was attached at the kraal of the late Andries Dube, making five head in all.

Reasons for Judgment.—In view of the findings in (1), (2) and (3) the Court holds that only five head of cattle could have been attached and no more and all attachments in excess of this number, whether they be estate stock or not are not valid. In the original action the respondents should have claimed thirteen head and not five as first respondent admitted in his examination in chief. The Court accordingly declared the cattle non-executable with costs.

Against this judgment this appeal is brought by Harriet Dube only

The Assistant Native Commissioner appears to have misconstrued the position. His duty was not to decide whether the attachment was or was not valid, as that was not in question. His sole duty was to decide whether or not the stock attached was or was not the property of the claimants and whether, for that reason, it was or was not liable to execution.

The claimants by entering interpleader proceedings must be taken to have admitted the validity of the writ and the Assistant Native Commissioner in deciding that the stock was not executable for a reason other than that it belonged to the claimants went beyond what he was asked to decide. The Messenger was furnished with a warrant of execution requiring him to levy a sum of £54. 12s. 9d., and he was entitled under that warrant to attach sufficient stock to realize that sum

The appeal is allowed with costs, the judgment in the Court below is set aside, except in so far as the beast claimed by Nelani Mpeta is concerned, and the record returned in order that the actual claimants may, if so advised, lead evidence on their claim and thereafter for a fresh judgment to be entered.

CASE No. 35.

MTIYELWA MBULAWA vs. MAXESIBE MANZIWA.

PORT ST. JOHN'S: 11th February, 1936. Before H. G. Scott, Esq., and Messrs. E. F. Owen and M. Adams, Members of the N.A.C.

Adulterine child—Pondo custom—Cannot under any circumstances inherit property of his mother's husband—The illegitimate issue of husband can however inherit in absence of legitimate male children.

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

(Case No. 48 of 1935.)

The plaintiff claimed from defendant certain stock, grain and pots, and in his particulars of claim alleged, *inter alia*, that he is the son and heir of the late Menziwe Mbulawa.

Defendant in his plea denied that plaintiff is the son and heir of the late Menziwe, and says that during the subsistence of Menziwe's marriage according to Native Custom with one Magxiyana the latter committed adultery with one Ntlafunga and became pregnant by him, as a result of which plaintiff was born.

When the case came on for hearing it was agreed that the issue as to the legitimacy of plaintiff should be taken first, and the defendant led evidence to prove his allegation, and put in (by consent) the record of a civil action tried in the Court of the Resident Magistrate, Ngqeleni, on 22nd March, 1904, in which Menziwe obtained damages against Ntlafunga for adultery with Magxiyana.

Plaintiff's attorney, without calling evidence to rebut defendant's evidence, applied for judgment subject to evidence on other points on the ground that plaintiff is the heir, even if held to be an illegimate son of Menziwe's wife, since under Native Custom he is the son of his father the late Menziwe.

The Native Commissioner gave the following ruling, without deciding the question of fact as to plaintiff's legitimacy or illegitimacy:—

"In the opinion of this Court the plaintiff is the heir of the late Menziwe."

Against this ruling an appeal has been noted "on the grounds that the said judgment is wrong and bad in law and contrary to Pondo Custom".

It has frequently been held by this Court that merely to say that a judgment is wrong and bad in law and contrary to custom is not a compliance with Rule 10 (*b*) of Government Notice No. 2254 of 1928, which requires that the grounds of appeal should be clearly and specifically stated.

As, however, the Court was concerned with the one issue only, it is considered that for the purpose of this case there has been sufficient compliance with the Rule quoted.

The point of Native Custom at issue having been put to the Native Assessors they state:—

"According to Pondo Custom an adulterine child of a married woman can never in any circumstances inherit the property of her husband.

" Even if the child has been brought up at the husband's kraal and dowry paid for him from that kraal he cannot become heir.

" If the child is the illegitimate issue of the husband, even if fetched from elsewhere, he can inherit in the absence of legitimate male children."

This opinion is in conformity with the case of Nomboxula Umgcuka *vs.* Mdinwa Posiwe, 1930, N.A.C., p. 15, and is considered by this Court as a correct statement of Pondo Custom.

The appeal is allowed with costs, the ruling of the Native Commissioner is set aside, and the case is sent back for such further action in the Native Commissioner's Court as the parties may desire.

CASE No. 36.

MANYANGWENI MKUPENI vs. MARWEBA NOMUNGUNYA and Others.

Port St. John's: 4th June, 1936. Before H. G. Scott, Esq., President, and Messrs. E. F. Owen and J. H. Nicholson, Members of the N.A.C.

Damages, Claim for, by unmarried girl—Forcible abduction and seduction—Failure to observe "Twala Custom—"Ntlonze".

(Appeal from Native Commissioner's Court, Tabankulu.)

(Case No. 248 of 1935.)

The plaintiff, an unmarried girl and a minor, duly assisted, claimed from the three defendants jointly and severally, the one paying the others to be absolved, the sum of £25, less £3 paid on account, as damages for forcible abduction and seduction.

The Assistant Native Commissioner entered judgment in favour of the defendants, holding that this was an ordinary case of " Twala " according to Native Custom.

Against this judgment an appeal has been noted on the ground, *inter alia*, that in the circumstances disclosed in this case the said custom of twala had been abused and plaintiff had been the victim of an assault neither sanctioned nor contemplated by custom.

The Assistant Native Commissioner found the following facts proved:—

" Defendant Marweba knew plaintiff Manyangweni and had " Metshaed " with her—He arranged with his two friends Gunyeni and Notofa (second and third defendants) and plaintiff's aunt Mamadabase to twala her. She was taken to Sigxavane's huts, where she remained alone in the store hut with Marweba all night and connection took place with her consent. Next day the girl was found by Marweba's brother Mbozaboza and returned to her aunt's kraal. A report was made to plaintiff's father, who was living at another kraal, and he proceeded to Mbozaboza's kraal and demanded damages. A beast was paid and also a goat for the twala ".

Everyone of these facts, except the payment of the beast, was denied by plaintiff's witnesses, and it is clear that the Assistant Native Commissioner unreservedly accepted the defence evidence without giving any reason for disbelieving plaintiff's witnesses. In doing so he committed an error, as it was his duty to weigh carefully the evidence of the two sets of witnesses, and if he found he was unable to believe one set to have given his reasons for rejecting their evidence. As he had not done so, this Court is in as good a position as he was to judge the value of the evidence.

A perusal of the record discloses the following facts:—

That on the day in question plaintiff was in a hut about dusk with two other women, Mamadabase and Mantuka, when the three defendants came in. First defendant called Mamadabase out and the other two then caught hold of the girl and took her out, and when they got to the stock kraal first defendant caught up to them. At this point there comes a diversion in the story of the plaintiff and the defendants. Plaintiff says she was forcibly taken to Notshekete's kraal where the second and third defendants held her down while first defendant had connection with her and that this happened again the following morning. The defendants say she went quite willingly and when they got to the kraal first defendant remained alone in the hut with her and he then had connection with her with her full consent. The next day the three defendants went to a beerdrink leaving the plaintiff with one Novela. On their return they found Mbozaboza, first defendant's elder brother, who said he was looking for the girl, and took her away. The three defendants left the same day for Cweraland and did not return home. First defendant admits that he did not ask the girl's permission to twala her, nor did he report the twala to her father as is required by custom, and in fact he did not carry out any of the essentials of the Custom of twala. He did not even report to his elder brother, Mbozaboza, that he had carried off the girl in order to marry her. The flight of the three defendants to Cweraland shows that they were afraid of the consequences of their act and that they did not wish to face the inquiry which they knew was inevitable.

While it is recognized that the custom of "twala" is still largely practised among the natives, this Court is not prepared to countenance its use as a cloak for forcing unwelcome attentions on a patently unwilling girl. It is true, also, that in cases of real "twala" the girl does make a show of resistance as to appear to go too willingly would be regarded as a disgrace but in such cases it is always shown that the resistance is not serious.

In the present case the first defendant admits in his evidence that he knew the girl did not want to marry him as she had another lover. He does say that he was in love with her and she with him, but if this is so why did he not ask her permission to twala her?

That the plaintiff was not willing to be twalaed is evidenced by the fact that her father made a demand for ten head of cattle as damages and that she herself had brought this action.

It is suggested that the case was settled by payment of the one beast by Mbozaboza , but it is clear that that was not so, because the plaintiff's father distinctly stated at the time that he was accepting it as "Ntlonze" only, and not in settlement of the damages.

The record of the case does not disclose whether Native Law or Common Law was applied, and the pleadings only tend to obscure the position.

The plea to the summons was that the girl had been twalaed, which would be no defence in an action under Common Law where the girl was not a consenting party, and the notice of appeal states that the judgment is contrary to Native Custom.

In this case, however, it is an unmarried girl who sues. She would have no right of action under Native Law but would have one under Common Law. As no exception was taken to the summons it follows that the defendants accepted the position that Common Law must be applied.

In the opinion of this Court the Assistant Native Commissioner erred in finding that this was an ordinary case of twala and that the girl was willing. The defendants have been guilty of a serious assault on the plaintiff for which she is entitled to be compensated in damages.

The appeal is allowed with costs, and the judgment in the Court below altered to one for plaintiff as prayed, with costs, against the defendants jointly or severally, the one paying the others to be absolved.

CASE No. 37.

MBONI GULENI vs. NKANTOLO MARINQI.

Port St. John's: 3rd June, 1936. Before H. G. Scott, Esq., President, and Messrs. E. F. Owen and J. H. Nicholson, Members of the N.A.C.

Absolution judgment—Defendant is entitled to costs unless good cause shown for depriving him thereof.

(Appeal from Native Commissioner's Court, Port St. Johns.)

(Case No. 32 of 1935.)

The appeal in this case is solely on the question of costs.

Plaintiff sued defendant for the delivery of a certain beast or its value, £4, alleging that during or about the winter of 1931 he had agreed with defendant to deliver to him six sheep in exchange for a certain brown heifer. The plea was a general denial.

After hearing the evidence, the Acting Native Commissioner entered a judgment of absolution from the instance and made no order as to costs.

The appeal is on the ground that the Acting Native Commissioner erred in making the order he did, thus punishing the defendant, who successfully resisted the claim preferred against him.

In a written judgment the Acting Native Commissioner says:—

"I was dissatisfied with the manner in which both parties gave their evidence. . . . I cannot bring myself to believe that there was in fact no transaction whatever between the parties and that the whole of plaintiff's claim is entirely without foundation, but he has not satisfied me that his account of what occurred is true or that his claim is just. Again, I am not satisfied with defendant's witnesses. I feel convinced that there *was* some transaction between the parties, but what, I cannot discover. In these circumstances

I am not prepared to give judgment for either party, particularly as it appears that there is other evidence which might have been placed before the Court . . . as the plaintiff has not satisfied me that his claim is true and just and as I do not believe defendant's denial that any transaction whatever took place, absolution from the instance will be granted with no order as to costs."

After the appeal was noted the Acting Native Commissioner added the following reasons:—

"In reply to the notice of appeal, my judgment did not depend upon a successful opposition by defendant of plaintiff's claim. If this had been so, judgment would have been entered for defendant. I came to the conclusion that there had been some transaction between the parties, that plaintiff had, and defendant had not, performed his part, but what the transaction was I was unable to decide. In these circumstances I did not feel justified in entering judgment for, or awarding costs to, either party."

The additional reasons furnished by the Acting Native Commissioner are somewhat inconsistent with those given in his written judgment, for in the latter he says he was not satisfied that plaintiff's account of what had occurred was true or that his claim was just. If he found that plaintiff had carried out his part of the contract then his difficulty in ascertaining what that contract was is not understood. Be that as it may, the Acting Native Commissioner was unable to decide who was telling the truth. In the case of Forbes *vs.* Golach & Cohen (1917, A.D., 559) the Appellate Division held that the proper course in such a case is to grant absolution from the instance with costs.

In the present case the plaintiff failed to prove his case and no good reason has been shown for depriving defendant of the costs which would ordinarily follow the event.

The appeal is allowed with costs, and the judgment in the Court below amended by striking out the words "no order as to costs" and substituting therefor the words "with costs".

CASE No. 38.

MACEBO GXUMISA vs. SIDUBEDUBE and MNGAWOMILE.

Port St. John's: 16th October, 1936. Before H. G. Scott, Esq., President, and Messrs. H. Nourse and C. P. Alport, Members of the N.A.C.

Procedure—Adultery—Quantum *of proof—Evidence—Uncorroborated, insufficient—Irrelevant—Inadmissible.*

(Appeal from Native Commissioner's Court, Bizana.)

(Case No. 138 of 1935.)

This was an action for damages for adultery. In his particulars of claim plaintiff alleged that at divers times and places, more especially during the year 1932, the defendant Sidubedube committed adultery with his (plaintiff's) wife Madlomo, as a result of which she became pregnant and gave birth to a male child, of which plaintiff alleges defendant is the father.

The adultery was denied by the defendants. After certain evidence had been led for the plaintiff the following note appears on the record:—

"Mr. McLeod intimates that he is tendering to-day evidence of subsequent acts of adultery and is not prepared to offer any evidence to-day. The Court records that no matter what evidence is recorded about subsequent intimacy after the birth of the child does not prove that defendant is the father of the child, as made out in the summons, and further that the Court records that further evidence of intimacy subsequent to the birth of the child will not affect its decision, and in the absence of further evidence of adultery prior to the pregnancy of the woman. Mr. McLeod, in view of this ruling, does not propose to call further evidence but has evidence of subsequent intimacy available."

The Native Commissioner thereupon entered judgment of absolution from the instance with costs, and against this judgment an appeal has been noted on the following grounds:—

1. That the Native Commissioner wrongly rejected material evidence in support of the plaintiff's case.

2. That the evidence adduced in support of plaintiff's claim is sufficient to warrant the Court in giving judgment for the plaintiff unless and until the defendant has adduced satisfactory evidence to disprove the testimony adduced by plaintiff.

The only witness in regard to the adultery which resulted in pregnancy and the birth of a child as alleged in the summons is the plaintiff's wife. She says that when she found she was pregnant she took the pregnancy to one Nobula, accompanied by first defendant and others, being persuaded to do so by Blayi and Nobula (it is evident that someone else than Nobula is intended, as it is not likely that he would persuade the woman to take the pregnancy to himself). She goes on to say that she at first denied that she was pregnant, but when it was obvious that she was she named first defendant. If this is true, it is strange that she did not mention it to plaintiff's brother, Kwenqe. The latter says that the first time he knew that first defendant was the father of the child was when plaintiff told him of it after his return from work some two years or more after the birth of the child. He says also that the woman had refused to tell him. Plaintiff in his evidence says that his wife wrote and told him that the people at home told her to say that it was Nobula who was responsible and that the pregnancy was actually taken to him. No mention of first defendant was apparently made in this letter. It is difficult to understand why she should not have done so for, if her evidence is to be believed, she was not trying to shield him.

It is to be observed, also, that Madlomo did not say when and where the adultery with first defendant, which forms the basis of this claim, occurred. She makes the bare statement that she committed adultery with him.

Madlomo, Kwenqe and Qolweni (Madlomo's father) all gave evidence as to the catching of first defendant in the act of adultery with Madlomo, but these acts all occurred after the birth of the child born as a result of the pregnancy referred to in the summons.

It must be apparent that at the time summons was issued the plaintiff must have known of these catches, and it is significant that no claim in regard to them was made in the summons.

It was sought to call evidence in regard to the subsequent acts of adultery, presumably as corroboration of Madlomo's evidence in regard to the pregnancy, but the Native Commissioner refused to allow this to be done, and we are of opinion that he rightly rejected this evidence. The allegation in the summons was that the pregnancy was the result of the intercourse in 1932, which actually was ascribed to Nobula, and the fact that defendant had connection with her after birth of the child, if he did do so, is in no sense proof that he had connection with her prior to that event. The admission of that evidence would have seriously prejudiced him.

Having alleged that the intimacy occurred at a certain time, evidence of intimacy subsequent to that time was irrelevant in the absence of any allegation in the summons in regard thereto.

In the opinion of this Court the Native Commissioner rightly regarded the evidence of Madlomo with suspicion, and as her evidence was entirely uncorroborated he was, in the circumstances of this case, justified in entering a judgment of absolution from the instance.

The appeal is dismissed with costs.

CASE No. 39.

SIGXAMAMA NGQONDI vs. GRIFFITH GXARA.

PORT ST. JOHN'S: 15th October, 1936. before H. G. Scott, Esq., President, and Messrs. H. Nourse and C. P. Alport, Members of the N.A.C.

Damages for Assault: Award of reasonable.—Retaliation does not cause Plaintiff to be in pari delicto.

(Appeal from Native Commissioner's Court, Libode.)

(Case No. 150 of 1934.)

The appellant has appealed against an award of £50 as damages for an assault upon the respondent (plaintiff in the Court below) on the following grounds:—

1. That the Native Commissioner should have granted a postponement on account of the absence at the Transvaal Gold Mines of the defendant who has now returned.
2. That the parties in this case were actually in *pari delicto.*
3. That the damages awarded are excessive.

The first ground of appeal was abandoned by appellant's attorney.

In so far as the second ground of appeal is concerned, this Court is of opinion that the parties were not in *pari delicto.*

The evidence on record shows that defendant was the aggressor.

It is true both parties were prosecuted for affray, but the fact that the plaintiff was only reprimanded and discharged while defendant was fined £1, or in default of payment two weeks hard labour, indicates that the Court did not take a serious view of plaintiff's part in the affair.

Even if plaintiff did retaliate by striking defendant after he had himself been struck, he was justified in doing so.

In regard to the third ground of appeal, it appears from the evidence of the District Surgeon who treated plaintiff that he was suffering from a scalp wound three inches in length on the left side of the forehead and that the wound was through the scalp and the skull fractured. This wound healed after about two weeks. Four months later plaintiff suffered from severe headaches and was treated in the Ntlaza Hospital, where plaintiff says he was detained for three months. After that he was again treated by the District Surgeon who says plaintiff is suffering from traumic-neurosis, which is generally permanent, and that he would not pass him for work on the mines, and in his opinion he is unable to stand any physical or mental effort and that he is really incapable of work. He goes on to say that plaintiff can do casual labour, but only for short periods, and he places his disability at 60 per cent. to 70 per cent. The plaintiff paid £3. 18s. for medical attention.

It is clear that the blow originally delivered was a severe one, as it fractured the skull, and the weapon used, a knob-kerrie, was a dangerous one. As a consequence of this injury plaintiff is precluded from seeking work on the mines, and his earning capacity in other spheres of labour has been very materially reduced.

It appears also that he will never regain his full vigour, and in these circumstances the Acting Assistant Native Commissioner awarded £50 damages.

Now, whatever may be the view which this Court might have taken had this case come before it in the first instance, the question now before it is whether it should interfere with the finding of the Court below by reducing the amount of damages awarded. The Court, on appeal, will only interfere with the discretion of a magistrate in awarding damages if the Court considers that the amount awarded is grossly excessive or that the magistrate, in arriving at the amount, was unduly influenced by factors which should not have weighed with him (Tothill *vs.* Foster, 1925, C.P.D., 857). In the present case this Court is of opinion that the damages awarded are not so unreasonable or excessive as to justify it in reducing them.

The appeal is dismissed with costs.

CASE No. 40.

NOMTEBE and NOMHLANGENI vs. MZUMBE MHLATYWA.

PORT ST. JOHN'S: 15th October, 1936. Before H. G. Scott, Esq., President, and Messrs. H. Nourse and C. P. Alport, Members of the N.A.C.

Damages for Adultery—Quantum of proof—Evidence insufficiency of.

(Appeal from Native Commissioner's Court, Bizana.)

(Case No. 23 of 1936.)

This is an appeal against a judgment in favour of plaintiff (respondent) for three head of cattle or their value, £9, and costs, as damages for adultery alleged to have been committed with plaintiff's wife by first defendant (Nomtebe), the second defendant being sued as head of first defendant's kraal.

From the evidence it would appear that about February, 1935, plaintiff married by Native Custom one Malusizini, daughter of Njelo, and paid as dowry three head of cattle and £1. Shortly after the marriage he proceeded to work in order to earn money to buy a horse which was required from him as dowry.

Zinyokoto, plaintiff's elder brother, as the result of a letter received from plaintiff, went to see plaintiff's wife at her father's kraal. He says that Njelo gave him certain information, on which he took action against him before Headman Mdibaniso with a view to getting an order on Njelo to take him (Zinyokoto) to the kraal where the girl was. The Headman gave Zinyokoto an Induna, Pupa, who went with him to second defendant's kraal, where they found Malusizini cooking. This was between 10 and 11 o'clock in the morning. They questioned her and she made certain replies, but her statement is inadmissible as evidence against the defendants.

Zinyokoto says that he and Pupa then went into the hut where first and second defendants were and inquired what the woman was doing there, and that first defendant replied that she was his wife. Mkwenkwana, another witness for plaintiff, states that about the time the summons was issued he met second defendant near his kraal and asked what he was doing in that locality, and that he said he was taking Njelo's girl back to her home, and that he had been advised that there was trouble pending as she was someone else's wife. The woman was with second defendant and was carrying a bundle.

The defendants deny absolutely that the girl was ever at their kraal or that Zinyokoto and Pupa came to their kraal, and second defendant denies that he met Mkwenkwana and says he does not even know him.

Neither Njelo nor Malusizini were called, nor is there any evidence on record to show how long the woman, Malusizini, had been at the defendant's kraal. She was seen there on only one occasion and that was in the daytime. Evidence surely is available to show whether or not Malusizini was living at the kraal as a wife.

The only evidence on the record at present is an alleged admission by first defendant that he had married her and this is denied by him.

In the opinion of this Court the Native Commissioner was not justified in finding that adultery had been committed on the very scanty evidence on the record.

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

CASE No. 41.

RAFANA MBANGI vs. NJAJI MAVIYO.

Port St. John's: 16th October, 1936. Before H. G. Scott, Esq., President, and Messrs. H. Nourse and C. P. Alport, Members of the N.A.C.

Appeal—Withdrawal from proceedings of attorney for appellant in Native Commissioner's Court before close of case—Notice of appeal signed by appellant personally—Appellant's attorney in Appeal Court permitted to argue on additional grounds of appeal not contained in notice of appeal—Documents admitted by consent—Admissibility—Irregular for judicial officer to make reference in reasons for judgment to matter of which no note appears on record.

(Appeal from Native Commissioner's Court, Tabankulu.)

(Case No. 295 of 1934.)

A previous appeal in this case against a judgment in the Court below granting an order in favour of the plaintiff for the return of his wife, Mankanti, or alternatively the return of seven head of cattle, less five allowed as deductions for the children born to her, was prosecuted in this Court during August, 1935, when, owing to a gross irregularity on the part of the presiding officer in the Court below, the appeal was allowed. The whole of the proceedings, after the close of the pleadings, were set aside and the case was returned to be tried de novo before another judicial officer.

In terms of this order the case was duly tried *de novo* before a different judicial officer who, at the conclusion of the proceedings, entered judgment for the plaintiff as prayed with costs.

The plaintiff's claim was for the return of his wife, Mankanti, or the refund of twelve head of cattle paid as dowry, less five head for five children born of the marriage; or their value at £3 each, and the custody of the four surviving children.

Against this judgment an appeal has now been noted on the grounds that the judgment is against the weight of evidence and contrary to law.

The notice of appeal has been signed by the defendant personally owing to his attorney of record in the Court below withdrawing from the proceedings before the case for the defendant had been concluded.

In this Court, however, the defendant (appellant) was duly represented by an attorney who, in the circumstances, was permitted to avail himself of the rule of this Court permitting additional grounds of appeal to be argued where the party was not represented in the Court below.

The appellant's attorney accordingly elected to confine his arguments solely to the question as to whether certain irregularities had been committed in the Court below during the course of the fresh proceedings. His contentions, briefly set out, were:—

(*a*) That the record, No. 15 of 1924, in which the present appellant was the plaintiff and the present respondent the defendant, had been wrongly admitted.

(*b*) That certain dipping registers which had been admitted by consent were of no legal evidential value by reason of the fact that the dipping foreman had not been called to testify to the relative entries.

(*c*) That the presiding officer had committed a gross irregularity by including the following comment in his "Reasons for judgment", there being nothing whatever on the record to support this statement:—

"At this stage of the proceedings, after a short adjournment, Mr. Palmgren intimated that his client was prepared to compromise and consent to judgment and the case was postponed. Defendant went back on this and Mr. Palmgren then stated that he had no option but to withdraw from the case."

With regard to the appellant's contentions as set out in (*a*) and (*b*) above, the record clearly shows that the previous case, viz., No. 15 of 1924, as well as the dipping registers, were put in by consent of the parties. These exhibits were, therefore, rightly admitted, and in so far as the dipping registers were concerned this Court is of the opinion that it was unnecessary in these circumstances for the dipping foreman to have been called.

With regard to contention (*c*), this Court agrees that the presiding officer committed a very grave error of judgment in making reference to a matter which does not appear in the record, but it considers that the appellant has not been materially prejudiced thereby as there is ample evidence on record to justify the presiding officer in finding in favour of the plaintiff on the merits of the case.

The appeal is accordingly dismissed with costs.

CASE No. 42.

MABUKU MAQUTU vs. MGXULWA SANCIZI.

Port St. John's: 16th October, 1936. Before H. G. Scott, Esq., President, and Messrs. H. Nourse and C. P. Alport, Members of the N.A.C.

Native Custom—Taking of "Ntlonze" not confined to cases of adultery and may be taken by force from alleged wrong-doer—Costs.

(Appeal from Native Commissioner's Court, Bizana.)

(Case No. 69 of 1936.)

In the Court of the Native Commissioner, Bizana (plaintiff) sued defendant (appellant) for the return of two blankets and certain other articles, alleging that defendant had wrongfully and unlawfully and forcibly dispossessed him of them, alleging that he had stolen some of her peaches.

Defendant in her plea stated plaintiff was caught in her garden stealing peaches and that she took from him two blankets as "Ntlonze" or evidence, which she contended she was entitled to do. She stated also that she was willing to deliver the blankets as soon as he admitted that they were his property and that they were taken from him in the circumstances as above set out and handed the blankets into Court. She denied taking the other articles claimed. No evidence was led, and the claim to the articles other than the blankets was abandoned.

The Assistant Native Commissioner entered judgment in favour of the plaintiff for the return of the blankets and costs of suit, holding that the Native Custom of taking some article from an alleged *tort feasor* is applicable to adultery cases only, and that consequently defendant was not entitled to withhold the blankets in question even if the allegations in her plea were proved.

An appeal has been noted against the award of costs to plaintiff.

From the record it would appear that the blankets were taken on the 9th February, 1936, and summons was issued on the following day, and the blankets were handed into Court on the 24th *idem*.

The Assistant Native Commissioner, in his reasons for judgment, states that it is admitted that defendant had neither instituted action civilly for the recovery of the value of the peaches nor had she laid a charge against plaintiff for the theft of the peaches.

If any such admission was made a note thereof should have been made on the record. No such note appears.

In the course of argument plaintiff's attorney contended that defendant was not entitled to withhold the blankets and that this Native Custom is not applicable to cases other than adultery cases.

It is clear from the Assistant Native Commissioner's reasons for judgment that his judgment was based on the assumption that the Native Custom of taking "Ntlonze" applied to adultery cases only.

This point having been put to the Native Assessors, they state unanimously that the custom is not confined to cases of adultery and that "Ntlonze" may be taken by force from an alleged wrongdoer.

With this expression of opinion this Court is in agreement.

It follows, therefore, that defendant was justified in taking the plaintiff's blankets if she found him committing a tort in her garden, and the plaintiff's action for their recovery was premature, and defendant should not have been ordered to pay the costs (see A. Kumsha *vs.* L. Bokolo, 1933, N.A.C. 40).

The appeal will be allowed with costs, and the judgment in the Court below amended to read "For plaintiff for the return of the blankets. Plaintiff to pay costs of suit".

CASE No. 43.

MFIXANI MANUNGA vs. SITELO YEKISO.

UMTATA: 22nd. February, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and H. Nourse, Members of the N.A.C.

Widow—Child of—Ownership—When dowry of deceased husband not returned.

(Appeal from Native Commissioner's Court, Mqanduli.)

(Case No. 193 of 1935.)

In this case judgment was delivered on the 12th December, 1935, and an appeal noted on 27th December, 1935. A security bond for the costs of appeal signed by appellant's attorney for appellant and himself was filed, but the Clerk of the Court refused to approve of the sureties as sufficient.

In terms of Rule 8 (3) of Government Notice No. 2254 of 1928, the party noting an appeal or cross-appeal shall give security to the satisfaction of the Clerk of the Court in the sum of £5 for the payment of the costs of the other party.

It has been ruled by this Court that the obligation to furnish security within twenty-one days of the judgment appealed against is equally binding on the appellant as in the case of the notice of appeal itself (Buti Xoki *vs.* Jim Tshazi, 1932, N.A.C., 48), and allowed an objection to the hearing of an appeal on the ground that such security had not been furnished within the period laid down.

On inquiries being made it has been ascertained that the appellant's attorney was not advised by the Clerk of the Court of the non-acceptance of the security furnished. Had this been done there was ample time to have obtained other security. The appellant's attorney in this Court has undertaken to furnish the necessary security. In these circumstances, and as respondent's attorney does not object, this Court is prepared to allow the appeal to proceed.

The plaintiff's claim in the Court below was as follows:—

1. For three head of cattle or their value, £15, being dowry paid for one Nodabepi.

2. For ten head of cattle or their value, £50, being dowry of one Nomadebevana.

3. For a declaration of rights in respect of three minor children, Ntwazi, Sitoko and Sipaki.

The Native Commissioner entered judgment as prayed in respect of the first two claims but reduced the value to £3 each, and on the third claim declared plaintiff to be guardian of Ntwazi and entitled to her delivery, and awarded plaintiff costs of suit. Against this judgment an appeal has been noted.

The plaintiff is the elder brother and heir of the late Yoyo Yekiso, who entered into a customary union with Noleki, the daughter of Sikondo Mkona, the issue of which were two girls, Nodabepi and Nomadebevana. After Yoyo's death Noleki returned to her father's kraal, and while she was living there Nodabepi was married and five head of cattle were paid as dowry for her. Of these cattle Sikondo disposed of two and one was given to him by plaintiff for maintenance of the girl Nodabepi, and the balance plaintiff took away with him.

Subsequently defendant and Noleki "telekaed" Nodabepi and were paid two head of cattle, which they admit increased to three, and it is these cattle which form the subject of the first claim. Noleki and defendant allege that when Nodabepi got married her husband promised to pay six cattle and that plaintiff agreed to Noleki keeping the sixth beast, when paid, as an "isipipo" beast, and that this beast and another were paid as a result of the teleka. Plaintiff denies that he made any such arrangement, and this Court is of opinion that defendant has not proved that such a beast was given to Noleki.

In regard to the second claim, it is admitted in the pleadings that seven head of cattle were paid for Nomadebevana, one of which was lost or stolen shortly after receipt, and that there have been four increase. Three of the original cattle and one of the increase have died and defendant admits responsibility for the balance of six. Defendant claims also that he is entitled to retain these six head of cattle until the plaintiff should apportion to him two head, one for maintenance of the girl Nomadebevana, and one for the expenses incurred in connection with her marriage. It is admitted by defendant that he arranged Nomadebevana's marriage without consulting plaintiff and consequently he has no claim for wedding expenses (Loliwe Xosana *vs.* Gwama Dalasile, 3, N.A.C., 189). The Native Commissioner found on the evidence that defendant had failed to prove that he had maintained Nomadebevana, and with this finding this Court agrees. The claim for maintenance and wedding expenses must therefore fail.

It was argued before this Court that defendant should not be called upon to return any cattle that are not in existence. Now, it is clear from the evidence of both defendant and Noleki that they made no report to plaintiff of the death of these cattle until he came to claim them. It is established Native custom that a person holding cattle on behalf of another must report their death to the latter within a reasonable time, and if he does not do so he is liable to replace them.

In regard to the third claim, the Native Commissioner found that there had been a customary union between Noleki and defendant but that the girl Ntwazi, who was conceived as a result of their intercourse prior to marriage, was born at the

kraal of the woman's father before the marriage took place and awarded her to plaintiff. Assuming that the child was born in such circumstances, the question as to her ownership was submitted to the Native Assessors who state:—

"If the woman bore a child before she married defendant it belongs to the first husband, whose dowry had not been returned. It would not belong to the woman's father because he still retains the dowry, nor would the heir of the first husband have to pay any cattle, other than an isondlo beast, to obtain her. It makes no difference whether the child was born at the kraal of the late husband or at that of the woman's father."

The custom on the point seems clear but, in the opinion of this Court, the evidence as to whether Ntwazi was born before or after the marriage of her parents is inconclusive. Noleki, defendant, and Ndabempi all testify that Ntwazi was born after the marriage, and the only evidence in rebuttal is that of Sikondo, who says that she was born before the marriage. In the opinion of this Court the Native Commissioner was not justified in entering a final judgment on the evidence led.

The appeal is allowed and the judgment altered to "Absolution from the instance with costs in regard to the claim for the girl Ntwazi".

The remainder of the judgment is confirmed.

The appellant having succeeded in obtaining a substantial alteration to the judgment is entitled to the costs of appeal.

CASE No. 44.

POSELO QASHILANGA vs. NTSINTSI MTUYEDWA.

UMTATA: 21st February, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and H. M. Nourse, Members of the N.A.C.

Dowry—Action does not lie to compel payment of where Custom of "ukuteleka" obtains—Pondomise Custom, Practice—Appeal: Additional ground of.

(Appeal from the Court of Native Commissioner, Qumbu.)

(Case No. 133 of 1935.)

Plaintiff claimed six head of cattle, or £18, as balance of dowry for his sister, who was married to Mpakato, younger brother of defendant, and stated that the dowry was fixed at twelve head, of which six had been paid, and that defendant as head of the kraal had agreed to pay such dowry.

Defendant admitted the marriage but denied that at the time Mpakato was an inmate of his kraal or that he at any time promised to pay the balance of his dowry.

After hearing evidence, the Native Commissioner entered judgment for the plaintiff as prayed, with costs, and found as a fact that defendant had agreed to pay the balance of dowry for Mpakato out of the dowry of his daughter, Nomhlopu, when she married, that Nomhlopu has been married and dowry paid for her, and that defendant has failed to carry out his agreement.

Against this judgment an appeal has been noted on the following grounds:—

1. That it is not in accordance with Native Custom for a brother to agree to pay his brother's dowry, and that if the agreement be regarded as a common law contract then the Native Commissioner should have required evidence as to the benefit derived from the agreement by defendant and reason for his change of attitude in that the probabilities are in favour of the defendant.

2. That it is contrary to Native Custom in "Ukutwala" unions to retain the girl at the kraal of the bridegroom elect and that custom demands that she be returned to her parents' kraal pending acceptable arrangements regarding dowry. That it is submitted the girl was never returned to her parents' kraal according to the evidence, and as no definite arrangements were made regarding dowry at the time it would have been customary for plaintiff to have kept his daughter until the return of defendant from Burghersdorp.

3. That the dowry cattle actually paid did not belong to defendant and that the judgment is against the weight of evidence and probabilities of the case. It is submitted that the Native Commissioner erred and should have required further evidence from the plaintiff.

Six days later appellant's attorney gave notice that at the hearing of the appeal application would be made to this Court to include the following ground of appeal in addition to those previously supplied:—

> "No action to recover dowry exists under Native Custom as practised by the Pondomise tribe, and no custom exists for fixing amount of dowries, and that no judgment was competent in favour of plaintiff in the summons".

On formal application being made before this Court for the inclusion of the additional ground of appeal, respondent's attorney objected on the ground that it raised an entirely new defence which was prejudicial to the respondent.

Ample notice of the application was given, and the Native Commissioner dealt with the point in his reasons for judgment and the point raised is one merely of law and does not require evidence to be called to meet it, so it is difficult to see how the respondent is prejudiced by its non-inclusion in the original notice of appeal.

Following the decision of this Court in A. Mgabo *vs.* M. Bolokodlela (1933, N.A.C., 76) the application is granted.

In the case of Mzomba Zondile *vs.* Simanga Katana (3, N.A.C., 55), in giving judgment the President of the Appeal Court stated: "Plaintiff sued for balance of dowry on an alleged agreement to pay. This was denied by defendant, and the magistrate in his reasons for judgment very properly remarks 'that in cases of this kind the agreement to pay dowry must be proved absolutely'. When the custom of 'ukuteleka' obtains no action of this nature can be maintained. The remedy is to 'teleka' the woman. The Pondomise practise this custom". In the case of Monghayelana *vs.* Msongelwa (3, N.A.C., 292) it was also held that where the custom of ukuteleka obtains no action lies to compel payment of the dowry. The remedy is to retain the girl until the cattle claimed are paid. The Appeal Court further held that in that case no action lay either under Colonial law or Native custom (see also the case of M. Masheme *vs.* Scott Nelani, 4, N.A.C., 43).

As the parties are Pondomise, which tribe practises the custom of "ukuteleka", an action would not lie to compel payment of dowry in the absence of very definite proof of an agreement to do so which, in the opinion of this Court, the evidence in this case does not satisfactorily establish.

The appeal is allowed with costs, and the judgment in the Court below is altered to one of absolution from the instance, with costs.

CASE No. 45.

ZEKANI BOYA vs. NTLENENENGU NGQWANGQWA and Others.

UMTATA: 22nd February, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and H. M. Nourse, Members of the N.A.C.

Illegal siezure of cattle by herd boys—Whether acting within scope of employment—Onus on plaintiff—Liability of employers of herd boys.

(Appeal from the Court of Native Commissioner, Umtata.)

(Case No. 433 of 1935.)

In this case plaintiff sued defendants for £5 damages, in that on 16th May, 1935, and at Mpeko, Umtata District, the defendants herd boys and/or servants, acting in concert, and within the scope of their authority as defendants' herds and/or servants, alleging that plaintiff's cattle were trespassing upon alleged winter grazing, wrongfully and unlawfully siezed the said cattle and drove them to the kraal of the headman, by reason of which wrongful and unlawful action plaintiff was deprived of the possession, use and enjoyment of his cattle for almost a whole day.

Defendants pleaded denying that the said herd boys were acting in concert and within the scope of their employment, and consequently prayed for dismissal of the summons on the ground of misjoinder; they pleaded further that at a meeting in January, 1935, a certain defined area of the commonage was reserved for winter grazing, in which reservation plaintiff acquiesced, and that it was in terms of a general instruction issued at this meeting that any stock found grazing on the grazing area were to be taken to the headman; that certain herd boys, acting on this instruction and not on instructions from defendants or within the scope of their employment, finding plaintiff's cattle grazing on the reserved area, took them to the headman; that plaintiff is estopped from claiming damages for the actions of the herdboys because he acquiesced in the reservation, and finally that plaintiff suffered no damage whatever, as the cattle were handed back to him within an hour, during which time they suffered no injury and plaintiff no loss.

On application by defendants' attorney at the close of plaintiff's case, the Acting Additional Native Commissioner granted absolution from the instance with costs, and against this judgment an appeal has been noted on the following grounds:—

1. That the contention that native herdboys are not the servants and/or agents of their fathers or masters is not a sound one in law.

2. That as the defendants admit in their plea that their herdboys, who are named in the particulars of claim, seized the cattle from his (plaintiff's) possession and custody for an alleged trespass upon commonage alleged to have been reserved for winter grazing, and in as much as defendants seek to justify the acts of their herdboys, servants and/or agents, there is sufficient unrebutted evidence and proof upon the record of the case, that not only are the herdboys named the servants and/or agents of the defendants but that they were acting within the scope of their employment and/or authority as such for the benefit of the defendants, who (not the herdboys) would have a common interest in and derive a common benefit from the protection of grazing alleged by defendants to have been reserved in the Mpeko location, Umtata District.

3. That upon the authority of the case of Mbara *vs.* Landrey (1917, C.P.D., 599) and other decided cases, the judgment of absolution from the instance with costs is bad in law.

4. That the evidence as it stands discloses a *prima facie* cause and right of action, entitling plaintiff to recover damages against the defendants.

5. That plaintiff's case stands unrebutted and the trial Court has erred, therefore, in its judgment.

6. That generally the judgment is against the weight of the evidence and is bad in law.

In so far as the first ground of appeal is concerned, it would seem that this refers to a portion of the argument put up by defendants' attorney in applying for absolution from the instance, which argument does not appear to have influenced the Acting Additional Native Commissioner in arriving at his judgment. As it is not the arguments of the defendants' attorney which have to be considered by this Court, this ground of appeal falls away.

In regard to the second ground of appeal, the mere fact that defendants admitted that the herdboys siezed the cattle for trespass on reserved grazing ground does not render them liable for the act of those boys unless it is proved that their act was done in the course of their employment. In order to regard an act as done in the course of employment, it must have been done in furtherance of the object of the employment, or in what the servant believed to be in the interest of the master, or at least it must have been a matter incidental to the employment (Mbara *vs.* Landrey, 1917, C.P.D., at p. 603). Whether an act was done in the course of employment is a matter of fact and each case must be decided on its merits.

"A plaintiff who seeks to make a master liable for the negligent act of a servant must prove that the servant was acting in the course of his employment. That onus may be discharged by inference from established facts; but it does not seem to me to be shifted by the mere proof that the act was done at a time when and a place where the servant was in his master's employ". (Innes, J. A., in Mkize *vs.* Martens, 1914, A.D., at p. 391.)

Now the facts in the case under consideration, as deposed to by plaintiff and his witnesses, are that plaintiff's cattle were being driven to his kraal from the dipping tank, and when about a mile from the tank and while still on the commonage four boys, herds and servants of the defendants, appeared and drove the cattle off to the headman's kraal about a quarter of a mile away, where they were detained for some time and then handed back to plaintiff.

Can it be said that the herdboys in taking plaintiff's cattle from the grazing ground were acting within the scope of their employment? Their duty was to herd the cattle of their masters and to prevent them trespassing. It was no part of their duty to their masters to prevent cattle belonging to other people trespassing unless such trespass was over property which belonged to their masters or in which their masters had an individual personal interest. If the cattle had been trespassing on a reserved grazing area this, as the Acting Additional Native Commissioner points out, would be an infringement of communal rights, and is very clearly distinguishable from the rights of the individual land or stock owner. Had the boys been acting in the individual interests of their masters it was to be expected that they would have taken the cattle to the kraals of their employers and not to the headman.

As already pointed out, the onus of proving that the herdboys acted within the scope of their employment rests upon plaintiff, and this the Acting Additional Native Commissioner has found that he failed to do, and with this finding we are in agreement. That being the case a judgment of absolution from the instance was justified.

The appeal is dismissed with costs.

CASE No. 46.

SISI BIDA vs. WILSON NJOMANE.

Umtata: 24th February, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and H. M. Nourse, Members of the N.A.C.

Damages—Assault—Self-defence—Retorsion—Damages.

(Appeal from Native Commissioner's Court, Umtata.)

(Case No. 376 of 1935.)

The plaintiff claimed from defendant the sum of £50 as damages for an assault by hitting him with a stick and biting him on the thumb so severely that it became necessary to amputate it.

Defendant admitted that while being attacked by the plaintiff and in self-defence and in order to release himself from a strangle-hold he bit plaintiff's thumb.

The Acting Additional Native Commissioner found in favour of plaintiff and awarded £10 damages. Against this judgment an appeal and cross-appeal have been noted.

The grounds of appeal are:—

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

2. That judgment should have been in favour of defendant particularly as the judicial officer found as a fact that plaintiff had a strangle-hold on defendant by means of a strap hanging round the latter's neck and that he, defendant, was entitled to defend himself against this form of attack.

3. That the judgment is contrary to law in that the plaintiff was admittedly engaged in an unlawful act and cannot profit by his own misdoing.

4. That the damages awarded are excessive.

The cross-appeal is against the amount of damages awarded.

Respondent's attorney objected *in limine* to the third ground of appeal on the ground that it raises a new defence which should have been pleaded in the lower Court.

After argument the Court upheld the objection, with costs, and struck out the ground of appeal objected to for the reason that it was a defence which should have been pleaded in the Court below and could not be raised for the first time on appeal.

Appellant's attorney then applied to be allowed to insert the same ground of appeal as an additional ground of appeal. The application was refused for the same reason.

This matter has caused some difficulty, for the Acting Additional Native Commissioner has couched his reasons in somewhat general terms and finds merely that the defendant's version as to how he came to bite the thumb is feasible and more probable and that this was done in the course of an altercation.

The plaintiff's case is that while he was ploughing his land defendant came up and hit his oxen, one of which got loose, and as he was holding the yoke to inspan it again defendant first struck him with his fist on the chest and then with a stick on the shoulder. In order to defend himself he took out a skey, but he denies that he struck defendant with it, although he suggests that it may have scratched him during the struggle. It is denied that in the course of ploughing plaintiff's oxen crossed over into defendant's land and trampled his mealies. It is somewhat significant that plaintiff and his witness declare that they did not see defendant's tobacco bag. Plaintiff apparently wishes to leave the impression that he was attacked unprovoked and that he did not retaliate, and that his thumb was deliberately bitten for no reason whatever. His version of the affair was not accepted when both he and defendant were charged criminally with affray, for they were both convicted of that offence, and the Acting Additional Native Commissioner in the Court below finds that there was a struggle, that plaintiff had a hold on the strap of defendant's bag and that the defendant's version as to how he came to bite plaintiff's thumb is feasible and more probable. Now on these important points he has disbelieved the plaintiff, and it would have been of assistance to this Court if he had given a definite finding as to the trampling of the oxen in the land and whether plaintiff did or did not strike defendant with the skey.

In view of the discrepancies and evasions in the evidence of plaintiff and his witnesses, we think we should accept defendant's story in dealing with this appeal. He says that, seeing plaintiff's oxen trampling his land, in which there were mealies growing, he went up to remonstrate with him and that plaintiff said he was doing this as defendant's oxen had done the same to his land the previous year. Plaintiff told him to get out of the way, and he then stood in front of the oxen to stop them. He admitted in cross-examination hitting the oxen on the horns. One of the oxen got loose, was turned by a boy, and plaintiff held up the yoke to inspan it again, and when defendant told him not to inspan it in his land and tried to drive it out, plaintiff took a skey out of the yoke and struck him on the head felling him. As he was getting up plaintiff struck him another blow with the skey on the cheek. Plaintiff then got hold of the strap of his tobacco bag, which was round his neck, and began twisting it, thereby choking him, and it was then that he found plaintiff's thumb near his mouth and in order to release himself from what was a dangerous position he bit it once and immediately let it go again. This caused plaintiff to release his hold and the matter then ended.

In these circumstances can he be blamed for taking advantage of the proximity of plaintiff's thumb and biting it to get out of what he evidently considered was a dangerous position?

The case of Mulvullha *vs.* Steenkamp (1917, C.P.D., 572) is one which approximates somewhat closely to the present one. There the plaintiff had struck defendant on the neck with a sjambok and defendant retaliated by striking him on the shoulder with a kerrie. Plaintiff then threw defendant down and got on top of him. Defendant managed to get up and plaintiff then tried to get the kerrie away. Defendant struck plaintiff a blow over the head with the kerrie and inflicted a serious injury. In giving judgment on appeal Gardiner, J., said: "He inflicted a severe injury, and the magistrate is of opinion that he used excessive violence in defending himself. Possibly that is so, but I am not concerned with the question whether he is criminally liable, but with the matter of civil liability. It may well be that the Crown, which has an interest in preventing breaches of the peace and the use of excessive violence in self defence, was entitled to prosecute and obtain a conviction. But can the man who started the fight by the use of such a weapon as a sjambok, who continued it by getting through the fence and endeavouring to disarm defendant of his means of defence, claim damages for the injury he has brought upon himself?"

De Villiers on Injuries (p. 212) puts the law clearly when he says: "It is a good defence to an action of injury that the act complained of was one that was demanded by the exigencies of legitimate self-defence against unjust aggression . . . It may happen that a person who is attacked acts in excess of what is required by the exigencies of self-defence; if then the force used in repelling force is in unreasonable excess of what the urgency of the case demanded, such an excess is in itself an act for which the person first attacked may be held at least criminally liable. When the excess is not utterly unreasonable the Courts would probably not too closely scrutinise whether the act of self-defence is exactly commensurate with that which the impending danger required; for, in the first place, not only is the defence of one's self or of others a right but it may also be a duty; secondly, the very act of self-defence is usually by the nature of the case committed at a time when there is no opportunity of paying a regard to the exact limits which may be held on consideration to be commensurate with the original act of agression; which, indeed, is not at any time, as a rule, an easy matter to accomplish; and thirdly, considerable allowance must be made for the state of mental excitement which, as a rule, follows an aggression upon the person."

It is clear therefore that where there has been an excess of violence in defending oneself, criminal liability may exist but it does not follow that an action for damages will lie. Each case must be treated on its merits.

It is evident that what weighed with the Acting Additional Native Commissioner in arriving at his decision were the consequences that followed on the plaintiff's thumb becoming septic. If the sepsis and subsequent amputation had not followed, it is improbable that he would have found that defendant had exceeded the requirements of self-defence. Now, if defendant was justified in biting plaintiff's thumb at all, then he cannot be held liable in damages merely because sepsis subsequently set in and the injury consequently became aggravated. There is nothing to show what really was the cause of the thumb becoming septic. It is suggested that it might have been due to the fact that defendant was suffering from pyorrhea. On the other hand it is just as likely that it was due to plaintiff allowing dirt to get into the wound.

We are of opinion that, in all the circumstances of the case, the defendant did not exceed the bounds of self-defence to such an extent as would justify damages being given against him.

The appeal will be allowed with costs and the judgment in the Court below altered to one for defendant with costs.

The cross-appeal is dismissed.

CASE No. 47.

JOHANNES TONJENI vs. CHARLES TONJENI.

UMTATA: 22nd February, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and H. M. Nourse, Members of the N.A.C.

Native Estate—Testamentary dispositions—Marriage by Christian rites before Annexation—Colonial Law does not apply to and it has effect of ordinary Native Customary Union only and a "house" according to Native Custom is created—Movable property allotted to or accruing to such house cannot be devised by will—sub-section (1) of section 23 of Act No. 38 of 1927—Costs ordered to come out of estate.

(Appeal from Native Commissioner's Court, Qumbu).

(Case No. 160 of 1934.)

In the Court below plaintiff (respondent) claimed from defendant (appellant), in his capacity as executor testamentary of the estate of the late Jantje Tonjeni, a declaration of rights in regard to all the movable property in that estate and the delivery of that property.

The following facts are common cause:—

1. That the late Jantje Tonjeni married his late wife Sannah by Christian rites in the Cofimvaba District, Tembuland, prior to the annexation of that Territory in 1885.

2. There was no male issue of such marriage.

3. Plaintiff is the nephew of the late Jantje Tonjeni and his heir according to Native law and custom.

4. Jantje Tonjeni by will dated 30th April, 1920, which is admitted to have been duly executed and to be valid appointed his grand-nephew, Jacob Punga Tonjeni, his sole heir, and defendant, Jacob's father, the executor of his will, administrator of his estate and guardian of the heir.

5. That Sannah Tonjeni predeceased her husband, who died on the 4th November, 1933, and the will, death notice and inventory were duly filed and Letters of Administration issued to defendant by the Master of the Supreme Court.

6. That included in the inventory were certain cattle, horses, sheep and goats and certain claims in favour of the estate amounting to £29. 15s., which amount was reduced during the course of the action to £12. 15s.

The plaintiff contended that this property belonged to the "house" of the late Jantje Tonjeni and was not capable of being devised by will in view of the provisions of section 23 (1) of Act No. 38 of 1927, an dthat he, as heir according to Native law and custom, was entitled to succeed to it.

The defendant objected to the jurisdiction of the Native Commissioner's Court on the ground that the validity of the will was in dispute. The objection was overruled.

Defendant also pleaded estoppel on the ground that as plaintiff had not filed his claim with the Master of the Supreme Court within the period fixed by the executor pursuant to section 46 of Act No. 24 of 1913, as it was contended he should have done, he was now estopped from proving his claim to the estate by action against the executor.

In his plea defendant contends that as the late Jantje Tonjeni admittedly left a valid will his estate is correctly being administered in accordance with the Administration of Estates Act of 1913, and that as the late Jantje Tonjeni died after the passing of Act No. 38 of 1927 that Act would apply to his estate and any property devised by will receives its statutory sanction. He contends further that as the marriage between the late Jantje Tonjeni and his late wife was a Christian monogamous union no " house " according to Native custom was established, and consequently the property in the estate did not fall within the purview of sub-section *one* of section 23 of Act No. 38 of 1927 and, therefore, was capable of being devised by will.

The Native Commissioner entered judgment in favour of plaintiff for the delivery to him of certain specified stock or their value, for an account to be rendered of the increase in the sheep and goats since the filing of the inventory, and the delivery of such increase, if any, to him and ordered the costs of the action to be borne by the estate.

Against this judgment an appeal has been noted on grounds which it is not necessary to set out in full as they are merely a repitition of the pleas and objection.

The points which this Court is called upon to decide are:—

1. Whether the Native Commissioner's Court had jurisdiction to try the action in view of the contention that the validity of the will was in question.

2. Whether plaintiff was estopped from bringing the action against the executor because he had not lodged his claim with the Master of the Supreme Court.

3. Whether, in view of the fact that the marriage was a Christian monogamous union, a " house " according to Native custom had been established to which property would accrue in accordance with that custom or whether Colonial law would apply to that marriage.

In regard to the first point, we are of opinion that the validity of the will itself was not in question, but merely whether certain property in the estate of the late Jantje Tonjeni was or was not capable of being devised by will. If any of the property devised fell within the purview of sub-sections (1) and (2) of section 23 of Act No. 38 of 1927, the will would be inoperative in so far as that property is concerned but that would not render the will itself invalid.

In regard to the second point, it seems to us that there is no substance in the contention that plaintiff should first have lodged his claim with the Master of the Supreme Court, and that only in the event of that officer declining to recognize it could he bring an action against the executor. The Master does not administer the estate nor is there any duty cast upon a creditor to lodge his claim with him. It is clear from section 46 of Act No. 24 of 1913 that any claim against the estate must be lodged with the executor, and if

he rejects the claim he is the right person to be sued. It was argued before this Court on the authority of the case of Setlaboko *vs.* Setlaboko (1, N.A.C., 275), that while defendant held the office of executor he was the right person to administer and distribute the estate, even thoug that might have to devolve according to Native law and custom. Sub-section 7 of section 23 of Act No. 38 of 1927 as amended by Act No. 9 of 1929 appears to us to dispose of this argument for it provides that neither the Master nor any executor appointed by him shall have any powers in connection with the administration and distribution of any portion of the estate of a deceased native which falls under sub-sections (1) or (2).

It remains only to deal with the third point.

According to the death notice of the late Jantje Tonjeni, filed of record, it appears that he married his wife, Sannah, by Christian rites without antenuptial contract about 1872 at Cofimvaba, Tembuland, long before the annexation of that Territory to the Cape of Good Hope. From this document it also appears that prior to the marriage by Christian rites he lived with his wife in a Native customary union.

Before this Court appellant's attorney admitted that all the authorities were in favour of the view that Colonial law would not apply to a marriage according to Christian rites between persons residing in any of these Territories prior to their annexation. In the case of Sekeleni *vs.* Sekeleni (21. S.C., 118), it was laid down that a marriage contracted in East Griqualand prior to its annexation would have no effect other than that of an ordinary Native marriage. This decision was followed in so far as Tembuland is concerned in the case of Rosie Peter *vs.* Mkwane (2, N.A.C., p. 152), and Luti *vs.* Siqola & Siqola (2, N.A.C., 160). If, then, such a marriage has only the effect of an ordinary Native marriage it follows that a "house" according to Native custom was created and as in the present case there was only one wife her house would be the Great House.

In the case of Fenekiso *vs.* Sikade (5, N.A.C., 178), it was held to be indisputable Native custom that all property not otherwise allotted and adventitious property acquired by a kraal head belonged by custom to his Great House, and that it is not competent for a native to disinherit his heir without showing cause at a public meeting. It is provided in sub-section (1) of section 23 of Act No. 38 of 1927 that all movable property belonging to a native and allotted by him or accruing under Native law and custom to any woman with whom he lived in a customary union or to any house shall upon his death devolve and be administered under Native law and custom. As the marriage of Jantje and Sannah Tonjeni had the effect only of a Native customary union, it follows that the section quoted applies, and it was not competent for the former to devise his property by will away from the heir under Native custom who is, admittedly, the plaintiff.

The appeal is dismissed.

In regard to the costs of appeal, it was argued on behalf of respondent that the estate should not be burdened with the costs but that appellant should be ordered to pay them *de bonis propriis*. In the opinion of this Court the appellant was justified in defending the action and bringing it on appeal and it sees no reason for making him pay the costs personally.

It is ordered that the costs of appeal be borne by the estate.

CASE No. 48.

MKWENKWANA NQWILISO vs. SINYUKO NQWILISO.

UMTATA: 15th June, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and L. M. Shepstone, Members of the N.A.C.

Costs, award of—Plaintiff liable on issues on which he was unsuccessful and to be awarded costs on issues on which he was successful.

(Appeal from Native Commissioner's Court, Tsolo.)

(Case No. 345 of 1935.)

In this case plaintiff claimed from defendant nine head of cattle, twelve reims, twelve strops, one axe, the door and roof of a hut, one chain. The total value amounting to £31. 10s.

In his plea defendant admitted that the door and roof claimed were in his possession and stated that he is and always has been prepared to hand same over to plaintiff upon payment of £1. 5s. due by plaintiff in respect of moneys lent to him by defendant.

No counterclaim for the £1. 5s. was entered nor was any tender made either before issue of summons or afterwards. The Native Commissioner found that there was insufficient evidence in regard to the loan of the money and entered judgment in plaintiff's favour for the door and roof or their value £1. 15s., for defendant in respect of six of the cattle claimed and absolution from the instance in regard to the balance of the claim, and ordered plaintiff to pay costs of suit.

Practically all the evidence was directed towards the claim in respect of the stock and other articles, and only a few lines in regard to the door and roof.

The appeal in this case is solely on the question of costs, on the ground that the plaintiff was partially successful in his action in obtaining judgment for the door and roof of the hut, no tender to deliver which had been made, and that his claim to the stock was not found to be frivolous and unnecessary litigation

The ordinary rule of law is that the plaintiff should have the costs of the issues on which he succeeds and that defendant should get the costs of issues successfully pleaded and proved by him (Fripp *vs.* Gibbon & Co., 1913, A.D., 357), where the issues are unextricably interwoven and it is difficult, if not impossible, to "wholly" allocate any particular item to any particular issue the party mainly successful will be entitled to a general order for costs in his favour (Pelser *vs.* Levy, 1905, T.S.). When a party is successful on some issues and unsuccessful on others costs if severable must be apportioned accordingly (Policansky *vs.* Herman & Canard, 1911, T.P.D., 319). The issues in the present case are not so inextricably interwoven that it is not possible to separate them. The claim for the door and roof was quite separate from the other items claimed, and if defendant had made a tender of them he would then have been liable for costs only to the date of tender. Instead of doing so he detained them pending payment of an amount which the Native Commissioner found he had not proved was due to him and consequently plaintiff was forced to come to Court to obtain his property. Plaintiff will have to pay the costs of those issues on which he was unsuccessful and he should not be penalised further by being made to pay all the costs.

In the opinion of this Court the Native Commissioner did not exercise a judicial discretion in ordering plaintiff to pay all the costs. The appeal is allowed, with costs, and the judgment in the Court below amended by awarding plaintiff costs on the claim in which he succeeded and defendant costs on the claims in which he succeeded.

CASE No. 49.

DANISO MLANJANA vs. NOMPOFU and Another.

UMTATA: 15th June, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and L. M. Shepstone, Members of the N.A.C.

Adultery—Evidence in proof of—Defendant found at night in hut alone with plaintiff's wife with door closed and no light strong presumptive evidence of adultery—Onus to rebut on defendant—In absence of such rebuttal plaintiff entitled to judgment.

(Appeal from Native Commissioner's Court, Tsolo.)

(Case No. 385 of 1935.)

This is an appeal from a judgment by the Assistant Native Commissioner in favour of defendants in an action for damages for adultery. The defendants were called upon to enter appearance on 3rd January, 1936, and as they failed to do so judgment was entered against them on 16th January, 1936. On the 28th *idem* this judgment was rescinded and the hearing proceeded. The plaintiff's case is that his wife and first defendant were caught in the kitchen hut at his kraal by Gqagqa and Mapupu. The story of these two witnesses is that they had been to a beerdrink at the kraal of one Mguniso, which they left about sunset, leaving plaintiff's wife and first defendant there. Late that night they went to plaintiff's kraal to inspect it. Hearing voices in the kitchen hut they went there and Gqagqa pushed open the door and found first defendant in there with plaintiff's wife. The woman ran out and first defendant was in the upper part of the hut. They took from him a bag, blanket and stick and drove him and the woman to the headman's kraal, where the woman is alleged to have admitted the adultery and first defendant is alleged to have admitted having been found in the hut but denied the adultery. Next day the woman was taken to first defendant's kraal and she there denied the adultery. On being taken before the Headman again she denied the adultery. The Headman did not give judgment in the case. The first defendant denies that he was caught in the kitchen hut at plaintiff's kraal with the latter's wife, and says that Gqagqa and Mapupu met him on the road, forced him to go back to plaintiff's kraal, where they took from him his bag and stick and then took him to the Headman where they took his blanket.

The Assistant Native Commissioner has found as a fact that the first defendant was found in the kitchen hut with plaintiff's wife on the night of the alleged adultery. There is ample evidence to support this finding, and it was incumbent upon defendant to give some explanation of his presence there. The fact that he was found with plaintiff's wife alone in the kitchen hut at that late hour with the door closed and without a light creates a very strong presumption against him, and this he has not attempted to

rebut; and this, coupled with the woman's admission that adultery had been committed that night, is, in the opinion of this Court, sufficient to establish the charge against defendant. It is true that the woman subsequently denied the adultery, but she has given an explanation of her reason for doing so which is not unreasonable.

In the case of Ngonyolo *vs.* Beyana (5, N.A.C., 5), where it was proved that a woman was found at night in another man's hut, this Court held that in the circumstances the magistrate was correct in holding that adultery had taken place. The position in the present case is exactly similar.

In the opinion of this Court the Assistant Native Commissioner erred in holding that there was no proof of adultery.

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

CASE No. 50.

JEMIMA TITI vs. MAUDE TITI.

Umtata: 15th June, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and L. M. Shepstone, Members of the N.A.C.

Surveyed building allotment—Use and occupation of after decease of registered holder who during his lifetime had contracted three marriages by Christian rites—Terms "Great House", "Right Hand House" and "Qadi" not applicable to wives successively married by Christian or Civil rites—Widow of registered holder's deceased son has no right to dispossess widow of registered holder of occupation of lot.

(Appeal from Native Commissioner's Court, Umtata.)

(Case No. 950 of 1935.)

The plaintiff claimed (*a*) a declaration that she is entitled to reside at the kraal of the late John Titi during her lifetime, and (*b*) an order ejecting the defendant from such kraal and restraining her from in any way interfering with any matters appertaining to that kraal.

The Additional Native Commissioner ordered defendant to remove from the Building Lot No. 173, in the Xongora Location, Umtata, within seven days from the date of judgment and to cease all interference with the buildings on the aforementioned site.

It is common cause that the late John Titi was married four times. His first wife, Nomaki, and his second wife, Majam, were married by Native Custom. He subsequently married Nomaki by Christian rites and Majam then left her kraal and never returned.

Nomaki's eldest son, born before the Christian marriage, was Samuel. Samuel married one Jemima by Christian rites and had a son Hemming Sonwabu, who is described as the heir of the late John Titi's Great House. After the death of Nomaki, John Titi married successively by Christian rites Emma, who died leaving no male issue, and Maud, the present plaintiff, whose eldest son is admittedly heir to what is termed John Titi's "Right Hand House".

John Titi in his lifetime was the registered holder of a building Lot (No. 173, Xongora Location, Umtata), on which the plaintiff has been living ever since her marriage. Samuel Titi also resided on this lot until about 1922 when he removed to Tabase, where apparently he has a kraal site. The Additional Native Commissioner has found as a fact that there is in existence a building lot registered in Samuel Titi's name and this is not disputed.

On or about 24th November, 1935, the defendant came to plaintiff's kraal and possessed herself of the keys of the buildings, assumed full control thereof, installed herself therein, and ordered plaintiff to leave. This action is admitted by defendant, but she justifies it on the ground of her son's legal right to live at the Great Kraal and her right to live with him.

An appeal against the judgment has been noted on the following grounds:—

(1) That it is against the weight of evidence and contrary to law inasmuch as,

(2) the kraal in question is clearly the Great Kraal of the late John Titi;

(3) appellant's minor son is the heir of John Titi in the Great House;

(4) The Respondent is in the position of a Qadi of the Right Hand House;

(5) the effect of the judgment is to place the Qadi of the Right Hand House in complete and sole control of the Great House to the exclusion of the minor heir and of his mother;

(6) that a building site for the respondent's house is in existence, and the mere fact that the late John Titi as a matter of convenience unlawfully utilized that building site as a garden and kept the respondent at the Great Kraal is no reason in Law for perpetuating that position after his death;

(7) that as the Right Hand House has received its stock, the question of usufructuary interest in the stock at the Great House falls away;

(8) that the proper place for the stock of the Great House is the Great Kraal, and the proper persons to live and control that stock at the Great Kraal are the minor heir, Hemming Sonwabu, with his mother the appellant;

(9) whilst it is admitted that in Law, respondent may have the right to occupy the Great Kraal after John Titi's death, such a right is subject to her clear and unequivocal acknowledgment of the right of the heir to be there also; and as she is refusing to recognise that right, it is necessary that she be removed to the Right Hand Kraal building site or that the position of the parties be referred to a meeting of relatives to decide that question.

From plaintiff's evidence it would appear that prior to the survey of the Umtata District, the late John Titi had a kraal site which, on survey, was not included in the residential area set aside, and he accordingly gave it up and was granted the surveyed building lot now in question. On this lot he lived with Nomaki and Emma and subsequently with plaintiff. Alongside this lot was another building allotment registered in the name of Samuel Titi, and below these is one registered in the name of Majam, the wife who went away after John Titi married Nomaki by Christian rites.

Can it be said that the late John Titi had any Great Kraal? He had only one building lot, on which he lived with the wives successively married by Christian rites, and had no separate allotments for each of his wives. The terms

Great House, Right Hand House and Qadi are applicable to the wives married according to Native Custom and cannot, in the opinion of this Court, be applied to wives married by Christian or Civil rites. As was said in the case of Mavayeni *vs.* Mavayeni (5, N.A.C., 91): "Whatever the status of the second of two wives successively married by Civil rites may be, this Court is not prepared to accept the proposition that she is comparable to the wife of the minor house where the marriage had been contracted according to Native Custom."

With this statement of opinion we are fully in agreement and consider that it is wrong to describe the plaintiff as the Qadi of Right Hand House of the late John Titi, and that the building lot in question cannot be said to be the "Great Kraal" in the sense in which that term is ordinarily used in describing the establishment set up by a native who marries according to Native Custom.

This being so, the building lot registered in the name of Majam is not the proper place for the plaintiff to reside, and she cannot be compelled to remove to it from the place where she has resided during the whole of her married life. Plaintiff's right is to the use and occupation of the immovable property belonging to the deceased (i.e. John Titi) and held by him under title granted under the provisions of Proclamation No. 227 of 1898 [see section 9 (1) of Proclamation No. 142 of 1910]. The defendant has a similar right to the building lot registered in Samuel Titi's name, but she has no rights whatever over the late John Titi's immovable property. It is urged that Hemming Sonwabu, being heir to the late John Titi, is entitled to reside on his building lot; but he is also heir to Samuel's lot. He cannot have two lots and will eventually be required to elect which of the two lots he desires to retain, but that election has not yet been made and cannot be made until the death of the respective widows of John and Samuel Titi. It may happen that he does not elect to retain John Titi's lot, in which case it would be reallotted in terms of Proclamation No. 264 of 1933.

Even granting that the heir, as such, is entitled to reside on John Titi's lot, this does not entitle his mother, who has no personal rights there, forcibly to take occupation of that lot and dispossess the plaintiff thereof. The judgment in the Court below does not in any way interfere with the heir's rights if and when he decides to exercise them. He is a boy of very tender years and has not, so far as this Court is aware, expressed a desire to live at any particular place.

The appeal is dismissed with costs.

CASE No. 51.

VEYISHILE TONOSE vs. XABANO TONOSE.

UMTATA: 15th June, 1936. Before H. G. Scott, Esq., President, and Messrs, H. E. F. White and L. M. Shepstone, Members of the N.A.C.

Right of father to eject his son from his kraal for good cause.

(Appeal from Native Commissioner's Court, Engcobo.)

(Case No. 76 of 1936.)

The plaintiff in the Court below claimed against defendant an order of ejectment from his kraal, on the ground that for some years he, by reason of his quarrelsome nature, threats, assaults, disobedience to plaintiff's orders, and wrongdoings, has been a source of constant anxiety and expense to plaintiff and has made the peaceful occupation by plaintiff of his kraal impossible.

The defendant denied these allegations and claimed that he is entitled to reside at the kraal in question as it is the Great House Kraal, of which he is the heir. He alleges also that plaintiff has diverted and is still diverting property appertaining to the Great House to the Right Hand House without consulting him.

The Assistant Native Commissioner has accepted the evidence of the plaintiff on the following matters of which he complains:—

(1) Defendant will not obey his instructions generally.

(2) He has on various occasions been called upon to pay damages for defendant's torts and now desires to rid himself of this responsibility.

(3) The defendant has on occasions assaulted him.

(4) Defendant neglects to carry out ordinary kraal duties properly.

(5) Owing to these differences it is impossible for plaintiff to reside in one kraal with defendant, and if the ejectment be not granted he fears that grave consequences may result.

(6) Defendant has been warned by authorities to behave himself and to obey his father without result.

The defendant denies practically everything his father says, but has to admit that plaintiff had complained to the police about his assaulting him and also that his father had brought him before the magistrate with a view to disinheriting him. Now, it is evident that the plaintiff would never have taken the extreme step of attempting to disinherit his son without some very good reason.

There is no evidence that plaintiff is diverting property from his Great House to his Right Hand House beyond a bald statement by defendant and his witnesses to that effect. They allege that defendant called meetings of relatives in regard to the alleged diversion, but no one who was present thereat has been called.

This Court agrees with the finding of the Assistant Native Commissioner on the facts.

It is very common practice for a father to order any of his sons to set up an establishment for himself, and such an order does not in any way necessarily imply that the father is thereby disinheriting his son (Mkeqo *vs.* Matikita 1, N.A.C., 242). In the present case the plaintiff has specifically stated that he does not intend to disinherit his son. The evidence in this case does not disclose whether the plaintiff's is a surveyed kraal-site held under title or whether it is unsurveyed and merely held under certificate of occupation. The latter would appear to be the more probable. The case of Mavayeni *ve.* Mavayeni (5, N.A.C., 91) dealt with the right of occupation of a surveyed kraal site, and it was held that it is an established principle of Native Custom, which has long been recognized by this Court, that the head of a family is under an obligation to maintain and support the members thereof and that they are entitled to reside with him at his kraal and cannot be ejected therefrom without some good and sufficient cause. Even if that case can be said to apply to the present one we are of opinion that plaintiff has shown good and sufficient cause for having his son ejected.

The appeal will be dismissed with costs, but the defendant will be allowed three months from the date of this judgment to obtain another kraal site and erect his huts.

CASE No. 52.

NTLAMVANA SIGOGO vs. NATANGA NOGAYA.

UMTATA: 15th June, 1936. Bafore H. G. Scott, Esq., President, and Messrs. H. E. F. White and L. M. Shepstone, Members of the N.A.C.

Ubulunga Custom—When temporary ubulunga becomes permanent—Executable for debts of husband.

(Appeal from Native Commissioner's Court, Tsolo.)

(Case No. 353 of 1935.)

The respondent (Matanga Nogaya) obtained judgment against one Manuka, and certain seven head of cattle were attached in the possession of appellant. The respondent led evidence to show that the cattle in dispute are progeny of cattle paid as dowry for judgment debtor's sister, and the claimant led a certain amount of evidence to the effect that they are the progeny of a temporary ubulunga beast given to Manuka's wife, who was claimant's sister.

The claimant's attorney then stated that his case was based on the fact that the cattle attached are the progeny of a temporary ubulunga beast given shortly after East Coast Fever and which had never been replaced by a permanent ubulunga, and asked for a ruling.

The Native Commissioner ruled: "That if a temporary ubulunga beast is not replaced by the first heifer born to it or by any other permanent beast, and the temporary ubulunga is not taken away, the latter becomes a permanent ubulunga, and it and its progeny are attachable for the debts of the husband."

Claimant's attorney then intimated that he did not wish to adduce further evidence, and the Native Commissioner thereupon declared the cattle exccutable. Against this judgment an appeal has been noted on the ground that a temporary ubulunga beast remains such no matter how long it is with the donee and that neither it nor its progeny can be attached for the debts of the husband of the donee, and further that the donor may at his leisure select any beast out of the progeny of the temporary ubulunga beast as a permanent beast and this beast and its progeny are no longer the property of the donor, but such selection does not affect the remaining cattle, which remain the property of the donor.

The point at issue being one entirely of Native Custom is submitted to the Native Assessors who state:—

"We found that ubulunga cattle can never be seized at all. No fixed time is set as to when a permanent ubulunga beast can be allotted. The cattle can remain with the girl for any length of time even up to the time when her daughters get married without any allotment of a permanent beast being made. If any one came forward and said a definite time is fixed for the allotment of a permanent beast he would be quite wrong. We do not agree with the opinion of the Native Assessors in either of the cases Jakavula *vs.* Melane and Mpambani *vs.* Masipula."

The first sentence of this opinion is in direct conflict with the many decisions of this Court that ubulunga cattle are attachable, and we do not accept it.

In view of the statement of the Assessors that they do not agree with the opinions expressed in the cases of Jakavula *vs.* Melane (2, N.A.C., 89) and Mpambani *vs.* Masipula (Tsolo Case No. 4/1920, not reported), it is desirable to lay down some definite rule.

The opinion expressed by the Assessors in the case of Jakavula *vs.* Melane was as follows:—

"That the custom of temporary ubulunga is a common one, and when such a temporary ubulunga beast is given its first heifer calf must be allocated, as soon as it is weaned, as the final ubulunga."

And in the case of Mpambani *vs.* Masipula:—

"That in cases where a temporary ubulunga beast is given to a woman, its first heifer calf becomes a permanent ubulunga, and that the original beast then ceases to be an ubulunga animal, being either restored to the giver or regarded as Nqoma."

The case of Rulwa *vs.* Kiliwa (2, N.A.C., 90) would appear to be in conflict with that of Jakavula *vs.* Melane. In this case Rulwa claimed four head of cattle which he said were a temporary ubulunga beast and its three increase. After plaintiff's evidence the magistrate dismissed the case, holding that under Native Law ubulunga and dowry could not be dissociated. On 27th July, 1910, the Appeal Court in setting aside this ruling said:—

"In this case it is alleged that a temporary ubulunga beast was placed with defendant's wife by plaintiff and it has increased, and under circumstances such as these the plaintiff would be entitled to recover the balance of existing cattle upon his allocating the final ubulunga beast," and returned the case to be heard on its merits. On further hearing, the magistrate gave judgment for the defendant, finding that the animal in question had not been given as temporary ubulunga.

The case came before the Appeal Court again on the 15th November, 1910, which dismissed the appeal and referred to the case of Jakavula *vs.* Melane. No reasons were given by the Appeal Court in dismissing the appeal, but the reference to Jakavula's case seems to indicate that it approved of that decision.

In the present case the alleged "temporary" beast was given about 25 years ago, and no allocation of a permanent beast has been made, and, in these circumstances, we are of opinion that the original beast must be regarded as a permanent ubulunga and that it and its progeny are liable to attachment for the debts of the husband of the woman to whom it was given.

We are further of opinion that Custom requires that allocation of the permanent beast must be made after the first heifer calf of the temporary beast is weaned, and if this is not done within a reasonable time the original beast becomes the permanent ubulunga.

The appeal is dismissed with costs.

CASE No. 53.

1939 (T&N) 82.

MAFUMANA MAPELO vs. PANGALELE MPUNZIMA.

UMTATA: 15th June, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and L. M. Shepstone, Members of the N.A.C.

Practice and Procedure—Appeal from Chief's Court to Native Commissioner—section 12, Act No. 38 of 1927—section 8, G.N. No. 2254 of 1928—"Hear and determine as if a case of first instance"—Meaning of—Not primarily an appeal.

(Appeal from Native Commissioner's Court, Umtata.)

(Case No. 658 of 1935.)

The plaintiff (respondent) sued defendant (appellant) in the Court of Chief Regent David Dalinyebo for a declaration of rights in respect of two girls, Nomanana and Nomtshewu, alleging that they were illegitimate children of Nozita, wife of his grandfather Wagada Mpantsha, whose heir he is.

Defendant alleged that Wagada had rendered Nozita pregnant and had paid five head of cattle as damages but had never married her. He denied that she had ever been married to any man, and said the two girls who form the subject of this action had been picked up while living at her people's kraal and claimed them as his.

The Chief Regent gave judgment in favour of plaintiff, holding that as Wagada's heir he was entitled to the girls. An appeal from this judgment was noted to the Court of the Native Commissioner at Umtata.

In the latter Court defendant, in his notice of appeal, stated that the Chief's judgment in regard to Nomanana was wrong in law as she was a married woman and that Nontandazo (*alias* Nomtshewu) appertained to him (defendant) according to Native Custom, and in his reply to the plaintiff's statement of claim stated, *inter alia*:—

" Defendant denies that plaintiff has any claim or right to the girls Nomanana and Nomtshewu or to any dowry cattle paid for them or either of them or that may be paid for them or either of them in the future."

When the case came on for hearing, defendant's attorney applied for an amendment to this paragraph by adding the following words at the end thereof: " in as much as Nozita was, after the death of Wagada, given in marriage to one Mhlekevu Ngxukume, and the girls Nomanana and Nomtshewu are the issue of such marriage and belong to the said Mhlekevu Ngxukume ".

Objection was taken to this amendment on the ground that it raised an entirely new defence and one inconsistent with the defence raised in the Chief's Court.

The Additional Native Commissioner upheld the objection and declined to allow the amendment.

After hearing evidence, the Additional Native Commissioner upheld the Chief's judgment, and against this judgment an appeal has been noted on the following grounds:—

1. That the Additional Native Commissioner, in dealing with the merits of the case, *de novo* erred in being influenced by evidence alleged to have been given in Chief David Jongintaba's Court, as this Court is not a Court of record, and the maxim *omnia praesumuntur rite esse acta* cannot be applied to the proceedings and evidence alleged to have been given therein
2. That evidence in a Chief's Court cannot be used as a test to credibility unless it is confirmed in the Native Commissioner's Court by the sworn testimony of either the Chief himself or of a member of the " Ibandla " who was present at the hearing of the case.
3. That it is established in this particular case that certain evidence alleged to have been given in the Chief's Court is not only hearsay and inadmissable but that the Chief's record of it as set out in his reasons is inaccurate and not dependable.
4. That the Chief should furnish reasons for his judgment and not the alleged testimony of witnesses, as the latter course must necessarily impair the independence and functions of the Native Commissioner's Court and prejudice litigants in that Court (i.e., the Native Commissioner's Court).

5. That the Native Commissioner erred in not allowing the amendment to paragraph 3 of defendant's reply to plaintiff's statement of claim.

6. That plaintiff's case is meagre and inconclusive.

7. That the probabilities and evidence fully support the marriage of Nozita to Mhlekevu, and that the girls Nomanana and Nomtshewu, *alias* Nontandazo, are the issue of this union; moreover, there is a legal presumption that they are the issue of such union.

8. That the judgment is against the weight of the evidence and the probabilities of the case.

9. That in any event the Trial Court should have awarded defendant three head of cattle upon the latter's alternative defence to the claim.

Before the chief's Court, Situnzi Matiso and Gengqa Nqalasha made statements on behalf of plaintiff. The only witness for the defendant was Ntsibantu Mlisana, who knew nothing about the matter.

The witnesses Situnzi and Gengqa also gave evidence before the Additional Native Commissioner. Their evidence is to the effect that about 30 years ago they were asked by Wagada to negotiate for a marriage with Nozita, and that a marriage was arranged and seven head of cattle paid as dowry, and Nozita lived with Wagada as his wife for some years and gave birth to twins.

After Wagada's death she returned to her people, where she " picked up " certain illegitimate children, including the two girls in question. Wagada's dowry was never returned.

The defendant's case is that Wagada merely rendered Nozita pregnant and paid damages but never married her, consequently plaintiff has no claim to the two girls not born of that pregnancy.

Before the Chief's Court defendant claimed these girls as his own property and said Nozita was never married to anyone, and in the Native Commissioner's Court he took up the same attitude, at any rate with regard to Nomtshewu, and then attempted to put up a new defence that she was married to one Mhlekevu Ngxukume and consequently the girls belong to the latter. This was an entirely new defence, quite inconsistent with the attitude taken up in the Chief's Court and in the Native Commissioner's Court in the first instance, and was, in the opinion of this Court, rightly disallowed, but as a matter of fact evidence of this defence was led and not objected to.

In giving evidence before the Native Commissioner's Court, the defendant stated that at the time of Nozita's pregnancy he was a boy herding stock and gave a circumstantial account of what took place, such as the sending of Nozita with Pupani and Nondada to report the pregnancy, the payment of damages, the birth of her child, and that she never lived with Wagada even for a day. According to his own statement made in April, 1936, he was circumsised 16 years ago, so that at present he would be at most about 34 years of age. He says the pregnancy of Nozita occurred before the East Coast fever (1911), and consequently at that time he could not have been more than 8 or 9 years old and would have practically no knowledge of what actually took place. If the evidence of Situnzi and Gengqa is correct, the happenings in connection with Nozita occurred 30 years ago, and therefore defendant could only have been about four years of age.

Defendant led evidence to the effect that Nozita was married to Mhlekevu Ngxukume and dowry of six head of cattle paid for her, but the evidence in regard to the

marriage is very weak and unsatisfactory. Pupani's evidence on this point is of very little service to defendant, for he was not present and he was only told about it.

This witness was at the Chief's Court but did not give evidence, and in the Native Commissioner's Court he pretended he was a disinterested party and not related to Mhlekevu, whereas the evidence of his Headman shows that he was not speaking the truth and, in fact, was brother to Mhlekevu. It is not possible to regard him as a reliable witness. The only other witness is Mhlekevu's Great wife and she is rather vague, and her evidence is at variance with that of Pupani: She says Mhlekevu married Nozita after 1918, while Pupani says Nozita died in 1918. As Wagada died in 1911, it is extremely unlikely that Nozita would have remained unmarried for such a long time. Mhlekevu, the man who is supposed to have married Nozita, was not called either before the Chief's Court or before the Native Commissioner's Court.

One of the girls in question, Nomanana, is married and dowry was paid for her. Defendant arranged the marriage, provided the wedding outfit, and accepted the dowry and had it registered in his own name. He says he told Mhlekevu about this case and that Mhlekevu says he is going to talk about his children. This is not the attitude one would expect if he had really married Nozita.

In his reasons for judgment the Additional Native Commissioner states:—

"As the case is an appeal from a Chief's Court, I was of opinion that under section 12 of Act No. 38 of 1927 and the rules prescribed by Government Notice No. 2255 of 1928, the matter should be dealt with primarily as an appeal. In view of this I held I was entitled to take notice of the claim and reply of the defendant, together with the evidence as recorded in the Chief's Court, which I contend now forms part of the record of this Court".

The position from the aspect of the Judicial Officer's right to take cognizance of evidence led in the Chief's Court has already been dealt with in the case of Jora Nqeto *vs.* Nkomo Zinzile, heard at the present session of this Court, and there is no necessity to repeat what was then said beyond this that the Additional Native Commissioner is wrong in his contention.

In regard to the statement that the case should be dealt with primarily as an appeal, we are not prepared to say that this is a correct statement of the position. Admittedly the rules with regard to appeals from Chief's Courts are very sketchy and leave much to be desired in many respects but it could never have been intended that matters coming from Chief's Courts should be dealt with as appeals, otherwise provision would not have been made for the Native Commissioner's Court to deal with it as if it were a case of first instance and for him to give judgment only after hearing all the evidence tendered by the parties or deemed desirable by the Court [Section 12(4), Act No. 38 of 1927].

In the case of Jubete Mkize *vs.* Bonifase Mkize [1934, N.A.C. (N: & T:) 25], heard in the Natal and Transvaal Division of the Appeal Court, it was held, by a majority, that these matters should be treated primarily as appeals.

In a dissenting judgment Mr E. H. Lowe, one of the members, stated:—

"I have not been able to arrive at the same conclusion regarding the appeal as to costs. I am not satisfied that rule 8 was framed to obviate a plea of *res judicata* and to provide for a written record, and no more. Had that been all

the rule was intended to do, there would scarcely have been the need for the words used, ' hear and determine the case as if it were a case of first instance ", nor for the last clause of the rule.

" In incorporating Courts of Native Chiefs with our judicial system, a practice and procedure which are at variance with our own in some very important aspects have been given a degree of recognition. Under our system there is a continuity of practice running through all our Courts, from the lowest to the highest, so that no party may suffer prejudice in the passing of an action from one Court to a higher by any break or variation in judicial practice. The highest Court lays down the practice which becomes the practice of all Courts.

" Courts of Native Chiefs are however *sui generis*. In the first place their judicial practice is not based upon the decisions of the higher Courts. In the important question of onus, their practice varies from our own. The onus is not on the party who makes the charge or claim to prove it. The onus is on the party suffering the charge or claim to rebut it. Again, hearsay evidence, however remote, is acceptable evidence. It becomes manifest, then, that under those circumstances, there is danger of prejudicing the parties when a case passes from the lower Court, where Native judicial practice is in vogue, to the higher where a different, that is, our own, practice obtains. It is significant also that although as Courts of first instance, Courts of Chiefs stand on the same footing as those of Native Commissioners; appeals from Chief's Courts, as we know, lie to the Native Commissioner and not to this Court.

There is not possible the continuity of practice and procedure, which our system of jurisprudence provides for and demands, for Native Commissioner's Courts are bound by our own practice and procedure, under which the onus is placed on the party who makes the charge, and the acceptance of hearsay evidence is bound by strict rules.

" To provide for the switch over from one practice to another, some machinery was required. This machinery of necessity had to provide for a definite limit to the Native practice and procedure, after which our own practice and procedure must come into use. There was, in my view, no other way but a clear break from the practice which varies from our own in so many important aspects.

" This to my mind is the real significance of Rule 8, and explains the words ' hear and determine ' in the rule, and gives meaning to the last clause of the rule.

In this case the Commissioner, in my judgment, was right in his decision on the question of costs. Under our practice and procedure, the respondent became the plaintiff and was entitled to costs. To say that the appellant, having succeeded in the appeal from the Chief's Court to the Native Commissioner's Court, becomes entitled to costs appears to me to establish a link between our practice and that of the Chief's Court, to limit and confine which to such Courts was in my mind the particular intention of Rule 8.

" In my view the appeal on the question of costs should be dismissed with costs.

We are in agreement with this dissenting judgment and feel compelled to state, with respect, that we are not prepared to follow the majority decision in the case quoted.

Although it may be taken as a general rule that where inadmissible evidence has been allowed in and has influenced the mind of the Judicial Officer, the judgment should not be allowed to stand, such rule must be open to the exception that if the Appeal Court, whose duty it is to re-hear the

case, is satisfied that apart from such evidence the other evidence of the case leaves no room for doubt that the judgment appealed against was right and did justice between the parties, and that to over-rule the judgment would be to work injustice. The Court of Appeal should be free to refuse to interfere (Retief Bros. *vs.* du Plessis, 1928, C.P.D., 387. See also Buys *vs.* Nancefield Trading Stores, 1926, T.P.D., 513, and Lacey & Co. Ltd., *vs.* Desai & Co., 1927, T.P.D., 842, quoted in 1927, Bisset & Smith, Col. 12.)

In the case of Jora Nqeto *vs.* Nkomo Zenzile, already referred to, this Court held that the evidence, apart from the inadmissible evidence, was not sufficiently strong to enable it so say that the judgment should stand. The present case, however, differs from that one in that all the witnesses who gave evidence before the Chief's Court also gave evidence before the Native Commissioner's Court, and the judgment in the latter Court was based on that evidence, although the Additional Native Commissioner erred in treating the case primarily as an appeal from the Chief's Court.

We are satisfied that the evidence leaves no room for doubt that the woman Nozita was married to Wagada, and that the defence that she was married to Mhlekevu was merely a subterfuge with a view to defeating plaintiff's claim, and we are not perpared to disturb the Additional Native Commissioner's finding.

As an alternative defence to plaintiff's claim the defendant stated:—

"That, alternatively, failing his (defendant's) defence upon the merits of the suit, he will claim from the plaintiff "isondlo" cattle and wedding and Ntonjana expenses (if any) in respect of the said two girls".

The defendant in his evidence stated that he was not claiming isondlo from plaintiff, but intimated that he would do so from Mhlekevu. To be consistent in his defence he had to say he was not claiming isondlo from plaintiff, but it is clear that these girls grew up at his kraal and that he arranged the marriage of the one and provided a wedding outfit.

The plaintiff recognized that these cattle were due for, after judgment and before the appeal was noted, he caused a letter to be written to defendant's attorney offering to allow him three head of cattle for isondlo. No reply to this letter appears to have been sent.

No counterclaim was made in respect of the isondlo cattle nor was judgment given for any specific number of cattle in either the Chief's Court or Native Commissioner's Court. The only judgment given was a declaration of rights in respect of the two girls, and no decision was given as to the actual number of cattle paid for Nomanana.

The deduction for isondlo can be made when the dowry is handed over to plaintiff.

The appeal is dismissed with costs.

CASE No. 54.

MASILINGANE MANCE and Another vs. OPILE BLAATYE.

UMTATA: 15th June, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and L. M. Shepstone, Members of the N.A.C.

Practice—Security Bond—Where rejected by Clerk of Court, Appeal not duly noted.

(Appeal from Native Commissioner's Court, Cofimvaba.)

(Case No. 7 of 1936.)

The appeal in this case was noted on the 21st March, 1936, but the security bond was rejected by the Clerk of the Court and appellant's attorney duly notified.

The appeal has consequently not been duly noted.

The attorney for appellant in the Court below has addressed a letter dated 5th June, 1936, to the Clerk of the Appeal Court, Umtata, in which he applies for a postponement of the hearing of the appeal and states:—

"The reason is that the appellant's desire to deposit £5 cash security for costs and do not wish to sacrifice stock in order to do so. They require time to raise the money by other means, and incidentally the first-named appellant has gone to the mines for the purpose of acquiring the money".

Mr. Muggleston who appeared for respondent objected to the postponement.

The letter of appellant's attorney does not comply with the rules of this Court. His proper course is to make written application for a condonation of the irregularity in regard to the noting of the appeal. The reasons given for the application to postponement are inadequate, and this Court is not prepared to accede to his request.

The appeal is struck off the roll with costs.

CASE No. 55.

NTULI NOMANDI vs. MAHLOYEHLO NTLANGENI.

UMTATA: 15th June, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and L. M. Shepstone, Members of the N.A.C.

Great House—Second wife married after death of Great Wife who left an heir in Great House—Status of second wife—Pondomisi Custom.

(Appeal from Native Commissioner's Court, Tsolo.)

(Case No. 11 of 1936.)

The plaintiff claimed from defendant nine head of cattle, dowry for one Nokuma, and in his particulars of claim alleged that he is the heir of the Right Hand House of the late Nomandi and that defendant is the grandson and heir of the Great House of the said Nomandi, that about four years ago Nokuma, a daughter of the Right Hand House of Nomandi, was given in marriage by defendant's father, who received six head of cattle as dowry for her, which cattle have increased to nine head.

Defendant in his plea denied that plaintiff is the heir of the Right Hand House of Nomandi, but says that Nomandi first married as his Great Wife, Manxityana, who gave birth to defendant's father. After her death Nomandi married Manxopwe, the mother of plaintiff, Nokuma and others and put her in Manxityana's place to carry on the Great House, and contended that he as heir of that house is entitled to the dowries paid for Manxopwe's daughters.

The Assistant Native Commissioner found as a fact that Nomandi had three wives; Manxityana, Manxopwe, and Manjomase, married in the order named, but that Manxopwe was put into the Great House, and entered judgment for defendant with costs.

Against this judgment an appeal has been noted on the following grounds:—

"That it is contrary to the usual Native Custom for a wife to be placed in a house to revive the same, when there is an heir born to such house.

"That such defence was a special one and the onus was on the defendant to prove the same, which he failed to do, and, further, the magistrate in his reasons for judgment, did not find it proved. Consequently, the plaintiff should automatically have succeeded in his action."

Plaintiff and his younger brother both give evidence as to Manxopwe's status, but that evidence is necessarily only hearsay. Ntunja Mbotya states that Nomandi asked him to help make beer for the circumcision of the son of his Right Hand House son, the plaintiff. Bozolo Mboco states that he remembers Manxopwe's marriage and that he went to ask for her in marriage, that he went with the "duli" party, when they were told that she was to be the wife in the Right Hand House. The evidence of this witness is wholly unreliable, for he says Manxopwe was married about 1885, and he admits that at the time of Hope's War (1880) he was a small herd boy. It would be entirely opposed to Native Custom for such a young boy to be engaged in marriage negotiations.

The only other evidence for the plaintiff is that of Magade Madapu, who says that his sister, Manjomase, Nomandi's third wife, was the Qadi of the Great House.

On behalf of defendant, Ngxetezo Vika, who styles himself grandfather of the parties, states that before Manxopwe was married a family meeting was held at which it was decided to pay dowry for Manxopwe and that she should take over the Great House and was made Ntlangweni's mother, Ntlangweni being the father of Defendant.

Mgobodela Magxavule, a younger brother of Nomandi in another house, states that defendant's father Ntlangweni was always regarded as the heir of Manxopwe and that Nomandi's third wife was of the Right Hand House.

Qungu Mkondweni, a Headman, states that if an heir is born to a woman and she dies, it is customary to marry another woman and put her into that house.

The facts of this case having been put to the Native Assessors, they were divided in their opinion: The Assessors E. C. Bam (Tsolo), Bungani Mgudlwa (Engcobo), and Ndevu Jubasa (Qumbu), gave the following opinion: "If the wife dies leaving a son, the house of that woman is regarded as being still in existence by reason of there being an heir. A man marries, and if he likes he can take another woman from his late wife's people or a stranger and put her into the house of the deceased woman, and she is called the mother of the boy of the deceased woman, but, properly speaking, she is not the mother of the boy, and she only comes to look after the boy, but her rank is that of the Right Hand wife. She would be quite distinct and have her own establishment. Then the man marries a third wife, and she would be the Qadi of the woman first married, and the Right Hand wife would be freed from any responsibilities to the first house and the Qadi would take up those responsibilities.

Assessors Dudumayo (Mqanduli) and Mkondweni (Tsolo) stated: "If the Great Wife die, leaving a male child, another woman is married into that house to be his mother and look after him. She would be looked upon as the wife of that house. The Right Hand wife cannot be married as long as

that boy has no mother. If the woman is married and put into the house of the deceased woman this would be announced at the time of the marriage, otherwise she would be the Right Hand wife. Her sons would be regarded as the younger brothers and her daughters as the sisters of the son of the deceased wife. This is the custom applying to the Pondomisi".

The latter opinion is in agreement with that given in the case of Ntlangweni *vs.* Mkwabane (4, N.A.C., 381) and which was accepted by the Court as a correct statement of Custom applying to the Pondomisi.

This Court is of opinion that plaintiff has failed to establish that his mother, Manxopwe, was the Right Hand wife of the late Nomandi, and that the evidence shows that she was married into the Great House and consequently defendant would be entitled to the dowries of her daughters.

The appeal is dismissed with costs.

CASE No. 56. 1939 (T&N) 82.

JORA NQETO vs. NKOMO ZENZILE.

UMTATA. 15th June, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and L. M. Shepstone, Members of the N.A.C.

Practice and procedure—Appeal from Chief's Court—Section 7, G.N. No. 2255—Section 1 (4), Act No. 38 of 1927—Native Commissioner must determine case only on evidence before him—Cannot base findings on evidence of witness called before Chief's Court only and not called before Native Commissioner—Hearsay—Prejudice.

(Case from the Native Commissioner's Court, Umtata.)

(No. 227 of 1935.)

In the duly constituted Court of Chief Regent David Dalindyebo Nkomiyahlaba, Zenzile sued Jora Nqeto for twelve head of cattle which he claimed to be his own personal property. In that Court judgment was given in favour of the plaintiff for the full number of cattle claimed, and the defendant appealed to the Native Commissioner's Court at Umtata. In accordance with Rule 7 of Government Notice No. 2255 of 1928 (Chief's Civil Court Rules) the Chief Regent furnished particulars of the claim lodged with him, the reply of the defendant thereon, the judgment of the Court and the order thereon which incorporated the reasons for judgment. In addition to the above, the Chief also forwarded the statements of the witnesses who appeared before him. These statements necessarily were not on oath, the Chief having no power to administer an oath, and there was no cross-examination of the witnesses.

On the case coming before the Additional Native Commissioner, he recorded evidence of both parties and then entered judgment for the plaintiff (Nkomiyahlaba) for the delivery of twelve head of cattle and costs, thus confirming the Chief's judgment. Against this judgment an appeal has been noted on the following grounds:—

1. That it is submitted that the Additional Native Commissioner for the District of Umtata erred and acted irregularly in not deciding the credibility of the evidence for himself instead of being influenced by and acting upon evidence alleged to have been given in Chief David Jongintaba's Court, which is not a Court of Record and to which the *omnia Praesumuntur rite esse acta* rule of evidence does not apply, and was thus wrongly applied to the prejudice of defendant's case.

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

3. The fact that a certain black cow and a dun heifer were dead was not challenged by the plaintiff, consequently no judgment for the delivery of these cattle should have been given against defendant.

4. That as specific cattle were claimed the Court should have specified the cattle for which it gave judgment.

Dealing with the first ground of appeal the Additional Native Commissioner in his reasons for judgment states:—

" I was satisfied from the evidence of Wikili, Ngevayo, and Fota that three head of cattle were purchased from defendant by Wikili for the late Stephen, and that these cattle, after Stephen's death, were removed to the kraal of defendant, where they eventually increased to seven. The defendant's reply to this portion of the claim is a total denial, in which he is only supported by his sons, though the defendant's statement and that of Headman Mvumbi before the Chief's Court indicates that defendant was in possession of cattle belonging to Stephen's Estate ", and again: " The action comes on appeal from the duly constituted Court of Chief Regent David Dalindyebo and, as I held that the particulars furnished by the Chief in terms of section 7 of Government Notice No. 2255 of 1928, formed part of the present record, I was of opinion that for the purpose of testing the credibility of the witnesses I was entitled to refer to the evidence adduced at the Chief's Court."

Now, it is true that the particulars furnished in terms of section 7 of Government Notice No. 2255 of 1928 by the Chief's Court form part of the record in the Native Commissioner's Court, but this does not apply to the unsworn statements of witnesses, who appeared before the Chief's Court but not before the Native Commissioner's Court. In terms of section 8 of the Government Notice referred to, when the case comes before the Native Commissioner he shall hear and determine it as if it were a case of first instance in his Court, which means that he must try it *de novo* and base his judgment on the evidence adduced before him.

This is clear from the wording of section 12 (4) of Act No. 38 of 1927 dealing with appeals from Chief's Courts, which is as follows:—

" The Court of Native Commissioner may confirm, alter, or set aside the judgment *after hearing such evidence* (which shall be duly recorded) *as may be tendered* by the parties to the dispute, or may be deemed desirable by the Court."

This being so it was not competent for the Additional Native Commissioner to test the credibility of the witnesses in his Court by referring to statements of other witnesses, who were not before him, who had made unsworn statements and were not subjected to cross-examination. The statement made by Headman Mvumbi before the Chief's Court was clearly hearsay evidence, in so far as the Native Commissioner's Court was concerned and was consequently inadmissible and should not have been taken into consideration by the Additional Native Commissioner in arriving at his judgment.

It was argued before this Court on behalf of respondent that even though the Chief's Court is not a Court of Record there is nothing to prevent it making its own notes of the evidence led before it and forwarding this to the Native Commissioner's Court together with the particulars required by Government Notice No. 2255 of 1928, and that the Native Commissioner must of necessity take cognizance of that evidence in order to appreciate the reasons which actuated the

Chief's Court in arriving at its findings, and that this was the only construction that could be placed upon section 7 of Government Notice No. 2255 of 1928. With this contention we are unable to agree. It is a startling proposition to say that in cases of appeals from Native Chief's Courts the Native Commissioner can disregard all the rules of evidence and allow himself to be influenced by evidence which would otherwise be inadmissible. If the legislature had intended to effect such a drastic change in the law it would have made that intention clear. That there was no such intention may be gathered from the fact that the section above quoted refers only to the plaintiff's claim, defendant's reply, the judgment and reasons for judgment of the Chief, and expressly omits any reference to the evidence given before the Chief's Court. It is therefore not in order for the Chief's Court to attach to the particulars furnished notes of the statements made by witnesses other than plaintiff and defendant.

The legislature no doubt intended to provide an easy and inexpensive means of bringing a Chief's judgment before the Native Commissioner's Court, but it is open to question whether that intention has been realized, for the practice has grown up in some Courts for the attorneys appearing for the parties to draw up and file fresh statements of claim and replies thereto. These are not provided for in the tariff of fees laid down for Native Commissioners' Courts and cannot be charged for in a party and party bill of costs.

This Court does not wish to be understood as disapproving of this practice. On the contrary, it is of opinion that it is helpful to all concerned that the issues between the parties should be set out as clearly and concisely as possible.

This Court was also asked to decide whether or not the parties were bound in the Native Commissioner's Court within the four corners of their claim or reply, as the case may be, in the Chief's Court. In our opinion it would be undesirable to lay down any hard and fast rule, and each case must be dealt with on its merits.

That the attorneys practising in the Court of Native Commissioner at Umtata at any rate do not consider the parties are so bound is evidenced by the fact of the practice, already referred to, of filing fresh statements of claim and reply, which in many cases differ very materially from those as set out by the Chief's Court.

It can hardly be expected that the Chief's Court will have the necessary knowledge to set out in legal form all the defences, for example, which may be properly be taken to a claim. It might entail extreme hardship to hold the parties rigidly to what may be termed the pleadings in the Chief's Court. It is quite clear that the Additional Native Commissioner was influenced in his judgment in the case under consideration in respect of the cattle belonging to the Estate of the late Stephen Nqeto by the statement alleged to have been made to Headman Mvumbi, by which he admits he tested the defendant's credibility in his own Court. It is impossible to say how far he was as a consequence influenced against defendant in regard to the other portion of the claim, viz., Manala's dowry. There can be no doubt that definite prejudice was caused to defendant by the Additional Native Commissioner's reliance on inadmissible evidence.

In spite of the fact that a judicial officer has relied on inadmissible evidence, it is still open to an Appeal Court to refuse to interfere if it is satisfied that apart from such evidence the other evidence of the case leaves no room for doubt that the judgment appealed against is right and did justice to the parties and that to overrule it would work

injustice (Retief Bros. *vs.* Estate du Plessis, 1928, C.P.D., 387). In the present case, however, we are of opinion that the other evidence is not sufficiently strong to enable us to say that the judgment should stand and that the best course is to set aside the proceedings and order a retrial.

The appeal is allowed with costs, all the proceedings in the Court below after the particulars of claim, reply, judgment, and reasons for judgment furnished by the Chief's Court are set aside and the case returned for hearing before another judicial officer.

Costs in the Court below to abide the issue.

CASE No. 57.

KANDIYEZA BEN vs. PETSHANA MAJANGAZA.

UMTATA: 23rd October, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and W. F. C. Trollip, Members of the N.A.C.

Dowry, Desertion of wife—Allegation that she was driven away under accusation of witchcraft not proved—Dowry returnable.

(Appeal from Native Commissioner's Court, Tsolo.)

(Case No. 55 of 1936.)

Plaintiff (appellant) sued defendant (respondent) in the Court below for the return of his wife, defendant's daughter, Mangwanya, or the dowry paid for her, namely eight head of cattle, ten sheep, and one horse, together with their increase, alleging that he had married her three years ago and that she deserted him two years ago and refuses to return to him.

Defendant pleaded that only eight head of cattle and one horse were paid as dowry and that in August, 1935, his daughter returned to his kraal, having been discarded and ejected by plaintiff and/or his family on the accusation that she had been the cause of plaintiff's illness, and that consequently plaintiff was not entitled to the return of any of the dowry.

At the commencement of the case plaintiff's attorney waived the claim for the increase.

The whole crux of the case is as to whether the woman, Magwanya, had been driven away under an accusation of having been the cause of plaintiff's illness.

Considerable reliance was placed on the evidence of Mtsi Mbanjwa. This witness says that in May or June, 1935, plaintiff came to his kraal with his wife, and that plaintiff then complained that something was choking him at night and that he had stomach trouble, and also that the reason why he did not have children was because of a swelling in his testicles.

Mtsi then sent Magwanya to call plaintiff's father, and when the latter came he said he knew that his son was being killed by Petshana's daughter (Magwanya). Mtsi remonstrated with him, and plaintiff's father then stopped and said he would take her to her father next morning, and they actually left next morning. Other witnesses were called to testify that plaintiff's father had said to them that Magwanya had been the cause of plaintiff's illness. Magwanya, in her evidence in chief, says that both plaintiff and his father accused her of being the cause of the former's illness and drove her away. Her evidence as to his driving away is very vague and indefinite. Her story is that she and her husband stayed at Mtsi's kraal for four months, and it was there that plaintiff's father made the accusation against her,

but she could not have been seriously disturbed about this as she admits that while they were there her husband used to have connection with her.

From Mtsi's kraal she and her husband and his father went to the kraal of one Cengo, and it was from there that she went to her father's kraal. She does not say that anything happened at Cengo's kraal to cause her to leave, although she does speak of a "secret diagnosis" from which she was excluded, but whether this diagnosis took place at Cengo's kraal or at Mtsi's kraal is by no means clear, although from the Assistant Native Commissioner's reasons for judgment it would appear to have been at the latter, for he says:—

"The evidence is somewhat vague as to whether Magwanya was accused of using natural or unnatural means in causing plaintiff's illness. It was illicited from her that after the arrival of her parents-in-law, and during the absence of Mtsi, a woman doctor was called in for a secret diagnosis."

Now, according to Mtsi, plaintiff left his kraal before ploughing season of 1935. When Magwanya gave evidence on the 23rd June, 1936, she said she was pregnant by plaintiff and was then in her eighth month of pregnancy. If that is correct she must have cohabited with plaintiff after they left Mtsi's kraal and, therefore, her reason for leaving him was not because of what had happened at that kraal.

It is true that plaintiff and his father both deny the visit to Mtsi's kraal and this does tend to shake their credibility, but this does not alter the fact that defendant had pleaded that his daughter had been driven away under an accusation of having caused her husband's illness and this, in the opinion of this Court, he has not satisfactorily proved and, therefore, plaintiff was entitled to an order for the return of his wife, failing which the return of the dowry paid for her.

The only dispute in regard to the dowry is as to whether any sheep were included. Plaintiff says ten sheep were paid, whereas defendant says no sheep were paid. The evidence of the plaintiff and his witnesses on this point is not very satisfactory.

Plaintiff and defendant reside in different locations, and as plaintiff's father states that sheep cannot be removed from one location to another without a permit and no permit was obtained for the removal of any sheep, it is doubtful whether any sheep were included in the dowry.

The appeal will accordingly be allowed with costs, and the judgment in the Court below altered to read "for plaintiff for the return of his wife, Mangwanya, within one month from the date of this judgment, failing which the return of eight head of cattle or their value, £24, and one horse or its value, £10, and costs of suit."

CASE No. 58.

LANGA MBALISO and MBALISO vs. BONGA MTSHALU.

UMTATA: 23rd October, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and W. F. C. Trollip, Members of the N.A.C.

Damages for adultery and pregnancy—Failure to prove—Evidence must be conclusive in claim for—Impossibility of husband being father of child must be satisfactorily proved.

(Appeal from Native Commissioner's Court, Tsolo.)

(Case No. 82 of 1936.)

This is an appeal against a judgment in favour of the plaintiff in the Court below for five head of cattle or their value, £15, as damages for adultery alleged to have been committed by first defendant with plaintiff's wife Madlamini.

Plaintiff states that he went to the mines about the Spring of 1933 and returned about August, 1934, and when he returned, Madlamini was at her people's kraal, but he knew nothing about her being pregnant, and it was only after the child was born that the fact was reported to him. He then took her to first defendant's father, first defendant being away at the mines. On first defendant's return plaintiff immediately went to him with Madlamini, but he denied having committed adultery with her.

The only witnesses to the alleged adultery are Madlamini and the alleged go-between " Nomatemba ".

There are several unusual features about this case. In the first place Madlamini says that first defendant made overtures to her direct and she accepted him, and then she suggested " Nomatemba " as the go-between. Secondly no " Nyobo " or love fee was ever demanded by Nomatemba.

She explains this by saying that first defendant went off suddenly to the mines, but that explanation is not satisfactory, for she says she made appointments for them on five occasions, on one of which she actually saw them under one blanket, and therefore she had ample opportunity to demand the customary fee.

An examination of the evidence led for plaintiff reveals several discrepancies. Plaintiff states that when he took his wife to first defendant she said she had witnesses, whereas she says she was never asked this question. Again, plaintiff says he did not see Komanisi at defendant's whereas his wife says he was present. Madlamini states that cohabitation took place in the long grass between the land of first defendant and that of his brother, whereas Nomatemba says the place was between the lands they were hoeing and that of Matapile, who is not related to defendant. Madlamini says all the acts of cohabitation occurred at the same place and this place, it must be remembered, was amongst the lands, and the cohabitation took place in the daytime at a time when there were other people in the near vicinity.

Nomatemba only speaks of one act of adultery.

Another curious feature about the case is that Madlamini says that her pregnancy was not noticed at her home before the birth of the child. This is hard to believe.

It has been laid down in numerous cases in this Court that cases of adultery must be proved conclusively, and naturally the first thing the plaintiff is required to prove is that he could not have been the father of the child born to his wife. In the present case plaintiff's evidence as to the date of his leaving for work and his return therefrom is very vague. He speaks of " leaving about spring of 1933 and returning about August, 1934 ". These expressions leave room for considerable doubt as to the actual dates: It was within plaintiff's power to prove these absolutely, and he should have done so. As the case stands, it is not possible to say with certainty that he could not have been the father of the child.

Apart from this the discrepancies in the evidence of the two women leave room for considerable doubt.

The appeal is allowed with costs, and the judgment in the Court below altered to one of absolution from the instance with costs.

CASE No. 59.

GUMDASHE PANGALELE vs. SIHOM XUZELE.

UMTATA: 23rd October, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and W. F. C Trollip, Members of the N.A.C.

Native Custom—"Mvuzo" beast—Payment of is in accordance with Native Custom—Judgment creditor must reimburse messenger but has option of selecting beast to be paid—Circumstances under which "messenger" forfeits claim to reimbursement.

(Appeal from Native Commissioner's Court, Mqanduli.)

(Case No. 132 of 1935.)

In 1932 present defendant (Sihom Xuzele) brought an action before Headman Pangalele, of Mqanduli District, against one Mfikilinja for damages for adultery, and obtained judgment for five head of cattle. The Headman sent his messenger, Gumdashe, to collect these cattle but did not hand them over to Sihom.

On Sihom suing him in the Court of the Native Commissioner, Mqanduli, for delivery of the cattle, Pangalele pleaded that he was prepared to hand them over on payment of the beast he was entitled to by Native Custom for the settlement of the action.

In his replication, Sihom contended that the Headman was not entitled by law to demand a beast for settling the action and that in any case he could not refuse to hand over the cattle pending payment of this beast. No evidence was taken, and judgment was entered in favour of Sihom for the full number of cattle. Some two years later Gumdashe, the Headman's messenger, sued Sihom before the Chief Regent David Dalindyebo for a beast (Mvuzo beast) for his services in collecting the cattle from Mfikilinja and was successful. Sihom then appealed from the Crief's judgment to the Native Commissioner, Mqanduli, who reversed the Chief's judgment and entered judgment in favour of Sihom, and against this judgment an appeal to this Court has been noted on the ground that Gumdashe, as the messenger of the Headman, who succeeded in obtaining satisfaction of the Headman's judgment, is entitled to a beast for his services.

In this case Gumdashe handed to the Headman the cattle he had succeeded in obtaining but made no claim for remuneration, and it is only two years after his uncle, Pangalele, had failed to secure a judgment for the beast which he claimed was due to him for trying the case that he makes a claim against Sihom.

As the Native Commissioner says in his reasons for judgment, it would appear that the action in the Chief's Court was merely a subterfuge for Pangalele to obtain this beast under another pretext. It was admitted in the Native Commissioner's Court by Sihom's attorney that Sihom had offered Pangalele a beast which the latter had refused as it was unsuitable. In the trial before the Chief's Court, Sihom stated that he had offered Gumdashe a beast which had been refused.

To which of these two persons this offer actually was made is not certain, but that it was made to one or other of them is clear. The questions to be decided are:—

1. Has the Headman's messenger a claim as of right to an Mvuzo beast from a successful party in the Headman's Court, and can he sue for it or must he look to the Headman for his remuneration, seeing that he was employed by the latter?

2. If he has such a claim, does the fact that an offer was made to him and rejected affect his right to sue?

3. Does the fact that Gumdashe waited for two years after judgment had been given against Pangalele before bringing his action affect his claim in any way?

The facts of the case having been put to the Native Assessors they state:—

The payment of "Mvuzo" is in accordance with custom, and the man in whose favour judgment is given has to pay the "Mvuzo", but he has the option as to which animal out of those collected for him by the messenger he is going to pay. If the messenger refuses the animal offered he loses his claim to payment.

Neither a Headman nor a Chief has the right to keep the fine, he must hand it over at once to the person entitled thereto, and the messenger is supposed to be remunerated then. If the Headman keeps the fine for some time that does away with the right of the messenger to get the "Mvuzo".

In connection with the present case two things have occurred to disentitle the messenger to claim the "Mvuzo":—

1. The retention of the cattle by the headman.

2. The fact that after judgment was given against the Headman the messenger allowed two years to go by before bringing his action.

In view of this expression of opinion, Gumdashe would, in the circumstances of this case, appear to have no claim to a "Mvuzo" beast, and the appeal is accordingly dismissed with costs.

CASE No. 60.

NYANI MATINISE vs. JAVU MALOTE.

UMTATA. 21st October, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and W. F. C. Trollip, Members of the N.A.C.

Native Custom—Fine payment of for pregnancy entitles father of child to claim it at any time—*Tender of "isondlo" beast to obtain delivery of child not essential before action.*

Illegitimate child—Where fine for pregnancy is paid, the subsequent marriage to and payment of dowry by another man does not entitle latter to.

(Appeal from Native Commissioner's Court, Engcobo:)

(Case No. 256 of 1935.)

In the Court below plaintiff claimed from defendant the delivery of a certain female child, Mka-Miller, and in his particulars of claim alleged:—

1. Some years ago defendant sued plaintiff for £25 damages in respect of the seduction and pregnancy of defendant's sister, Nodatavana, by plaintiff and obtained judgment in the said amount and costs of suit, which plaintiff duly satisfied.

2. That as a result of the said seduction the said Nodatavana was delivered of a female child named Mka-Miller, of which defendant and/or his agent is in wrongful and unlawful possession.

3. That by reason of the premises plaintiff is entitled to the said child, but defendant notwithstanding demands refuses and neglects to deliver same to plaintiff.

Defendant's plea was as follows:—

1. Defendant admits paragraph 1 of plaintiff's summons.

2. Defendant states that as plaintiff paid only damages for seduction and pregnancy plaintiff is not entitled to the child, nor was it demanded at the time, and, furthermore, as plaintiff in case 231/26 denied paternity of child in dispute.

3. The child is not in the possession of or under control of the defendant but is in the possession and control of Dyubele Ludidi, the husband and guardian of Nodatavana.

Wherefore plaintiff has no claim in the premises and defendant prays that plaintiff's claim may be dismissed with costs.

The Assistant Native Commissioner entered the following judgment:—

"Judgment for plaintiff as prayed. Plaintiff to pay a Sondlo beast to defendant. Plaintiff to pay costs of suit up to 7th November, 1935. From this date defendant to pay costs."

Against this judgment an appeal has been noted on the following grounds:—

1. That the Court erred in allowing the plaintiff to make tender of Sondlo beast, after pleadings had been closed, and in view of the fact no such tender was made in the summons commencing action.

2. That plaintiff was estopped from leading evidence as to tender before action, in that no allegation of such tender was included in the summons.

3. That without such tender before action and allegation of tender in the summons, plaintiff is not entitled to delivery of the child.

And further should the above be overruled

4. That plaintiff is not entitled to claim delivery of the child for each and all the following reasons, both in law and Native Custom:—

   (*a*) He denied paternity of the said child in the former case, No. 231/26 (Engcobo). Such denial was definite and specific (*vide* summons and plea, *idem*).

   (*b*) He failed to pay for seduction and pregnancy on demand, but only paid after judgment had been given against him and a writ issued (*idem*).

   (*c*) He gave defendant no intimation within a reasonable time after birth of the child that he intended claiming such child.

   (*d*) That the first demand for the child was immediately before issue of summons.

   (*e*) That at the time of such demand no tender of Sondlo was made.

5. That as Dyubele Ludidi paid full dowry when he married Nodotavana, and took the child Mka-Miller as his own, the said child belongs to him, according to custom.

The main facts in the case are admitted with the exception of the point as to whether or not plaintiff made a demand on defendant for the custody of the child. It is clear that in 1926 plaintiff was sued for damages for the seduction and pregnancy of Nodatavana and, although he denied the paternity of the child born as a result of that seduction, judgment was given against him, and he duly satisfied that judgment.

A year or so after this case one Dyubele Ludidi married Nodatavana and paid eight head of cattle as dowry for her, and regards the girl Mka-Miller as his.

In regard to the first ground of appeal, the point was settled in the case of Tsoli Ngubentombi *vs.* Cunezi Mneme (4, N.A.C.,49), in which the position was similar to this. Plaintiff claimed custody of a girl of whom he was the natural father, and the defendant pleaded that as plaintiff had not paid " isondlo " he was estopped by his acts and conduct from making any claim to her.

The plaintiff's attorney then tendered an " isondlo " beast, and the magistrate entered judgment that plaintiff was entitled to the girl on payment of the isondlo beast, but as he had made no previous tender of that beast he ordered him to pay costs of suit. On appeal, the President of the Native Appeal Court said: " Appellant having accepted fine for the pregnancy of his sister well knew that respondent could claim the child *at any time* by paying one more beast as isondlo or maintenance ".

This Court knows of no rule of law which precludes a party to a suit making a tender after the close of the pleadings.

The fact that he has not made a tender earlier merely affects the question of costs.

The second ground of appeal is one of estoppel. This point should have been raised in the Court below and objection taken to the evidence of previous tender being led. As that was not done it cannot be raised for the first time on appeal.

In regard to the third ground of appeal, it is only necessary to refer to the cases cited by the Assistant Native Commissioner in his reasons for judgment, viz:. Tsoli Ngubentombi *vs.* Cimezi Mnene (4, N.A.C., 49), Mgunjana Lupindo *vs.* Sepambo Bonja (4, N.A.C., 51), and Ntlohwana *vs.* Kabane (2, N.A.C., 37), which clearly show that a tender before action is not essential to enable plaintiff to obtain delivery of the child.

In regard to the grounds 4 (*a*) and (*b*), this Court is unable to appreciate why, because a man has denied paternity in the first instance but on judgment being given against him has paid the customary fine, he should not be entitled to the child born of the seduction nor has its attention been directed to any such custom among the natives.

Ground 4 (*c*) and (*d*): This Court knows of no custom by which intimation that the natural father is going to claim the child must be made within a reasonable time. If no arrangement is made when the fine is paid as to the ownership of the child, then the natural father's right to it under Native Custom is clear (Takayi *vs.* Mzambalala 1, N.A.C., 121). Even where the full fine is not paid in the first instance the putative father may claim the child by paying the full fine, and this may be done at any time (Mpeti *vs.* Nkumanda, 1, N.A.C., 43).

The payment of the full fine *ipso facto* gives the putative father the right to the child in the absence of any agreement to the contrary at the time the fine is paid. If according to custom the child belongs to him, where then is the necessity for giving notice that he is going to claim it?

It is not unusual to leave an illegitimate girl at her mother's people's kraal until she marries before any claim is made in regard to her or her dowry.

Ground 4 (*e*) has been dealt with above under remarks regarding Ground of Appeal No. 3.

Ground 5: The custom in this matter is laid down in the case of Ndlela Ntshongole *vs.* Spana Danti (3, N.A.C., 126), which followed a similar decision in Nowata *vs.* April (1, N.A.C., 98).

From these cases it is clear that, provided a fine for the seduction and pregnancy has been paid, the subsequent marriage to and payment of dowry by another man does not entitle the latter to the illegitimate child.

The rights in that child vested in the natural father at the time of payment of fine and any later marriage could not affect those rights.

The question as to defendant no longer having custody of the child was raised in the pleadings but does not form one of the grounds of appeal. It may be as well, however, to refer to the case of Ntlokwane *vs.* Kabane (2, N.A.C., 37), wherein it was laid down that according to Native Custom the person who claimed and received the damages for the seduction and pregnancy is the proper person to be sued for the custody of the child, and if he lets the child out of his custody he is not released from his responsibility to the payer of the fine.

The judgment of the Assistant Native Commissioner is entirely in accordance with Native Custom and the previous decisions of this Court.

The appellant's attorney desired the Court to put the following point to the Native Assessors, viz.:—

"Whether a man, who is accused of having seduced and rendered pregnant a woman and who denies paternity of the child, but on the case coming before a Court is found to be the father of the child and condemned to pay damages and such judgment is satisfied on a writ of execution, is not to be regarded as having rejected the child and precluded from subsequently claiming it on payment of the usual isondlo beast".

The Court being of opinion that the law on the point is clear does not consider it necessary to consult the assessors.

The appeal is dismissed with costs.

CASE No. 61.

KOBO XUNDU vs. CHARLIE XUNDU.

UMTATA: 22nd October, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and W. F. C. Trollip, Members of the N.A.C.

Procedure—Onus of proof—Absolution judgment granted where onus on defendant—Competency of—Section 38 (*c*), *Proclamation No.* 145 *of* 1923—*Appeal and cross-appeal—Power of Appeal Court to alter judgment to one in favour of defendant where onus discharged—Section* 15, *Act No.* 38 *of* 1927.

(Appeal from Native Commissioner's Court, Engcobo.)

(Case No. 303 of 1935.)

In the Court below plaintiff claimed a declaration that he is the son and heir to the Great House of the defendant. In his plea defendant denied that plaintiff was his eldest son, and said that he is the illegitimate son of one Nojenti, to whom defendant was married by Native Custom, and was born after that marriage had been dissolved.

The case came before the late Mr. R. Welsh, who ruled that the onus was on defendant to prove the dissolution of the marriage.

After all the evidence of both parties had been led and the attorneys for the parties had addressed the Court, judgment was reserved to 3rd June, 1936. Before the arrival of that date Mr. Welsh died, and when the case came on for hearing again, by agreement between the parties, the evidence previously taken was put in and no further evidence was called.

The Acting Native Commissioner entered a judgment of absolution from the instance with costs, and against this an appeal and cross-appeal have been noted. The grounds of appeal are:—

1. That the Native Commissioner erred in arriving at his judgment before hearing the arguments. Immediately on the conclusion of the arguments he delivered a written judgment.
2. That the Native Commissioner overlooked the fact that the onus was on the defendant. In delivering judgment he stated that he found that plaintiff had failed to establish his case.
3. That the judgment was against the weight of evidence and the probabilities of the case.

The grounds of the cross-appeal are:—

1. That the Court erred in placing the onus on defendant.
2. That the weight of evidence and probabilities of the case justified a judgment in favour of defendant.

The first ground of appeal is effectively disposed of by the Acting Native Commissioner in his reasons for judgment. He says:—

"I have to deny this allegation. I certainly made a summary of the whole record but did not have a written judgment. Not having heard the witnesses, I made a thorough study of the evidence and gave both attorneys a full hearing before delivering judgment."

In regard to the second ground of appeal, it will be appreciated that the circumstances of this case were unusual, in that the ruling with regard to the burden of proof was given by one judicial officer. When the case came before another judicial officer the point was not raised again, and the latter quite correctly felt himself bound by the previous ruling. That being so, the Acting Native Commissioner presumably had this in mind when considering his judgment. After going very carefully into the evidence he came to the conclusion that the evidence was such that he could not find for either party. When the burden of proof is upon the defendant and he does not prove his case, as a rule the plaintiff should succeed, but an absolution judgment has been given in such cases, and the language of paragraph (*c*) of section 38 of Proclamation No. 145 of 1923 clearly contemplates such a possibility [see note in Buckle & Jones, 2nd Edition, p. 82, to section 46 (*c*) of Act No. 32 of 1917, which is in exactly similar terms to section 38 (*c*) of Proclamation No. 145 of 1923]. Such a judgment would appear to be competent, whether it is correct on the record as it stands is another matter.

The third ground of appeal and the second ground of the cross-appeal, being against the judgment on the weight of evidence and the probabilities of the case, will be dealt with together.

We do not consider there is any substance in the first ground of the cross-appeal. The plaintiff is admittedly the son of Nojenti, who was married to defendant by Native Custom, but defendant alleges he was born after the dissolution of that marriage. In these circumstances the onus of proving that dissolution was, in our opinion, correctly placed upon defendant.

Coming to the facts of the case, it may be said at once that this Court is in as good a position to weigh the value of the evidence as was the Acting Native Commissioner, for he did not have the witnesses before him and therefore his judgment was not based on the demeanour of the witnesses but merely on the record as taken before another judicial officer. The evidence previously taken was put in by consent, probably with a view to saving time and expense, but it would, in the long run, have proved more satisfactory to everyone concerned if the witnesses had been examined afresh.

The facts as found by the Acting Native Commissioner are as follows: —

1. That defendant was married to one Nojenti according to Native Custom.
2. That Sarah Ann was Nojenti's first child by defendant and was born at Nojenti's people's kraal.
3. The plaintiff is also a son of Nojenti and that he was also born at her people's kraal.
4. That defendant subsequently married one Grace—first according to Native Custom and thereafter according to Christian rites when their first son, Irvine, was one month old.
5. That plaintiff never resided with defendant nor did defendant in any way recognise plaintiff as his son.
6. That plaintiff never consulted defendant in regard to his circumcision, marriage, or other domestic matters.
7. That Nojenti, after she left defendant's kraal, stayed with one Ngetyengana Tyesi, by whom she had various children.

With these findings of fact we are in agreement, but they do not necessarily dispose of the case for, if plaintiff was born before the dissolution of his mother's marriage, he *might* possibly be entitled to succeed to her house, there being no legitimate male issue in that house.

In the opinion of this Court a perusal of the evidence clearly shows that defendant's marriage to Nojenti was dissolved prior to the birth of plaintiff. Defendant states that he married Nojenti about 1877, and dissolved her marriage in 1883 as he caught her in adultery with one Mapotyi. He drove her away, stating that he was forfeiting the dowry he had paid, and he gave her all her belongings, and from that day she never returned to his kraal.

At that time she was in her fifth month of pregnancy with the girl Sarah Ann (Hanjiwe).

About 1885 he entered into a customary union with Grace Ndzwane, and married her by Christian rites early in 1886.

The version given by plaintiff's witnesses is that Nojenti went to her people to give birth to the girl Sarah Ann and then returned to defendant's kraal, where she resided for some time—one of the witnesses says for two years, whereas another says it was a matter of months. That there was then a quarrel over some pumpkins having been ploughed over and that Nojenti then finally deserted defendant, but that at this time she was pregnant with plaintiff.

Now it seems much more likely that the defendant's version of the reason for her leaving is correct for, if the quarrel was over such a trivial matter as suggested by plaintiff's witnesses, it is difficult to understand why defendant made no attempt to get her or his dowry back. Support is also given to defendant's story by the fact that when Sarah Ann was five years old he went and fetched her and paid a maintenance beast but did not bring back either Nojenti or the plaintiff. If his marriage had not been dissolved there seems to be no reason whatever for his having left his wife and child.

If the period which elapsed between the customary union with Grace Ndzwane and the marriage with her by Christian rites was only one year, and the evidence supports this, then it is clear that plaintiff was born after the Christian marriage even if evidence of the plaintiff's own witnesses is accepted as correct.

Harold Xundu states: "I remember defendant marrying Grace when Nojenti went to give birth to Sarah Ann (Hanjiwe)"; and Hargreaves Xundu says: "When defendant took his second wife Nojenti had gone to her people's place to give birth to her first child."

If Nojenti was still only pregnant with Sarah Ann when the customary union with Grace took place, then it was practically impossible for plaintiff to have been conceived when the Christian marriage was entered into, and the latter marriage would have the effect of dissolving the prior customary union with Nojenti (see Mzambalala *vs.* Silinga, 1, N.A.C., 40). But even if it be conceded that plaintiff was conceived before the Christian marriage to Grace, this Court is satisfied on the evidence that Nojenti's marriage was dissolved prior to that conception and that defendant was not the author of that pregnancy, consequently plaintiff has no claim to be regarded as defendant's heir. The fact that plaintiff never consulted defendant in regard to his circumcision or marriage, and that plaintiff has allowed his alleged claim to lie dormant for so many years (he is now about 52 years of age), militate very strongly against his contention.

In regard to the second ground of the cross-appeal, it was argued on behalf of appellant that this Court has no power to alter a judgment of absolution from the instance into one in favour of defendant, and the case of British Imperial Oil Co. *vs.* Capetown Tramway Co., Ltd. (7, Bisset & Smith, 25), was cited in support of this contention. In that case, which was tried in 1916, Gardiner, J., said that the Court was not aware of any case where the Court had changed a judgment of absolution from the instance into one of judgment for the defendant, but he did not say that the Court did not have that power.

In the opinion of this Court, however, that power is conferred by section 15 of Act No. 38 of 1927, which provides that a Native Appeal Court shall have full power to review, set aside, amend or correct any order, judgment, or proceeding of a Native Commissioner's Court.

We are satisfied that we have all the material before us for finally determining the matter and that the defendant has discharged the onus placed upon him.

The appeal will accordingly be dismissed, the cross-appeal allowed on the second ground, and the judgment in the Court below altered to one for defendant with costs. The appellant will have to bear the costs of appeal.

CASE No. 62.

NTINGWEVU NTSHAM vs. MANCOTYWE NTSHAM and GOBIZEMBE.

UMTATA: 26th October, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and W. F. C. Trollip, Members of the N.A.C.

Kraalhead not liable for acts of persons not inmates of his kraal—Misjoinder—Dowries paid for daughters after death of a native do not fall into estate of deceased but become the property of his heir according to Native Custom—Maintenance—Widow not entitled to claim unless she lives at kraal approved of by deceased husband's relatives—Estate stock—Widow cannot dispose of without consulting heir.

(Appeal from Native Commissioner's Court, Qumbu.)

(Case No. 46 of 1936.)

In the Court below plaintiff sued defendants for seven head of cattle and one horse or their value, £40, and in his particulars of claim stated:—

1. That second defendant is kraal head and that first defendant is an inmate of his kraal, which makes him liable for torts of No. 1.

2. That plaintiff is the heir of his late brother Sofonia and that first defendant is the wife of the said Sofonia. That she left late Sofonia's kraal some two years after his death and went to second defendant's kraal, where she has resided ever since.

3. That Sofonia and first defendant had a daughter, one Dapu, who was married at second defendant's kraal during 1933, and eight head of cattle and one horse were paid to second defendant as dowry and registered in first defendant's name. That plaintiff as heir of Sofonia is entitled to such dowry, but despite frequent demand, defendants fail to deliver same or pay its value, less one beast for "isondhlo". Wherefore plaintiff prays that this honourable Court adjudge him so to do.

The following plea was filed by defendants:—

1. They deny the allegations in paragraph 1 of plaintiff's claim and put him to the proof thereof.

2. They admit plaintiff is the heir of his late brother Sofonia, who was the husband of the defendant Mancotwe. They deny the late Sofonia had a kraal of his own but say he resided at the kraal of plaintiff, who drove Maneotwe away from his kraal. That this was about the year 1914 and at the time the said Sofonia was away at work.

3. That the said Maneotwe returned to her father's kraal, where her husband consented to her staying until such time as he was able to establish a kraal of his own, but he died before he was able so to do.

4. Plaintiff has shown no interest in Mancotwe or her children until the marriage of Dapu.

5. That eight head of cattle and a horse were paid as dowry, for the said Dapu, which stock was taken possession of by Mancotwe, in whose name the cattle were registered for dipping purposes.

6. That with plaintiff's consent and knowledge five head of cattle of such dowry were disposed of by Mancotwe for wedding outfit, doctering fees and maintenance. The horse died of horse sickness.

7. That Mancotwe contends she is residing at the kraal at which she was resident with her husband's consent at the date of his death, and as the widow of the late Sofonia she is entitled to retain possession of the stock for the maintenance of herself and her children.

8. That defendant, Gobizembe, has at no time had possession or controlled the dowry paid for Dapu. He has never disputed the plaintiff's right to same.

In his replication plaintiff denied that he drove Mancotwe away and said that he has always desired her to return to his kraal, he also denied that five head of cattle were disposed of with his knowledge, except one for doctor's fees, and admitted that first defendant is entitled to a further beast for maintenance.

At the close of plaintiff's case absolution from the instance, with costs, was granted in regard to second defendant, and the case then proceeded and judgment was entered in favour of the remaining defendant with costs.

Against this judgment an appeal has been noted on the following grounds:—

1. That the judgment absolving defendant No. 2 is bad in law and fact, as there was evidence that defendant No. 2 had acted in connection with the receipt of the cattle in question and was thus rightly joined.

2. That the judgment is against the weight of evidence and probabilities of the case and in conflict with the Law and Native Custom applicable to the rights of widows to maintenance and support and their rights as to residence and generally.

In regard to the first ground of appeal, it is clear that second defendant was wrongly joined in the action in his capacity as head of the kraal, for the evidence shows that first defendant was not an inmate of his kraal and, even if it can be said that first defendant had committed any tort, he was not liable. He was, therefore entitled to be absolved.

If any action lay against him it might possibly be in his capacity as the person who received the dowry of Dapu, but that is not the action which has been brought against him.

The appeal on the first ground must fail.

The second ground of appeal is inartistically drawn and could with advantage have been more clearly and specifically stated. The judgment of the Assistant Native Commissioner as it stands cannot be upheld, for the effect of it is to vest property which is claimed to belong to the estate of the late Sofonia absolutely in the defendant. As Dapu was married after the death of Sofonia, her dowry does not form part of Sofonia's estate but belongs to his heir (Gasa *vs.* Gasa, 4. N.A.C., 162).

Even if this dowry did form part of the estate, the widow could only claim to be supported from it while she was living at a kraal approved of by her late husband's relatives.

Mancotwe alleges that she was driven away by plaintiff during her husband's absence at work, and that on his return she explained the position to him and he agreed to her remaining at the kraal of her people until he could establish

a kraal for her, but he died before he could do so. This may be quite true, but it was obviously only a temporary arrangement, and she is not entitled to go on living at her people's kraal indefinitely and still demand to have stock placed there for her support. If she desired to have a kraal at which such stock could be placed, she should have approached plaintiff with a request for this to be done. She has not done so and cannot demand that she should be allowed to remain with her people and still have control of the estate stock. Furthermore, she had no right to dispose of the stock in question without consulting the heir. If plaintiff refused or neglected to support her she could have taken steps to compel him to do so.

Mancotwe states that she disposed of the following stock out of Dapu's dowry: Two head for wedding outfit for Dapu, two head when Dapu was confined, three head for maintenance.

The dowry for Dapu was paid only three years ago, and there seems to be no good reason for this rapid dispersal of the stock. Defendant has not brought any evidence to corroborate her statement as to how she disposed of it. She does not explain why it was necessary to use two cattle for Dapu's confinement.

It is unusual for such a large expenditure to be incurred for that purpose, and we are not disposed to believe her on this point. Her statement as to the disposal of the three cattle for maintenance is also entirely unsupported. In regard to the cattle for wedding outfit, plaintiff says he supplied these and we see no reason to disbelieve him.

Dapu's dowry consisted of eight head of cattle and one horse. The horse is dead, and plaintiff admits that a deduction should be made of one beast for doctor's fees and one for maintenance.

The appeal will be allowed with costs, and the judgment in the Court below altered to one in favour of plaintiff for six head of cattle or their value. £18, and costs of suit.

CASE No. 63.

NXITI SAMBUNJANE vs. MANDANGATYA SAMBUNJANE.

UMTATA: 26th October, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and W. F. C. Trollip, Members of the N.A.C.

Dowry—A native paying dowry for his brother cannot subsequently sue latter for cattle so paid.

(Appeal from Native Commissioner's Court, Cofimvaba.)

(Case No. 102 of 1936.)

Plaintiff sued the defendant in the Court below for twelve head of cattle (including two increase) or their value, £60, being the dowry paid for one Kiki, the first daughter born in and married from the Right Hand House of the late Sambunjane Tsona, on the ground that the dowry for Kiki's mother (Right Hand wife) having been paid from the Great House he, as heir of the latter house was, according to Native Law and Custom, entitled to the dowry paid for such first daughter. The defendant, heir to the Right Hand House, admitted the existence of the custom referred to, but pleaded, *inter alia*, that of the ten head which had been paid as dowry three had died and one had been used for the wedding outfit, leaving a balance of six head which had increased to eight, and that plaintiff had used these in paying dowry for defendant's wife on defendant's behalf and had thereby forfeited any claim he may have had to it.

The Assistant Native Commissioner entered judgment for the number of cattle claimed, less three which had died, one for tombisa ceremony and one for wedding outfit, and against this judgment an appeal has been noted on the ground that it is against the weight of evidence.

In his evidence, defendant states that he and plaintiff sent two messengers to ask for the daughter of one Mr. Wegana in marriage for defendant, and that the eight head of cattle remaining of Kiki's dowry were paid to Mr. Wegana, and that when the cattle were paid plaintiff was the spokesman.

He also said that as plaintiff has paid these cattle on his (defendant's) behalf he could not now claim them from him.

It is true that in cross-examination he altered his attitude and denied that plaintiff had any right to Kiki's dowry and claimed that they belonged to him, and that consequently he had paid his own dowry, but in view of the Native Custom, the existence of which he admits, he must have been aware that the dowry paid for Kiki really belonged to plaintiff.

Plaintiff in his evidence says: "I heard defendant's evidence. He did not consult me about paying dowry; I said he should get a wife and I agreed to his paying these cattle. He paid dowry with them and at the same time I knew I would want my cattle. It seems as if I was just lending them to him, as I would later claim them"; also, "I paid the cattle for him"; and again, "I paid these cattle for defendant's dowry because I have no grudge against him".

It is abundantly clear from plaintiff's own evidence that he agreed to these cattle being paid as dowry for defendant, and he cannot now claim to get these cattle back. He may have a claim to be reimbursed at a later date because he helped to pay his brother's dowry, but that is not a matter which concerns the present case.

In the opinion of this Court the Assistant Native Commissioner erred in entering a judgment for plaintiff in view of the evidence he himself gave.

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

CASE No. 64.

TWALANA MALIASE vs. MBOZISA DUMALISILE.

UMTATA: 26th October, 1936. Before H. G. Scott, Esq., President, and Messrs. H. E. F. White and W. F. C. Trollip, Members of the N.A.C.

Damages—Illegal seizure and detention of stock—Alternative claim for, under Common Law and Pound Regulations—Effect section 65, *Proclamation No.* 387 *of* 1893—*Pound Regulations.*

(Appeal from Native Commissioner's Court, Mqanduli.)

(Case No. 73 of 1936.)

The plaintiff (now appellant) issued summons against the defendant (now respondent) in a claim for £3. 12s. damages alleging illegal impounding of the former's cattle by the latter. His particulars of claim are:—

1. That on 4th February, 1936, the defendant seized certain 36 head of cattle, the property or in the lawful possession of the plaintiff, from the commonage in the

Cezu Ward, alleging that they were grazing on "ground reserved for winter grazing 'doborasi'".

2. That the defendant then impounded the cattle at the kraal of the Headman of the Ward (one Mahlamvu).

3. That the defendant's action in so doing was illegal, as the pasture whence he took the said cattle had not been legally reserved for winter grazing.

4. That the plaintiff protested to the defendant against the impounding of his cattle, without avail.

5. That the plaintiff was only able to obtain possession of his cattle by proceeding to the village of Mqanduli and causing a legal demand to be served upon the defendant by a messenger sent out especially for the purpose of serving the said demand, and explaining that reference to the Native Commissioner's office had clearly established that the ground in question was not reserved as winter grazing.

6. That the plaintiff was put to great inconvenience and trouble, loss of time and a certain amount of financial expense and loss through the defendant's wrongful actions as above set forth.

7. That the plaintiff estimates the damages sustained by him at £5, but is prepared to accept (and claims) as such damages the sum of £3. 12s., this being the total of the minimum sum of 2s. per head provided by the Pound Regulations as damages for illegal impounding.

8. That the defendant has tendered the plaintiff a total sum of 1s. for such damages, which 1s. the plaintiff refused to accept as being insufficient.

Defendant excepted to the summons on the ground as follows:—

"That it is vague and embarrassing. Paragraph 7 claiming damages is very indefinite, and it is not clear whether the plaintiff is claiming damages under the Common Law or under section 65 of Proclamation No. 387 of 1893. On the 3rd instant defendant's attorney wrote to plaintiff's attorney and requested plaintiff's attorney to state whether plaintiff was claiming damages under the Common Law or under section 65 of Proclamation No. 387 of 1893. On the 5th instant plaintiff's attorney replied as follows: 'My contention is that the taking of the cattle under the circumstances disclosed in the summons amounts to an impounding and the damages provided by the Pound Regulations are claimable. Alternatively, even if the Court holds that the taking of the cattle does not amount to a wrongful *impounding*, nevertheless the taking is wrongful and arbitrary and gives the plaintiff the right to claim the damages sustained by him by reason of such takings. In such event the Court will be called upon to assess the damages claimable and I will argue that the minimum damages claimable under the Pound Regulations would form a basis for computing such damages, a basis to which the defendant cannot object as the tariff provides these damages, as the *minimum* claimable."

The above reply makes plaintiff's summons still more vague and embarrassing as it is quite clear therefrom that the plaintiff is hedging and will not definitely state whether he is founding his action on the Common Law or under section 65 of Proclamation No. 387 of 1893 or some other Pound Regulation. Plaintiff's attorney's letter is attached hereto and defendant prays it may be considered as forming part of this exception."

This exception was overruled, the presiding judicial officer holding that though a claimant cannot succeed where he claims both under Statute and Common law he might do so on the alternative if the original were rejected and he remarks:—

"In this case plaintiff had a *prima facie* case under both the Pound Regulations and the Common Law." In paragraph 7 of his summons it did not appear that he was relying on the alternative or both, but from his reply to defendant's query this becomes clear, and in the opinion of the Court defendant now knows what he has to meet and can accordingly frame his plea on the two claims. The Court is not prepared to say that the two claims are mutually inconsistent, and, interpreting paragraph 7, in the light of the further particulars furnished by plaintiff and embodied in defendant's statement of his exception, holds that the summons is not vague and embarrassing and that the exception must be dismissed with costs."

Thereupon defendant filed a plea as follows:—

1. Defendant denies paragraph 1, except he admits that he took possession of the cattle for the purpose of impounding them as they had trespassed on certain lands.

2. Defendant denies paragraph 2, and says that the Headman Mahlamva has no pound and the cattle were only taken to him for the purpose of impounding them.

3. Defendant denies paragraph 3 but admits that the pasture whence he took the cattle had not been reserved for winter grazing.

4. Defendant admits that his herds protested against the defendant taking possession of the cattle.

5. Defendant knows nothing about the allegations in paragraph 5, except that he delivered the cattle to plaintiff on receiving a demand.

6. Defendant denies paragraph 6, and says plaintiff suffered no financial loss or damage.

7. Defendant denies paragraph 7, and says that the cattle were never impounded in any pound and there was, therefore, no illegal impounding. That being the case, plaintiff cannot claim damages or any penalty under Proclamation No. 387 of 1893, section 65. Further, defendant says plaintiff suffered no damages.

8. With regard to paragraph 8, defendant admits that he tendered plaintiff 1s. before issue of summons, but defendant made it quite clear that he did not admit that plaintiff had any claim against him, but that he was merely tendering 1s. to save litigation and costs. Defendant, hereby, again tenders plaintiff 1s. but does not admit that plaintiff has any claim against him for damages as claimed. Defendant further points out (seeing that his exception was overruled) that plaintiff's claim is merely for damages for illegal impounding (see summons), and he cannot claim damages in this action for wrongfully seizing the cattle, as Mr. Attorney Trow mentions in his letter in reply to defendant's attorneys asking whether he is claiming damages under the Common Law or Pound Regulations.

The case then came on for hearing by another judicial officer, and at the close of the plaintiff's case defendant's attorney applied for the dismissal of the summons as no illegal impounding had been proved.

The Court dismissed the summons with costs.

Plaintiff has appealed against the whole of the judgment upon the following grounds:—

1. The evidence clearly shows a wrongful and unlawful seizure by the defendant of the plaintiff's cattle, a taking of them out of the possession of plaintiff, and an impounding of them at the Headman's kraal.
2. That once this is established, the plaintiff is entitled to damages without any special proof thereof.
3. The defendant clearly had a case to meet, and the finding of the Native Commissioner is against the weight of the evidence and wrong in law.

In his reasons for judgment the Assistant Native Commissioner remarks: "Plaintiff's summons clearly bases his action on an illegal impounding of his stock, and damages claimed are assessed on the scale laid down by the Pound Regulations as damages for illegal impounding."

He found that no illegal impounding of the stock took place; they were only seized and driven off by defendant and returned on demand to plaintiff later the same day; that plaintiff was relying on the provisions of the Pound Regulations (section 65 of Proclamation No. 387 of 1893) in the assessment of his claim, and to succeed in this he must prove that the stock were illegally impounded in a duly constituted pound, and this he had failed to do.

This Court finds that the particulars of claim show that the stock were not impounded but were seized and detained for the purpose of being impounded.

Defendant in his plea admits this. In the particulars of claim, plaintiff alleged both the illegal seizure and the illegal impounding.

In paragraph 7 of the summons, plaintiff estimates his damages at £5, but states he is prepared to accept (and claims) £3. 12s., this being the total of the minimum sum of 2s. provided by the Pound Regulations as damages for illegal impounding.

Though perhaps confusing, this does not indicate that his claim was being brought solely under the Pound Regulations. In the further particulars supplied by plaintiff's attorney he does say that he contends that the taking of the cattle under the circumstances disclosed in the summons amounts to an impounding, and the damages provided by the Pound Regulations are claimable; but he adds his alternative right to claim damages for the illegal seizure of the stock.

He says that the Court will be asked to assess the damages and that he will argue that the minimum damages claimable under the Pound Regulations would form a basis for computing such damages.

Now, section 65 of the Pound Regulations only provides a penalty by means of damages for illegal impounding, but the Proclamation makes no like provision in the case of illegal seizure and detention of stock with the intention of impounding them.

In the case of Lord *vs.* Gillwald (1907, E.D.L., 64), it was held that damages may be awarded for the infringement of a right though no damages beyond the mere infringement may be proved, and in the case Johnson *vs.* Donovan (1916, 37 N.L.R., p. 153), the ruling was that proof of any specific damage is unnecessary if it is plain that a right of plaintiff's has been infringed.

The principle is further expressed in the ruling in the case Cohen, Lazar & Co. *vs.* Gibbs (1922, T.P.D., 142), where it was held that the mere illegal and intentional seizure of a free man or his property is an *injuria* which will support an action for damages; so that it has been definitely held that a plaintiff has a claim for damages under Common Law for the illegal seizure and detention of his stock.

In argument before this Court it was contended that plaintiff had elected to proceed on his claim under the provisions of the Pound Regulations, and he was therefore precluded from setting up any claim under Common Law. The case Jeka Gubele *vs.* Ann Scheepers (3, N.A.C., 209) was referred to as supporting this. That case deals with damages for trespassing stock, and in this connection, apart from Common Law rights, alternative remedies are provided in the Pound Regulations.

All that that case decides is that once a proprietor has elected to proceed under one section of Proclamation No. 387 of 1893 and obtained redress thereunder, he cannot thereafter institute any other form of action.

As already pointed out, there is no provision in the Pound Regulations for a penalty by way of damages for the illegal seizure and detention of stock. Redress can only be obtained therefor under the Common Law.

In his summons plaintiff has averred the illegal seizure and detention of his stock, the further particulars clearly state an alternative claim for damages in regard thereto and the evidence adduced by him establishes a *prima facie* case for defendant to meet.

This Court holds that the Assistant Native Commissioner has erred in dismissing the summons. The appeal is allowed with costs, the judgment set aside, and the case returned to the Court below for further hearing.