1936 — 1939.

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SELECTED DECISIONS OF THE NATIVE APPEAL COURT

CAPE & O.F.S. DIVISIONS

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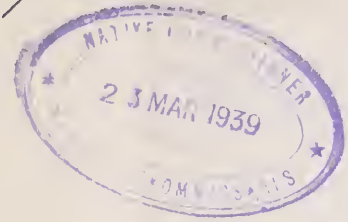

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OF THE

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(CAPE AND O.F.S.)

1938.

Volume 10.

(Parts I and II).

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Selected Decision

OF THE

Native Appeal Court

(CAPE AND O.F.S.)

1938

VOLUME 10.

CASE No. 1.

MAVELA BOYA vs. DAKAWULA MANGA.

BUTTERWORTH: 20th January, 1938. Before H. G. Scott, Esq., President, and Messrs. L. M. Shepstone and H. F. Marsberg, Members of the N.A.C.

Practice: Numerous postponements—undesirable and against interests of Justice.

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

(Case No. 56 of 1935.)

No good reason has been advanced for disturbing the judgment in this case and the appeal is accordingly dismissed with costs.

It is observed that this case was commenced in May, 1935, and was not completed until the 15th November, 1937, after twelve postponements had been granted.

It has frequently been pointed out and this Court wishes again to emphasise that it is highly undesirable and against the interests of justice that cases should be heard in so many instalments.

CASE No. 2.

MAGUTYWA SONYABASHE vs. MBINA MAQUNGO.

BUTTERWORTH: 20th January, 1938. Before H. G. Scott, Esq., President, and Messrs. L. M. Shepstone and H. F. Marsberg, Members of the N.A.C.

Illegitimate Child—Dowry of—"Tombisa" ceremony—Native Assessors opinion as to object of and place where it should be performed—Performance of ceremony at kraal of natural father does not mean that girl belongs to him unless he has paid damages and maintenance—Consent of relatives of girl's mother—Whether necessary.

Seduction—Scale of fines for second pregnancy—Fingo Custom.

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

(Case No. 58/1937.)

In the Court below the plaintiff sued defendant for th delivery of four head of cattle and £2 cash which had been paid as dowry for a girl named Qizana who, plaintiff claimed belonged to him.

From the evidence it appears that one Sam, an illegitimate son of plaintiff's sister, rendered Lolose, defendant's daughter, pregnant on two occasions. As a result of the first pregnancy a boy, Mlungisi, was born and the usual fine of three head of cattle was paid. The girl, Qizana, was born as a result of the second pregnancy but Sam had disappeared before her birth. About that time a fourth beast, a black heifer, was paid to defendant.

Qizana grew up at defendant's kraal but about four years ago she went to plaintiff's kraal to undergo the " tombisa " ceremony.

Plaintiff alleges that the black heifer was paid as a fine for Qizana while defendant says it was " isondlo " for Mlungisi.

The Native Commissioner entered judgment for the defendant with costs, holding that the fourth beast was paid as maintenance for Mlungisi and not as a fine and against this judgment an appeal has been noted on the grounds—

(1) that the Native Commissioner failed to give due weight to the fact that the girl, Qizana, was allowed to go to the kraal of the plaintiff for the " tombisa " ceremony, and

(2) that there is no proof that plaintiff ever fetched the child Mlungisi and as he was taken to plaintiff's kraal by his mother when he was sick and died there before plaintiff thought of fetching him, the question of maintenance could not and never did arise.

In dealing with the grounds of appeal the Native Commissioner says, in his additional reasons for judgment: —

" In regard to the first point, I did not accept as a fact that Qizana was allowed by defendant to ' tomba ' at plaintiff's kraal, but believed the evidence of defendant and Lolose that the ceremony was performed at that kraal without the consent of either. I have not been able to discover a decided case upon the significance of the ceremony and no authority was quoted for the contention that the ' tombisaing ' of Qizana at plaintiff's kraal established that she was regarded as his property. It seems obvious that the consent of defendant would be required to the ' tombisaing ' of his minor unmarried granddaughter and ward, and having accepted the evidence of the defence that this consent was not given, I could not attach any particular significance to the fact that the ceremony was nevertheless performed at plaintiff's kraal."

" In regard to the second point I accepted the evidence of defendant and Lolose that the child Mlungisi was taken to plaintiff's kraal at the latter's instance, and disbelieved the plaintiff's version of the child's arrival at his kraal. That being so I could come to no other conclusion than that the black heifer was paid as maintenance for Mlungisi, and plaintiff's claim could not succeed."

The facts of this case having been put to the Native Assessors they state unanimously: —

" Our custom of tombisa is to protect a girl against illness. In taking out that disease the child must be taken to her father's (the seducer) kraal. The mere fact that the ceremony is performed there does not mean that she belongs to him unless he has done all the necessary things, i.e. paid damages and ' sondlo '. The main object of the ceremony is to protect the girl against disease. The performance of the ceremony at a particular kraal has no significance in so far as the rights in a girl are concerned. The reason she is taken there is because the ceremony must be performed by the male

relatives on her father's side. It makes no difference whether she went there with the consent of her mother's relatives or without their knowledge.

Amongst the Fingo two head of cattle are usually paid for a second pregnancy."

The Native Commissioner has given sound reasons for accepting the evidence of the defendant in preference to that for plaintiff and this Court agrees with his finding.

The appeal is dismissed with costs.

CASE No. 3.

HARRISON NZANZANA vs. KNOX DAFETI PUKU.

BUTTERWORTH: 20th January, 1938. Before H. G. Scott, Esq., President, Messrs. L. M. Shepstone and H. F. Marsberg, Members of the N.A.C.

Practice—Appeal—Application for postponement to enable respondent to raise funds to instruct attorney to defend—Not sufficient cause for granting postponement—Objection that summons discloses no cause of action—should be taken in limine in Court below and cannot be raised for first time on appeal—Evidence led on matter not pleaded—If not objected to by opposing attorney Judicial Officer should not raise objection himself in his reasons for judgment—Claim in summons for property previously disposed of by plaintiff—Judgment for not competent—Liability of person in charge of property belonging to another for disposals made by his wife to whom he is married out of community of property—Pleadings—Duty of practitioners in drawing.

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

(Case No. 86/1936.)

Before commencing his argument in this case Mr. Webb stated that the respondent's attorney in the Court below had not been paid sufficient fees to enable him to represent his client on appeal and suggested that the matter be postponed to the next session of this Court to enable the respondent to raise funds to instruct his attorney.

The Court did not consider the reason given sufficient cause for postponing the matter and, therefore, refused to allow it to stand over.

In the Court below the plaintiff (respondent) claimed from defendant (appellant) the following cattle or their value £25 which he alleged belonged to the estate of his brother the late Burnside of which he is the heir, viz.:—

1. A black cow.
2. A red and white ox.
3. A red heifer, white underneath.
4. A black and white heifer.
5. A black heifer with white belly.

In his plea defendant stated that all the stock belonging to Burnside's Estate had been handed to plaintiff by defendants' wife to whom such stock had been left by Burnside at his death, prior to the issue of summons, that the red and white ox was never Burnsides' property and that the red and white heifer was sold by defendant's wife with the knowledge and consent of plaintiff.

The Native Commissioner entered judgment for plaintiff for the return of the black cow, red heifer white underneath and the black heifer white underneath or their value £15 and costs of suit.

The appeal is against that portion of the judgment ordering the return of the two heifers, on the ground that the red heifer white underneath was sold by defendant's wife to whom he was married by Christian Rites without community of property and that he (defendant) is not liable for her torts, and that the black heifer white underneath had been sold by plaintiff to a third party to whom it had been delivered and it was no longer in defendant's possession.

The Assistant Native Commissioner found as a fact that defendant's late wife had disposed of the red heifer which formed portion of the estate and that prior to the issue of summons plaintiff disposed of a beast, portion of the estate, to one Zululake and with these findings of fact we are in agreement.

It remains only to decide whether defendant is liable for the return of these animals.

It was argued in this court that the summons disclosed no cause of action and for that reason alone plaintiff was not entitled to a judgment.

This is one of the objections which may be taken to a summons in terms of Rule 2 (1) or Order XII of Proclamation No. 145 of 1923. That objection, however, must be taken, in limine, in the Court below and cannot be raised for the first time on appeal. The defendant allowed the summons to stand and the defect was cured by the evidence which disclosed that the cause of action was the possession by defendant of certain cattle in the estate of one Burnside of which plaintiff is heir and his refusal to hand them over.

It was further argued that there was no evidence that defendant was in charge of these cattle. It is true that the evidence on that point is not strong but defendant appears to have accepted that that was the position otherwise he would have appealed against the whole judgment.

Finally it was argued that defendant, having been married by Christian rites and community of property having been excluded by section 5 (1) of Proclamation No. 142 of 1910, was not responsible for the tort of his wife in selling the red heifer white underneath belonging to the estate.

In reply to this argument it is sufficient to say that the action in regard to this beast is not based on tort.

If the defendant was in charge of the cattle he is responsible to account for them. If he went away it was his duty to place someone in charge of the estate to see that it was not dissipated and he is not relieved of responsibility merely because it was his wife who disposed of the beast. Defendant would still have been liable no matter who it was that had sold it.

In regard to the black heifer, white underneath, the Assistant Native Commissioner states—

"That in view of defendant's plea he was not entitled to raise the question of the sale to Zululake, particularly in view of the fact that the transaction occurred prior to the issue of summons and was within defendant's knowledge at the time he pleaded over to the summons. The Court, therefore, ignored the evidence adduced in regard to this transaction and ordered that defendant hand over this beast, which is in his possession, to plaintiff. The question of its ownership is one between Zululake and plaintiff."

It seems to us that the Assistant Native Commissioner has approached this question from the wrong angle. The evidence with regard to the sale to Zululake was never objected to by plaintiff's attorney and in fact he cross-examined defendant's witness on it.

If plaintiff's attorney considered that in view of the plea defendant was not entitled to lead the evidence then he should have objected when it was tendered and it was not for the Assistant Native Commissioner to raise the objection himself.

That he did not ignore the evidence is shown by his giving a finding in regard to the sale to Zululake.

Now the plaintiff's claim is for certain cattle which he claims to be his property and in possession of defendant. The onus is on him to prove those facts. As the animal in question was sold before the issue of summons it was, at the date of issue of summons, no longer plaintiff's property and he has, therefore, no claim to it.

The Assistant Native Commissioner says the question of ownership is one between plaintiff and Zululake but this has already been settled by his finding as to the sale.

If defendant is compelled to hand over the heifer to plaintiff it only means that Zululake will sue plaintiff or possibly even defendant thus bringing about an entirely unnecessary multiplication of actions.

In the opinion of this Court, in view of the fact that plaintiff had parted with the ownership of the black heifer, white underneath, it should not have been included in the judgment.

The appeal is allowed with costs in so far as the black heifer, white underneath, is concerned and the judgment in the Court below altered to read " For plaintiff for the delivery of the black cow and the red heifer, white underneath, or their value, £10 and costs of suit."

The pleadings in the Court below were very inartistically drawn and leave much to be desired. The summons is one to which an objection might and should have been taken and the plea was contradictory and it is surprising that it was allowed to stand. It is the duty of practitioners, in drawing pleadings, to set out the claim and ground of action clearly and concisely and the defence should similarly be clear and concise.

It is trusted that this will be borne in mind, otherwise this Court may decide to mark its disapproval in making an order in regard to costs.

CASE No. 4.

DANIEL NDWANDWA vs. ELIAS MINI.

KOKSTAD: 2nd February, 1938. Before H. G. Scott, Esq., President, and Messrs. F. C. Pinkerton and G. Kenyon, Members of the N.A.C.

Practice: Res Judicata—*Elements required to determine plea of.*

(Appeal from Native Commissioner's Court, Mount Fletcher.)
(Case No. 46 of 1937.)

The plaintiff issued summons against defendant in the Court below, in which he claimed—

1. that defendant be obliged to take delivery of his three children born to Regina, the daughter of plaintiff, and of which children defendant is the father, and

2. delivery of one horse and five head of cattle, representing the balance of fines agreed upon to be paid by defendant to plaintiff in respect of the five children—two being now dead—born to Regina and of which children defendant is the father.

In his particulars of claim he set out that defendant and Regina had lived in concubinage for many years as a result of which Regina had given birth to five children, of whom three are alive and, with Regina, are living at plaintiff's kraal; that defendant has paid all the fines in respect of the five children, as agreed upon, except one horse and five head of cattle.

To this summons objection was taken on the ground of *Res Judicata* in that there has been a judgment in a previous action between plaintiff and defendant, based on the same or substantially the same grounds as the present action and with respect to the same or substantially the same subject matter or matters.

The Native Commissioner upheld the objection and dismissed the summons with costs and an appeal has been noted on the grounds that the subject matter and the cause of action in the two cases are entirely different.

In the previous case, which was between the same parties, plaintiff claimed 20 head of cattle and one horse or £110 as balance of dowry due or alternatively 17 head of cattle and one horse or payment of their value as damages for aggravated and repeated seduction of his daughter, Regina by plaintiff and in his particulars of claim alleged that in 1923 on promise of marriage defendant seduced and rendered pregnant, the said Regina, who was delivered of a male child in respect of whom defendant paid three head of cattle; that since then defendant had continuously cohabited with Regina who bore him five children—two of which died; that defendant had repeatedly promised to pay the usual Hlubi dowry of 20 head of cattle and one horse, but had failed to do so; that in the event of defendant failing to pay dowry plaintiff was entitled to damages in the sum claimed in the alternative (i.e. 17 head of cattle and one horse).

Defendant signed a consent to judgment for £85 and costs and judgment was entered accordingly.

In so far as the claim for the stock is concerned it is contended inasmuch as the judgment in the first case was for damages for repeated seductions whereas the present claim is for one horse and five head of cattle being balance of fines as agreed upon that the two causes of action are not the same.

Among the essential requirements of the exceptio rei judicatae are that the previous judgment shall have been given in an action—

(1) with respect to the same subject matter, and

(2) based upon the same ground.

The same subject matter will be regarded as in issue between the parties when the same thing, whether increased or diminished in value, is prayed for, as also when only part of the thing claimed in the first action is sued for in the second; nor does it matter whether the same words are used in describing it, provided it is in fact the same thing (Maasdorp 3rd Edition, Vol. IV., p. 263).

The second essential is that the ground of action shall have been the same, it not being enough that the thing claimed was the same. The same ground of action may be present, even though a different form of action may be brought, the defence of *Res Judicata* not being defeated by the fact that the action differs in form from the one pre-

viously brought, so long only as the matter in issue is the same (Maasdorp ibid p. 265).

Now in so far as the subject matter is concerned it seems clear that plaintiff is suing for part of what was claimed in the first action in which he obtained judgment for the value of 17 head of cattle and one horse as damages for repeated seduction for he does not aver that that judgment was novated by a new agreement and he is therefore claiming something for which he has already got judgment. As the Native Commisssioner say in his reasons for judgment:—

"The fact that the stock claimed in the previous case was described as 'damages' and that now claimed is described as 'balance of fines agreed upon' does not alter the position that the two claims are for damages in respect of the five children. Plaintiff has already obtained judgment for the full amount of damages claimed by him and this Court considers that, as he is not entitled to claim 'fines' in addition to 'damages' his present claim for five head of cattle and a horse described as 'balance of fines agreed upon' can only mean that he is now suing for the unsatisfied portion of his previous judgment and that the objection of *Res Judicata* should be upheld."

In regard to the second essential mentioned above it is evident that both actions are based upon the same cause of complaint, namely, the cohabitation of defendant with plaintiff's daughter, Regina, and the bearing by the latter of five children to defendant.

As the parties in the two actions are the same all the essentials to support a plea of *res judicata* in regard to the stock claimed are present and this Court is of opinion that the plea in regard thereto was rightly upheld.

The claim that defendant should be compelled to take delivery of the woman Regina and the three children stands on a different footing. This did not figure in the previous case at all.

In dealing with this claim the Native Commissioner says: "The claim in the present case for an order compelling defendant to take delivery of the three children tends to confuse the issue. This Court does not know of any such action under Native Law. According to Native Custom he should keep the children and then, when defendant claims their delivery, he can claim cattle for their maintenance. The Court, therefore, disregarded this claim."

The Native Commissioner appears to have overlooked the fact that he was asked to decide whether or not a certain claim was or was not *Res Judicata*, not whether plaintiff had any cause of action in connection with it. If in fact there is no such action under Native Law and Custom that is a matter for plea or possibly exception but it cannot be disregarded for the purpose of deciding on a plea of *Res Judicata*.

It may well be that plaintiff may hesitate to proceed with the action on this point alone but, if he desires to obtain a ruling of the Court on it, there is no reason why he should not be allowed to do so.

In the opinion of this Court the Native Commissioner erred in disregarding this claim. It is clearly not covered by the plea.

The result is that the appeal is allowed and the judgment in the Court below amended to read—

"Objection of *res judicata* upheld only in regard to the claim for one horse and five head of cattle, but overruled in regard to the balance of the claim. No order as to costs."

In regard to the costs in this Court we are of opinion that there should be no order.

CASE No. 5.

ZACHARIAH MPANDE vs. UMQANTO NQOLOSI.

KOKSTAD: 2nd February, 1938. Before H. G. Scott, Esq., President and Messrs. F. C. Pinkerton and G. Kenyon, Members of the Native Appeal Court.

Damages—Trespass—Land Regulations—Permission of Native Commissioner to occupy land sufficient even though certificate of occupation not issued—Applicant for land not to be penalised for neglect of duty by officials—Proclamations 125 *of* 1903, 195 *of* 1908, 143 *of* 1919 *and* 26 *of* 1936.

(Appeal from Native Commissioner's Court, Mount Fletcher.)
(Case No. 35 of 1937.)

In the Court below plaintiff (appellant) claimed from defendant (respondent) the sum of £7 as damages for trespass by three horses of the defendant in his land on four separate occasions.

In his plea defendant merely denied the trespass, and plaintiff then gave evidence in the course of which it appeared that he was not in possession of a certificate of occupation in respect of the land in question and that he had demanded from defendant 13s. 6d. in respect of the trespass on the four occasions. Defendant then filed an additional plea in the following terms:—

"1. That plaintiff having succeeded to the land upon which the four trespasses as claimed in the summons took place after plaintiff's father died in the year 1918 plaintiff can only be considered the owner of such land by virtue of a certificate of occupation in his favour and this was never granted to him, wherefore plaintiff's claim should be dismissed with costs.

2. That as plaintiff formally demanded payment of trespass fees 13s. 6d. in respect of the four trespasses as claimed in the summons he is estopped from claiming damages in respect of the said trespass as done in the summons. Wherefore defendant prays that plaintiff's claim may be dismissed with costs."

After hearing evidence the Native Commissioner entered a judgment of absolution from the instance with costs on the ground that plaintiff had failed to show that he was in lawful occupation of the land on which the alleged trespass took place. The grounds of appeal are:—

1. It is not a condition precedent or legally necessary to enable plaintiff to succeed in his action that plaintiff should be in possession of a certificate of occupation.

2. Provided, as is the case in this action, no certificate has rightly or wrongly been issued to another party in respect of the land to which plaintiff's claim relates, it is only necessary for plaintiff to prove that he is in lawful occupation of such land.

3. Such proof was duly adduced on behalf of plaintiff and the fact that the Native Commissioners of Mount Fletcher failed in their duties in issuing to plaintiff the requisite certificate of occupation and in seeing to it that the necessary entries in the appropriate land books or registers were made is no fault of plaintiff and cannot prejudice his lawful claim nor does such default destroy or negative the proof of lawful occupation of the said land adduced by plaintiff.

4. The judgment is against the weight of evidence and not in accordance with the legal principles deducible therefrom and is opposed to principles of justice.

The undisputed evidence in this case is to the effect that the land in question, which is in an unsurveyed district, originally belonged to the plaintiff's father. After his death it was occupied by the plaintiff and about six years ago it was measured and marked off by the Headman and one Bod Lehana and allotted to plaintiff and the allotment was duly confirmed by the then Native Commissioner.

No entry appears to have been made in the register required by law to be kept by the Native Commissioner nor was any certificate of occupation in terms of the law issued to plaintiff.

In these circumstances defendant contends that plaintiff is in unlawful occupation and cannot sue for trespass.

In a number of cases which have come before the Native Appeal Court it has been held that a person who is not in possession of a certificate of occupation cannot be regarded as being in lawful occupation and, therefore, cannot sue for damages for trespass. A reference to the reports of these cases discloses that in each instance the allegation is that the land had been allotted by the Headman but the approval thereto of the Magistrate of the district had not been obtained and the Courts held that allotment by the Headman alone was insufficient and the approval of the Magistrate was also necessary.

In the case of Blikman Mduna *vs.* Ngubo (3, N.A.C., 277) the President in the course of his judgment said: "Under the provisions of Section 5 of Proclamation No. 125 of 1903, no man may cultivate any land which has not been allotted to him by the Headman, with the approval of the Resident Magistrate, and Section 12 added to this Proclamation by Proclamation 195 of 1908, provides the manner in which any grant of land shall be registered, and goes on to say that any person charged with contravening either of the said Regulations *shall be deemed not to have obtained the necessary consent or permission unless such entry or certified copy shall be produced in proof thereof.*" The evidence goes to show that no grant of the land to the plaintiff has been registered, and it follows that no grant has been made to him with the approval of the Magistrate, and, therefore, even though the Headman may have allotted the land to the plaintiff, until such allotment has been approved by the Magistrate the plaintiff could not lawfully occupy such land.

It seems quite clear that this judgment was based on the very stringent provisions of Proclamation No. 195 of 1908, but, even so, it is to be doubted whether, if there had been evidence that the Magistrate had approved of the allotment the Court would still have held that the land was unlawfully occupied. The case of William Mabinda vs. T. Melwane (3, N.A.C. 279) referred to by the Native Commissioner in his reasons for judgment was decided while Proclamation No. 195 of 1908 was in force and the judgment was no doubt, influenced by that Proclamation.

Proclamation No. 195 of 1908, together with other proclamations dealing with the occupation of land in unsurveyed districts in the Transkeian Territories, was repealed by Proclamation No. 143 of 1919 which, in turn, was repealed by Proclamation No. 26 of 1936. In neither of the last two named proclamations were the provisions of Proclamation No. 195 of 1908, referred to in the case of Blikman Mduna *vs.* Ngubo (supra) repeated, an omission, which is significant as indicating a realization by the legislature of the injustice of penalizing an innocent party for the neglect of duty by a person over whom he had no shadow of control.

The decisions in the cases above referred to are consequently no safe guide for cases arising subsequently to the repeal of the Proclamation of 1908.

All that is required by Proclamation No. 26 of 1936, which now governs these matters, is that the Native Commissioner shall have given permission to occupy.

The entry in the land register or the production of a certificate of occupation would be conclusive proof of the grant of such permission but the absence of such entry or certificate does not preclude other proof being given.

It is the permission of the Native Commissioner which renders the occupation lawful and not the entry in the register or the grant of a certificate of occupation. As long as a person can prove that he has that permission he has complied with the provisions of the proclamation and his occupation is lawful. His omission to obtain a certificate of occupation naturally makes his task of proving his right to occupy more difficult, but it cannot render his occupation unlawful.

It would be unreasonable to subject a person who has done all that is in his power to comply with the law to penalties and disabilities merely because the officers charged with certain duties had failed to carry out those duties.

In this particular district we find that for a period of at least two years certificates of occupation for land which had been duly allotted had not been issued. It is unthinkable that any Court would hold that these lands were being unlawfully occupied. This Court is certainly not prepared to do so.

The Native Commissioner has clearly been guided by previous decisions of the Native Appeal Court but his attention does not appear to have been drawn to the provisions of the law obtaining at the time the decision he relied upon was delivered. If it had he might possibly have come to a different conclusion.

In the present case, as pointed out above, there is undisputed evidence that the allotment to plaintiff was made by the Headman of the location and *approved of by the Native Commissioner, and*, therefore, as far as the record goes, his occupation is lawful.

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

CASE No. 6.

NIVARD TEBELE q.q. vs. GEORGE KLAAS.

KOKSTAD: 3rd February, 1938. Before H. G. Scott, Esq., President, and Messrs. F. C. Pinkerton and G. Kenyon, Members of the N.A.C.

Practice—Res Judicata—*Requirements of plea of*—*Where cause of action in two cases not the same, plea of cannot stand.*

(Appeal from Native Commissioner's Court, Matatiele.)
(Case No. 274 of 1937.)

This is an appeal against a judgment of the Acting Assistant Native Commissioner, Matatiele, in upholding an objection of *res judicata* to a portion of plaintiff's claim.

The plaintiff sued for the sum of £20. 12s., being the value of 4 oxen and 2 chains and £7. 8s. damages. The particulars of claim are as follows:—

"1. On or about 3rd April, 1935, plaintiff obtained judgment against defendant for the delivery of certain 14 head of cattle, 2 chains, 1 harrow and 1 plough.

2. The plaintiff received from defendant thereafter 10 head only of the cattle, the harrow and the plough but defendant wrongly failed to deliver the remaining 4 cattle and 2 chains and although a writ of execution was levied, defendant continued to fail to point out or deliver to the Messenger of the Court the said 4 cattle and 2 chains and the Messenger was unable to find and attach same.

3. In consequence, plaintiff is entitled to the value of the cattle and claims as above set-off by way of damages or otherwise.

4. By reason of defendant's failure to deliver and plaintiff being thus unable to obtain the property, he is entitled to further damages in the sum of £7. 8s., being 1s. per head per month for the loss of the use and possession of the oxen."

Objection was taken to the summons on the ground that " The claim made therein is *res judicata*, the claim forming a portion of the judgment granted by the Court in Case No. 132/1934 between the same parties ".

The objection was upheld in respect of the claim for 4 cattle and 2 chains or their value, £20. 12s., with costs.

The appeal is on the ground that the cause and subject matter of the action in the present case are different from those in Case No. 132 of 1934.

To establish a plea of *res judicata* it is necessary to show that the previous judgment was given in an action (1) with respect to the same subject matter (2) based upon the same grounds, and (3) between the same parties.

In regard to (1) Maasdorp (3rd Edition, Vol. IV, page 263) states: " The same subject matter will be regarded as in issue between the parties when the same thing, whether increased or diminished in value, is prayed for, as also when any part of the thing claimed in the first action is sued for in the second; nor does it matter whether the same words are used in describing it, provided it is in fact the same thing ".

It might appear from a casual reading of the summons that plaintiff claimed part of what he obtained judgment for in the previous case but close scrutiny of the claim reveals that this is in fact not so. The original case was for specific performance, i.e. the delivery of certain property—a form of action which is within the limits of the jurisdiction of Courts of Native Commissioners. As the cattle and other articles were in existence, plaintiff was under no obligation, legal or otherwise, to place a money value on the articles sued for.

The case of Nortje *vs.* Nortje (6, S.C. 9) referred to by the Additional Assistant Native Commissioner in his reasons for judgment is no authority for his contention that the plaintiff should have claimed the alternative value of the cattle and other articles in the original case. That case merely decided that where there was a judgment of a competent Court in a divorce action decreeing a division of the joint estate it was not competent for the plaintiff in that action subsequently to bring another action claiming that defendant had forfeited the benefits arising out of the marriage in community of property and that that claim should have been made in the original action.

Defendant consented to judgment for the return of all the property claimed. He, however, it is alleged, delivered only 10 head of cattle, one harrow and one plough and a writ of execution was issued for the balance of four head of cattle and two chains. It is admitted that at the time the consent judgment was signed, defendant was in possession of all the property and was in a position to make full restitution.

It was stated by the Additional Assistant Native Commissioner, in his reasons for judgment, and was also argued in this Court, that if plaintiff obtains judgment in the present claim he would be in the extraordinary position of having one judgment in his favour for the articles and another for their value. This may be so but that is no reason for saying that the cause of action is the same in both cases. In the case of Ras *versus* Simpson (1904, T.S., p. 254), *Innes, C.J.*, stated that if specific performance had been asked for and decreed and had not been carried out it would have been competent for the plaintiff in another action to have asked in lieu of that decree for cancellation of the contract and damages. The case of Gordon *versus* Moffett (1934, E.D.L. 155) is very similar to the present action. There a consent judgment had been entered for the payment by defendant of £106, purchase price of certain erven, to be paid within four months against transfer. Execution was levied on this judgment and a return of *nulla bona* made. Thereafter plaintiff instituted action claiming a rescission of the contract of sale, ejectment and damages. Exception was taken that the matter was *res judicata*, but was overruled by the Magistrate. On appeal it was held that the judgment in Ras *versus* Simpson was direct authority in favour of the course adopted by the plaintiff in Gordon *versus* Moffet and that the grounds of action differed materially from those upon which the original action was based.

That appears to be the position in the case now under consideration. Plaintiff obtained judgment for the delivery of specific cattle and articles and as that judgment was not fully complied with he was entitled to claim damages for that failure. It is true that the summons has been loosely drawn and does not indicate clearly that the present claim is in lieu of the delivery of the cattle and chains but that should not, in the opinion of this Court, bar the plaintiff from his remedy and is not a matter which can effect the question as to whether or not a claim is *res judicata*.

In order to clarify the position, Mr. Zietsman, for appellant, has undertaken that application will be made for the necessary amendment to the summons.

In the opinion of this Court the cause of action in the two cases is not the same and the Additional Assistant Native Commissioner erred in upholding the plea of *res judicata*.

The appeal will be allowed with costs and the judgment in the Court below amended to read: "Objection overruled with costs" and the case returned for hearing on the merits.

CASE No. 7.

AARON NDLANYA vs. DRUMMOND TOBELA.

KOKSTAD: 3rd February, 1938. Before H. G. Scott, Esq., President, and Messrs. F. C. Pinkerton and G. Kenyon, Members of the N.A.C.

Ejectment—Damages for—Where defendant put it out of power of plaintiff to minimise damages he is liable for full amount of damages sustained.

Cost of appeal—Where appellant succeeded in obtaining a substantial reduction in amount of judgment he is entitled to costs.

(Appeal from Native Commissioner's Court, Umzimkulu.)
(Case No. 260 of 1936.)

In the Court below the plaintiff sued defendant for £77. 9s. 9d. damages for the forcible ejectment of his wife and property from his huts.

The Assistant Native Commissioner entered judgment for plaintiff for £64. 9s. 9d. with costs, and against this judgment an appeal has been noted on the ground that the damages awarded are excessive, in that—

(*a*) If plaintiff's wife, who was in charge of his kraal during his absence, did leave all his property lying outside the kraal, as alleged, with no regard as to whether the same was stolen or destroyed, she aggravated the damages by her actions in this connection.

(*b*) That under the circumstances disclosed damages should not have been awarded except in respect to the value of those goods or articles which are perishable and might have been damaged or destroyed by weather conditions before they could have been reasonably removed.

(*c*) That the values placed upon the various articles by plaintiff were excessive.

The main facts of the case are not seriously in dispute and are as follows: The plaintiff is a lawful resident on the farm Welverdient, in the District of Umzimkulu, where he has four huts and three lands in possession of which he has been for a number of years. The farm is tribally owned by a section of the Amawushe tribe and defendant is the Acting Chief of that tribe, is Headman of the location of which the farm Welverdient forms a part and has full control over the said farm. During 1936 there was some trouble between plaintiff's daughter and a girl named Lucy Ann over some clothing. The matter was reported to the police who said that defendant should enquire into it as it was of a civil nature. Plaintiff told defendant not to hold an enquiry as the case was one between his daughter and his niece. Defendant then demanded a beast from plaintiff as a fine for stopping the enquiry. Plaintiff refused to pay and reported to the magistrate who sent for defendant and instructed him not to demand the fine or eject plaintiff.

Plaintiff then went up to Johannesburg and, in his absence a letter dated 23rd June, 1936, was sent by an attorney on instructions from the Chief of the Amawushe tribe giving plaintiff notice to leave the farm with his family and stock on or before 31st August, 1936, and threatening legal proceedings for ejectment and damages on failure to comply. This letter was sent to plaintiff by his wife and he wrote to his attorney to defend the matter.

During September, 1936, plaintiff's wife was away from her kraal and on her return found the huts locked and her belongings thrown outside. She broke the locks and put her property back in the huts. Defendant had admittedly put the locks on the doors.

On the 23rd September, 1936, defendant and eleven other men went to plaintiff's kraal, ordered his wife to leave, dug out the doors and windows of the huts and threw her belongings out. Plaintiff's wife alleges that defendant also instructed the other residents of the farm not to take her or her family or her property to their homes. Defendant denies this but this Court is satisfied on the evidence that he did give such instructions, with the result that the property remained in the open unprotected and it gradually disappeared.

The defendant alleges that plaintiff's wife had prior to this date removed all her property to the kraal of one Panzi and that on the date when he destroyed the huts there remained only a box, a bundle of kaffir corn, an old mattress and a quantity of mealie meal. He admits, however, that plaintiff's wife lived in the kraal for two days after he locked the huts on the first occasion. As plaintiff, even according to some of defendant's witnesses, was a man of substance it is improbable that his wife would have been content to occupy

the huts without bedding, cooking utensils and other necessities of life. We are satisfied on the evidence that defendant's statement is not correct. Plaintiff's wife states that on the day she was ejected she made a list of all the property that was taken out and this list was handed in at the hearing of the case, an estimate of the value being placed against each article, the total coming to £46. 2s. 9d. In addition, plaintiff claimed £18. 7s. as the value of the huts and £13 as damages owing to his lands being taken away from him and re-allotted to other persons. The latter claim was disallowed by the Asistant Native Commissioner.

It is contended that the values placed on the various articles are excessive, but the defendant in his evidence did not question the values and this Court is of opinion that, with the exception of the huts, they are not excessive. As far as the huts are concerned it will be seen, on reference to the account annexed to the summons, that plaintiff has included a separate claim for the doors and windows removed from these huts which would leave only the walls and possibly some thatch and rafters. No evidence whatever was given on behalf of plaintiff in regard to their value. It seems unlikely that they really were of any value to him and the claim should not have been allowed in the absence of evidence.

It is contended also that plaintiff's wife aggravated the damages by leaving the property outside without taking steps to protect it against theft or destruction and that in any case damages should only have been awarded in respect of perishables which might have been damaged by weather conditions before they could reasonably have been removed.

In ordinary circumstances there might have been a good deal of substance in these contentions. In the present case, however, it must be remembered that defendant by his own actions put it out of the power of plaintiff's wife to obtain shelter locally for her property. Her relatives say they could not take her property in because of defendant's orders and their attitude is not surprising in view of the extremely arbitrary, high-handed and illegal manner in which he had dealt with plaintiff's property.

It must be remembered that defendant was a man in authority whose orders had to be obeyed. It is true that the relatives of the plaintiff's wife did give her and her children shelter contrary to these orders but it can be understood that they would take a risk where human beings were concerned which they would not take for inanimate objects. Plaintiff's wife states that there was no kraal to which she could have removed the property and there is nothing to show that she could have safe-guarded it in view of the defendant's orders.

In the opinion of this Court the loss of the plaintiff's property was the direct consequence of defendant's illegal acts and orders and he is liable to compensate plaintiff therefor. As pointed out above, the value of the huts should not have been allowed, but in so far as the other articles are concerned this Court is of opinion that the Assistant Native Commissioner was justified in accepting the values placed thereon by plaintiff.

The appeal will be allowed and the judgment in the Court below amended to read " For plaintiff for £46. 2s. 9d. with costs ".

As appellant has succeeded in obtaining a substantial reduction in the amount of the judgment he is entitled to the costs of appeal.

CASE No. 8.

MZENDANA GEBUZA vs. MATANA GEBUZA.

Umtata: 18th February, 1938. Before H. G. Scott, Esq., President, and Messrs. W. J. G. Mears and W. H. P. Freemantle, Members of the N.A.C.

Inheritance: Adulterine child cannot inherit in preference to a legitimate son of Customary Union—Tembu Custom.

(Appeal from the Native Commissioner's Court, Mqanduli.)
(Case No. 231 of 1937.)

In the Court below plaintiff (respondent) sued the defendant (appellant) for nine head of cattle or their value, £45, and in his summons alleged:—

"1. Plaintiff is the eldest son and heir of the late Gebuza Mpikwa, and is still a minor and is assisted in this case by Sinyingi Mpikwa, his legal guardian, who is a brother of the late Gebuza Mpikwa.

2. That defendant is an illegitimate son of the late Gebuza Mpikwa's wife, one Matshini Sigidi having committed adultery with her and having paid fine to the said late Gebuza for such adultery.

3. That defendant, during May last, without the consent of plaintiff or his said guardian disposed of 9 head of cattle belonging to the said late Gebuza's Estate.

4. That these 9 head of cattle are the property of plaintiff by virtue of his heirship to the late Gebuza, and defendant had no right to dispose of them."

In his plea the defendant alleged that plaintiff was the second son of the late Gebuza Mpikwa, denied that he (defendant) was illegitimate and while admitting that one Matshini Sigidi had committed adultery with the late Gebuza Mpikwa's wife and that he had paid damages for such adultery, denied that these facts ousted him from his position as the eldest son of the union between the late Gebuza and his wife.

When the case came on for hearing, plaintiff's attorney admitted that defendant was recognized as a son of the late Gebuza Mpikwa, but not as his heir. Defendant's attorney admitted that defendant was born shortly after one Matshini Sigidi had committed adultery with the wife of the late Gebuza Mpikwa and that he had paid damages for adultery and pregnancy.

The only witness called was Singingi Mpikwa, a brother of the late Gebuza Mpikwa, and guardian of plaintiff. It was admitted that plaintiff was born after defendant. From the evidence given by this witness it appears that defendant's mother was rendered pregnant by Matshini and that four head of cattle were paid as damages, that defendant was born as a result of this pregnancy and that Gebuza was absent at the mines during the period of gestation and could not have been the father of defendant. It appears also that defendant grew up at the late Gebuza's kraal and was treated as a son. He was circumcised at Gebuza's kraal after the latter's death. The cattle in dispute were taken by defendant to pay dowry for his wife. After this witness's evidence had been taken, argument was heard on the legal point whether an adulterine child can inherit in preference to a legitimate son of the customary union.

The Native Commissioner held that defendant as the adulterine son, though older than plaintiff, could not inherit tho Estate of the late Gebuza Mpikwa to the exclusion of the latter's legitimate male issue and entered judgment in favour of plaintiff for the restoration of the nine head of cattle disposed of by defendant or their value, £45, and costs.

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

That the said judgment is contrary to Native Law and Custom in which the legal maxim "Pater est quem matrimonio demonstrat" (the maxim properly is "Pater est quem nuptiae demonstrant") also applies, and that even assuming the late Gebuza's wife had committed adultery, as he the said late Gebuza accepted the defendant as his son, no one else can challenge his position.

At the outset it may be said that the legal maxim referred to is not applicable. The presumption is that all children born of a lawfully married woman are the children of her husband, but it may be rebutted by evidence that the husband was absent from home or had no access to his wife for a time inconsistent with the period of gestation. In the present case there is uncontradicted evidence on the record that the late Gebuza Mpikwa was away at the mines during the whole period of gestation and could not have been the father of the defendant. That being so it is somewhat difficult to understand why this appeal has been brought, for the decided cases clearly show that, in Tembuland at any rate, an adulterine son cannot succeed to his mother's husband's estate where there is legitimate male issue of the marriage between his mother and the deceased as will be seen from the following cases.

In the case of Sidubulekana *vs.* Fuba (1, N.A.C., 49) the Native Appeal Court went even further and held that Sidubulekana, who was an adulterine son, could not succeed to the exclusion of legitimate sons in other houses.

It is true that in a case between the same parties heard at a later session (see 1, N.A.C., 52) the Native Appeal Court held that, there being no sons in the Right-hand House but Sidubulekana, as he had not been repudiated he was entitled to succeed to the property of that house although there were legitimate sons in the Great House. The Court, however, was careful to point out that this decision did not in any way affect the previous decision which was correctly decided in accordance with Tembu Custom while the latter case was dealt with according to Fingo Custom.

Another case dealt with under Tembu Custom was that of Baatje vs. Mtuyedwa (1, N.A.C., 110). While the report indicates that Baatje, who was an adulterine child, was twice publicly declared to be illegitimate, this did not affect the custom in the case. The President of the Native Appeal Court, in giving judgment said, *inter alia*: "According to Native Custom such a child cannot inherit where there is legitimate male issue of the marriage as in the present case".

In Mbudelwa Madlongo *vs.* Mnyulu Nandi (3, N.A.C., 119) it was held that under Tembu Custom no married woman produces a bastard and the only man who can bastardize her son is her husband. This case does not apply in the present instance because it is clearly proved that the defendant is illegitimate and the mere fact that he was not publicly repudiated does not give him precedence over the legitimate son. Even although he was accepted as a son he would rank merely as a younger brother to the legitimate son.

Finally in the case of Ludidi *vs.* Msikelwa (5, N.A.C., 28) it was held that an adulterine son could succeed to his mother's husband's estate *in default of legitimate issue.*

The last-mentioned case is one in which members of the Pondomise Tribe were concerned amongst whom, apparently, adulterine sons are allowed to succeed to the exclusion of collaterals. The custom of this tribe is different from that of the Tembu Tribe but even there an adulterine son is not allowed to oust a legitimate son in the same house from his position as heir.

The appeal is dismissed with costs.

CASE No. 9.

BUNGA MAHASHI vs. ZIHLALELE MAHASHI.

UMTATA: 18th February, 1938. Before H. G. Scott, Esq., President, and Messrs. W. J. G. Mears and W. H. P. Freementle, Members of the N.A.C.

Inheritance—Son of third wife married whether put in Great House or as Qadi would succeed to Great House property —Marriage—Facts indicating.

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

(Case No. 66 of 1936.)

In the Court below plaintiff (appellant) claimed from defendant (respondent) five head of cattle or their value £25 and alleged in his summons that he was the eldest son and heir in the Great House of the late Mahashi Mtsheke; that defendant is the eldest son and heir to the Right Hand House of the late Mahashi Mtsheke and had possessed himself of certain oxen the property of the Great House.

Defendant denied that plaintiff is the heir in the Great House of Mahashi but says he is the son of one Mascbeni whose heir is one Cinizele; he admits being in possession of three head of cattle belonging to the Great House but says the fourth beast claimed (a red and white ox) is his property and denies that there is a fifth beast.

During the course of his evidence the plaintiff admitted that the red and white ox belongs to defendant and the claim to it was abandoned. The Assistant Native Commissioner entered judgment in favour of defendant and found the following facts proved:—

1. That Nojam is the Right Hand House widow of the late Mahashi.

2. That Zihlalele is the eldest son and heir of the Right Hand House.

3. That Nosayini was merely a concubine to the late Mahashi.

4. That no son was born to Novayile who was the Great Wife of Mahashi, and

5. That, therefore, Zihlalele is the heir to the Estate of the late Mahashi.

This finding of facts seems to show that the Assistant Native Commissioner has paid very little attention to the evidence. If he had read the evidence only cursorily he could not possibly so completely have confused the names and status of the various wives.

The position is actually that the late Mahashi married as his Great wife, Nojam, who had no male issue, and as his Right Hand wife, Novayile, who is the mother of the defendant, Zihlalele. The marriage with Nojam was dissolved and the dowry paid for her returned. The late Mahashi then took Nosayini, the mother of plaintiff, and the dispute centres round her status.

The plaintiff's case is that Mahashi married Nosayini, paid seven head of cattle as dowry for her and placed her in the Great House. Defendant on the other hand asserts that she was merely a concubine and that no dowry was paid for her. It is common cause that as a girl Nosayini was rendered pregnant by some man and gave birth to a boy named Cinizele.

The only question to be decided is whether or not Mahashi married Nosayini. If he did it does not really signify whether she was put into the Great House or whether she was the third wife for in either case her son would be the heir to the Great House.

In favour of there having been a marriage we have the following facts which are not disputed:—

1. That she lived at Mahahi's kraal as a wife for a number of years.

2. That Mahashi's oldest land was, after his death, made over to Nosayini by Luvukuvu, who was then guardian of the family, and no protest was ever made in regard to this. If Nosayini had not been Mahashi's widow it is unlikely that she would have been given a land at all. Novayile, the Right Hand wife, only got a virgin land.

3. That the Great House stock was registered in plaintiff's name by Luvukuvu without protest.

4. That plaintiff was circumcised at Mahashi's kraal. Nontsumpa, defendant's only witness, attempts to do away with the significance of this fact by saying that plaintiff was really circumcised by Cinizele but he has to admit that the circumcision took place near his kraal and at the same time as his own son. At that time Nontsumpa was the guardian of the family as Luvukuvu was dead and it is unlikely that he would have allowed the circumcision of an unrecognized son at the kraal particularly as he must have been aware of the light in which such an action would be regarded.

In addition to the above-mentioned undisputed facts there is very strong evidence on behalf of plaintiff that seven head of cattle were paid as dowry for Nosayini, that a meeting of relatives was called and it was then intimated that she was being put into the Great House and that she lived for many years with Mahashi. If she had been only a concubine it is in the highest degree improbable that she would have been allowed to live at his Great Kraal.

Against this array of evidence there is only that of Nontsumpa which does not explain away the very significant facts already referred to.

In the opinion of this Court the evidence in favour of plaintiff's contention is overwhelming.

In regard to the number of cattle in the defendant's possession the only dispute is in regard to one ntusi ox. While defendant and Nontsumpa deny that there ever was such an ox there is the evidence of Gangilanga and Wageza, in addition to plaintiff and his mother, that there was such an ox and that it was disposed of by defendant and we think this evidence is sufficient to out-weigh the bare denial of defendant and his witness.

The appeal is allowed with costs and the judgment in the Court below altered to one in favour of plaintiff for the return of one black (waba) ox, one ntusi ox, one red (nala) ox and one badi ox or their collective value £20 with costs of suit.

CASE No. 10.

SITOZA SORWIDI vs. NOJAWUSI SORWIDI.

UMTATA: 18th February, 1938. Before H. G. Scott, Esq., President, and Messrs. W. J. G. Mears and W. H. P. Freemantle, Members of the N.A.C.

Practice—Appeal—Additional grounds of—Irregularity—Judicial officer must confine himself to pleadings—Judgment not in terms of claim.

(Appeal from Native Commissioner's Court, Engcobo.)
(Case No. 276 of 1936.)

In this case, plaintiff (respondent) sued defendant (appellant) on a summons, the particulars of which are as follows:—

1. Plaintiff is the Right Hand House widow of the late Sorwidi Mngonongwana who died about five years ago and who has no male issue in his Right Hand House where plaintiff resides.
2. Defendant is the eldest son and heir of the said late Sorwidi Mngonongwana in his Great House and guardian of plaintiff.
3. Plaintiff is the owner in her own right and by nqoma of some 83 sheep, all appertaining to the said Right Hand House and in addition certain 10 goats are the property of the said Right Hand Honse.
4. Defendant recently wrongfully and unlawfully and against the will and consent of plaintiff forcibly removed 23 of the aforesaid sheep from the said Right Hand House and the said 10 goats from the kraal of one Dumalisile, where plaintiff kept them for the benefit of the said Right Hand House, and diverted the same to the aforesaid Great House where defendant now keeps and kraals them, and controls them to the entire exclusion of plaintiff, denying her any right thereto.
5. Defendant further threatens to remove and divert to the said Great House the whole of the stock at the said Right Hand House.
6. Defendant refuses and neglects to support plaintiff.

Wherefore plaintiff prays for: (1) a Declaration of Rights that she is the owner or lawful possessor of the aforesaid 83 sheep and 10 goats, and is entitled to keep and control them at the said Right Hand House. (2) That defendant be ordered forthwith to return the aforesaid 23 sheep and 10 goats and any increase thereof to plaintiff at the said Right Hand House. (3) That defendant be ordered to refrain from interfering with any of the aforesaid stock in the future, and from diverting any of the same to the said Great House or elsewhere.

The plea was to the effect that the plaintiff was not the wife of the late Sorwidi Mngonongwana in the Right Hand House and that the sheep and goats were Great House property.

After hearing evidence the Assistant Native Commissioner entered the following judgment:—

1. Plaintiff is declared Right Hand House widow of the late Sorwidi.

2. The stock in question, viz.: 23 sheep and ten goats are declared Right Hand House property and their return to plaintiff is ordered.

3. An order restraining defendant from interfering with stock in future.

Defendant to pay costs.

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

1. Defendant is the heir of the Right Hand House of the late Sorwidi Mngonongwana, and also guardian of the property and persons in the said house.

2. That as such he is the owner of, and entitled to the possession of the said stock, and

3. Also entitled to deal with the said stock.

Application is now made, after due notice to respondent, to amend, amplify and add to the grounds of appeal in the following manner:—

(*a*) That in as much as respondent claimed a declaration of rights that certain sheep and goats were either her personal property or loaned to her, she was bound by her summons and the trial Court acted irregularly in giving her a judgment declaring her to be the Right Hand widow of the late Sorwidi and appellant refers to the allegations in Par. 3 of the Particulars of claim in the action in particular.

(*b*) That upon the facts, as found by the Court below, plaintiff failed to prove that the 23 sheep and 10 goats in question in the suit were personal or nqoma property belonging to her and defendant should accordingly have been absolved from the instance or awarded a final verdict on the issue.

(*c*) That the Trial Court acted irregularly in declaring the said 23 sheep and 10 goats to be the property of the late Sorwidi's Right-hand House as plaintiff's claim is based on the allegation that they are either her personal property or that of a third party.

(*d*) That the order restraining the appellant's rights, as owner, was not competent of the Trial Court, having regard to the nature of the claim, which was neither for an order of support or maintenance, nor for the removal of defendant from his position as the lawful custodian of the said sheep and goats and as respondent's guardian according to Native Custom.

Respondent's attorney objected to the granting of the application, relying upon Rule 22 of Government Notice No. 2254 of 1928, which provides that in the hearing of an appeal the parties shall be limited to the grounds stated in the notice of appeal, except where the appellant is not represented by a legal practitioner and was not so represented in the Native Commissioner's Court. The meaning of this rule is, in the opinion of this Court, that the parties will not ordinarily be allowed to argue upon any points not mentioned in the notice of appeal but that does not preclude the Court, upon application, in terms of Rule 19 of the aforesaid Government Notice, from allowing additional grounds of appeal to be put in in suitable cases.

In the case of Aaron Ngqabayo *vs.* Mpiyousa Bolokodlela (1933, N.A., 76) the Court said, *inter alia*: " In the same way that, notwithstanding the rules, this Court will allow an appellant to urge on appeal a ground not stated in his notice of appeal, provided it is not exclusively one of procedure, it is felt that the same privilege should be accorded to a respondent, otherwise the Court may find itself in this position that it will have to confirm a judgment based on an erroneous conception of the law governing the case—even if the application be refused it will still be incumbent on the Court of its own motion to raise the question of illegality."

In the case of Poselo Qashilanga *vs.* Ntsintsi Mtuyedwa (1936, N.A.C., 89) application was also made for the inclusion of a ground of appeal not contained in the original notice of appeal. Respondent's attorney objected on the ground that it raised an entirely new defence which was prejudicial to the respondent but the Court, following the decision in Mgabo *vs.* Bolokodlela (supra) granted the application, as it was of opinion that there was no prejudice to respondent, the point was merely one of law which did not require evidence to be called to meet it.

While this Court will not readily accede to applications for additional grounds of appeal to be filed, it is of opinion that the present case is one, in which its indulgence should be exercised, the respondent not being prejudiced thereby.

The application is accordingly granted with costs.

In this case the Assistant Native Commissioner seems entirely to have ignored the claims in the summons and has given a judgment upon what he imagined was the issue between the parties.

The claim of the plaintiff was that she was the owner *in her own right and by Nqoma* of some 83 sheep, and also that certain ten goats are the property of the Right Hand House. It is true that she states that the sheep all appertain to that House, but this is meaningless in view of her evidence. In the prayer to the summons she asks for a declaration of rights that she is the owner or lawful possessor of the aforesaid sheep and goats and is entitled to keep and control them at the said Right Hand House.

The plaintiff then proceeds to call evidence. Her own statement is a mass of contradictions but it would appear that her allegation is that some of the 83 sheep are the progeny of sheep nqomaed to her by her father or purchased from their wool sold by her, while others are the progeny of four sheep nqomaed to her by a mythical Gaika man who lives beyond the Kei.

Now if her statement is true none of these sheep appertain to the Right Hand House of the late Sorwidi Mngonongwana.

In regard to the goats, plaintiff has given two versions. First that her husband exchanged a hamel from the Right Hand House for two ewe goats which have increased to ten and then that the hamel which was exchanged came out of the nqoma sheep. She does, however, claim these goats as her own property.

Now the Assistant Native Commissioner did not believe the evidence for the plaintiff as to the sheep but found that the twenty-three sheep and ten goats taken by defendant belonged to the Right Hand House which was something he was not asked to do. According to the summons he was asked to declare that the plaintiff is the owner or lawful possessor of the stock. She clearly is not the owner and if it really is estate stock then also she is not the lawful possessor.

It is quite irregular for a judicial officer to enter a judgment which is not claimed in the summons. It was argued in this Court that the real issue between the parties was that the stock was Right Hand House property. If that is so then it has been very successfully hidden both in the summons and the evidence. It is not for this Court to assume a claim which is not set forth definitely.

We are entirely in agreement with the Assistant Native Commissioner in his rejection of the evidence on behalf of the plaintiff that the 23 sheep taken by defendant really belonged to a Gaika who had nqomaed them to her, but cannot follow why he should for that reason have declared them to be Right Hand House stock. This surely is illegal.

Plaintiff does not claim that this is so and defendant says they belong to the Great House. Upon what principle then does the Assistant Native Commissioner give a finding upon which there is no evidence?

As stated above the plaintiff claimed that she was the owner or lawful possessor of the sheep and goats in question and in the opinion of this Court she has failed to prove that, and absolution from the instance should have been granted. The appeal succeeds therefore on ground (*b*) of the additional reasons for appeal. This being so it is unnecessary to consider the other grounds of appeal.

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

If the defendant is refusing to support plaintiff she has her remedy but should bring her action in proper form.

CASE No. 11.

ROBERT MABUYA vs. WILLIAM MLONYENI.

BUTTERWORTH: 20th May, 1938. Before E. N. Braatvedt, Esq., Acting President, and Messrs. A. G. Strachan and H. F. Marsberg, Members of the N.A.C.

Animals—Stabbing of Ox—Offer of compensation—Claim for damages—Practice—Dismissal of summons on ground that Plaintiff had compounded a crime—No evidence of compounding—Summons wrongly dismissed.

(Appeal from Native Commissioner's Court, Kentani.)
Case No. 147 of 1936.

In this matter Appellant, who was Plaintiff in the Court below, claimed £4. 10s. damages for the death of an ox stabbed by Defendant.

The summons alleged that on being questioned Defendant admitted the stabbing and offered to pay the amount claimed.

Exception was taken to the summons as disclosing no cause of action in that Plaintiff had compounded the crime of cattle killing.

This exception was overruled and a plea was then filed denying the killing of the ox, the making of the admission and the offer of reparation.

To the plea a replication was filed denying the compounding of a crime.

When the hearing took place it came before a different judicial officer, and after Plaintiff's case had been presented, on the application of Defendant's attorney the summons was dismissed with costs on the grounds that Plaintiff had compounded a felony.

Appeal has been noted against this decision on the following grounds:—

1. That there is no rule of our law which requires the Appellant to prosecute the Respondent before suing for compensation.

2. That the action was based on a claim for damages sustained by the Appellant, and arising from the stabbing of a beast, the property of Appellant, by the Respondent, and which wrongful act he alleges the Respondent admitted.

3. That the claim is not based on an illegal or an immoral contract at all, nor do the particulars of claim in the Appellant's summons aver any such contract or any criminal offence; that no illegality appeared from the the facts before the Native Commissioner whereby he should have refused to hear the case on the merits, especially as the Respondent's exception to the summons had already been overruled; and that as the Respondent did not formally allege illegality in his plea, the Native Commissioner erred in dismissing the Appellant's summons before he, the Native Commissioner, had investigated all the facts of the case and had heard evidence of both the Appellant and the Respondent and their witnesses.

It seems hardly necessary to observe that if in fact Plaintiff had been guilty of compounding a crime he would not be able to succeed, for no Court would enforce a contract based on this offence which is defined in Bell's Legal Dictionary as " An

agreement whereby, for a consideration, a person injured agrees to refrain from prosecuting or if possible to discontinue a prosecution ".

According to the evidence—and in passing it may be said that the admission made by Defendant to the Sub-Headman in the presence of the Headman is admissible evidence—what actually occurred is this:—

Plaintiff says a meeting of men was called in connection with this matter and that Defendant, on being questioned, stated: " I stabbed it. I am asking for pardon. I stabbed it by accident. I will pay for it "; and later: " Defendant said: ' I stabbed the ox by accident as it was scattering my thatch grass. ' " . Again: " Defendant was not handed into custody on this admission. Defendant admitted and at the same time begged me to allow him to pay in March. He did not beg me not to charge him. I did not charge him. I know it is a criminal offence to stab another's beast. Defendant begged me to allow him to pay for the beast. If he had not promised to pay me the £4. 10s. I would have charged him criminally. The reason I did not charge him is because he promised to pay me "; and finally: " I did not know the difference between a civil and a criminal matter. When I found the beast and the person who stabbed it, I merely wanted him to raise my beast. . . . No mention was made of criminal action at any time during this investigation."

Nowhere in this evidence is there anything to show that there was any agreement to refrain from prosecuting the defendant in return for a consideration nor, in fact, is there anything to show that Defendant actually committed any crime. Defendant's excuse, according to Plaintiff, is that he stabbed the ox by accident, and if that is so he would not be criminally liable. Further evidence may show that the stabbing was not accidental, but the Assistant Native Commissioner was not justified in coming to the conclusion that a crime had been committed without hearing all the evidence, more particulary as Plaintiff seeks to be reimbursed in the total sum of £6. 10s. for the death of his beast, at which figure he valued it, and there was therefore no valuable consideration or reward in the legal sense for refraining from prosecution even if such agreement had been made.

As there is no evidence of the compounding of a crime the Assistant Native Commissioner erred in dismissing the summons.

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

CASE No. 12.

BENSON BALA vs. NGEMTU MATIWANE.

Butterworth: 20th May, 1938. Before E. N. Braatvedt, Esq., Acting President, and Messrs. A. G. Strachan and H. F. Marsberg, Members of the N.A.C.

Interpleader Action: Award of costs to party partially successful.

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

Case No. 243 of 1937.

This is an interpleader action in which is claimed certain three cattle, 13 sheep, and one horse, attached at the instance

of present Respondent in pursuance of a judgment obtained by him against one Andrew Bala, father of claimant, who is now the Appellant. All the stock in question was attached in possession of the judgment debtor, thus throwing the onus of proof of ownership upon Claimant.

The Native Commissioner found for Claimant in respect of the sheep and the horse but declared the cattle executable and made no order as to costs.

From this judgment appeal is brought, firstly against the order declaring the cattle executable, and secondly against the order as to costs.

In regard to the cattle, Claimant maintains that he provided the marriage outfit for his sister and that a week after the wedding his father allotted him two of the dowry cattle paid for his sister (the third beast claimed is the progeny of one of them).

The only evidence led for Claimant was his own, and that of his father, the judgment debtor concerned, and they say that the adult cattle were branded B.B. when acquired in 1933 and were left at the judgment debtor's kraal for his support. Moreover, they admit that the only other person present when the allotment was made was one Paul, uncle to Claimant. This person was not called in support of the claim, it being stated that he was at the time unwell. By Native Custom such an allotment of dowry as is here alleged must be publicly made and in the presence of as many members of the family as possible before it is regarded as effective and it is therefore strange that not even Paul was called to add weight to this testimony. In his evidence Claimant's father states that the brand on one of the beasts was plainly visible at the date of attachment in November, 1937, yet when examined by the presiding judicial officer in February, 1938, no semblance of a brand could be found.

The animal is stated to have been branded in 1933, and if the brand endured so clearly for four years it is remarkable that it should disappear in the ensuing three months. It is furthermore significant that the other animals also bear no brand, as pointed out by the Native Commissioner in his reasons for judgment, despite Claimant's assertion that he habitually went to his father's kraal during the December school vacations in order to earmark his sheep. No reason is adduced as to why he did not take the opportunity of branding the cattle at the same time.

In view of the surrounding circumstances, this Court is not prepared to say that the Native Commissioner erred in coming to the conclusion he did, and the appeal on the first ground must therefore fail.

The second ground of appeal is worded as follows:—

(*a*) That as the Appellant was successful and obtained judgment for a substantial amount, he was entitled to an order awarding him costs.

(*b*) That the interpleader suit became necessary owing to Respondent's refusal to release the stock from attachment; he had sufficient opportunity of releasing the 13 mixed sheep, 4 lambs, and bay gelding on receiving claim from Appellant.

(*c*) That there was no misconduct by the Appellant, or other exceptional circumstances why he should have been deprived of his costs.

(*d*) That the discretion allowed the Native Commissioner as to the award or otherwise of costs was not judicially exercised in the circumstances.

It cannot be disputed that the general rule as to costs is that the successful party is entitled to his costs and it was laid down in the case of Godloza *vs.* Smith 1932 E.D.L.D. 154 that the principles to be applied in the awarding of costs in interpleader matters are the same as in trial matters.

That case was taken on appeal on the question of costs, the lower Court having awarded costs on the whole issue to the Claimant in an interpleader suit which succeeded in part only. The circumstances were that oxen and a wagon had been attached at different times and places under the same writ and the claimant was successful only in respect of the oxen, the wagon being declared executable. The Supreme Court held that the issues were thus clearly separate and distinct and that the Magistrate should have awarded the costs of each issue to the party successful in that issue.

In the present case all the animals attached were found at the kraal of the judgment Debtor at one and the same time, and all were claimed to be the property of Appellant. There would thus appear to be no ground for claiming that separate and distinct issues were involved in this matter such as were referred to in the case of Godloza vs. Smith (*supra*) and the ordinary rules in regard to costs should therefore apply.

Indeed, no contention was raised in the lower Court that more than the one issue was involved, and it is only on appeal that it has been argued on behalf of the Respondent that such is the case.

With that view this Court is unable to agree and holds that there are not separate and distinct issues involved and that the Appellant is entitled to his costs on the whole issue.

The appeal on the second ground is therefore upheld and the judgment of the Native Commissioner as to costs altered to read " Defendant to pay costs ".

At the request of Counsel, Claimant in the Court below is declared to have been a necessary witness.

BENSON BALA vs. NGEMTU MATIWANE.

ADDITIONAL JUDGMENT IN THE ABOVE-MENTIONED CASE.

(Appeal from the Native Commissioner's Court, Nqamakwe.)
Case No. 243 of 1937.

The Respondent obtained a judgment against the Appellant's father, Andrew Bala, and a writ of execution for the judgment debt and costs was issued. The Court Messenger attached a black heifer, a red cow with white face, a black bull, a bay gelding, and 17 sheep. The Appellant claimed that all the animals attached were his property. Respondent did not admit the claim, and interpleader action resulted.

The Native Commissioner, after hearing all available evidence, declared that the cattle attached were executable, but that the sheep and horse were not executable. He made no order as to costs. It is against this judgment that the present appeal is brought.

The Appellant, who is a teacher by profession, left his father's kraal some years ago. All the animals which were attached were found in his father's kraal, and were entered in his father's name in the dipping tank register. The sheep,

it would seem, bore the Appellant's earmark, and the horse was branded L.D., being the initials of a Native (now deceased) from whom the Appellant states that he bought it. The cattle were adjudged by the Native Commissioner not to be branded despite Appellant's assertion to the contrary. The Appellant did not discharge the onus which rested on him to prove that the cattle were his property. His story on the point appears to be a highly improbable one. One of the cattle attached—namely a black heifer—was the animal which the Respondent had claimed from Appellant's father and for which he had obtained judgment. In spite of this fact the Appellant claimed it as his property in the interpleader action.

On the evidence before him the Native Commissioner correctly held that the cattle claimed were executable.

In regard to the question of costs, the appeal is brought on the following grounds:—

(*a*) That the judgment as to the costs is against the law.

(*b*) That as the Appelant was successful and obtained judgment for a substantial amount he was entitled to an order awarding him costs.

(*c*) That the interpleader suit became necessary owing to Respondent's refusal to release the stock from attachment, he had sufficient opportunity of releasing the 13 mixed sheep, 4 lambs and bay gelding on receiving claim from Appellant.

(*d*) That there was no misconduct by the Appellant, or other exceptional circumstances why he should have been deprived of his costs.

(*e*) That the discretion allowed the Native Commissioner as to the award or otherwise of costs was not judicially exercised in the circumstances.

The Native Commissioner gives as his reason for making no order as to costs that the Appellant succeeded only to the extent of approximately half the value of the claim.

It has been held in many cases that the Court has a judicial discretion as to costs, and that a successful party should, as a general rule, be awarded costs. In the case of Fripp *vs.* Gibbon & Co. A.D. 1913, de Villiers, J.P., said: "Questions of costs are always important, and sometimes complex and difficult to determine, and in leaving the Magistrate a discretion the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties."

Although, therefore, the general rule is that a successful party should be awarded costs— and it was held in the case of Godhloza *vs.* Smith E.D.C. 132" that costs in interpleader proceedings are governed by the same principle which applies to ordinary actions—yet the Court has a judicial discretion to depart from this rule where there are exceptional circumstances which justify such departure in the interests of fairness and justice.

The Native Commissioner does not say that in his opinion such special circumstances were disclosed in the present case. It was on the ground that the Claimant (Appellant) had only partially succeeded that he made no order as to costs. It is argued on behalf of the respondent that there are two issues in the case—namely the claim to the sheep and horse, and the claim to the cattle—and that as each of the two parties succeeded each should have been awarded costs in regard to

the issue on which he was successful. I do no think, however, that this contention is correct. All the animals were in the possession of the judgment debtor when attached, and they were attached on he same day and under the same writ.

The Appellant must have been aware when he claimed the cattle as being his property that his claim was false. The evidence establishes that fact. The Respondent was compelled to call five witnesses to prove that Appellant's claim was wrong. In these circumstances the Native Commissioner could rightly have held that there were exceptional circumstances in the case which would have justified him in making no order as to costs.

We are, however, bound by the record, and for the reasons stated I somewhat reluctantly agree with my brothers that the appeal must suceed on the question of costs.

E. N. Braatvedt,
Acting President of the Court.

Butterworth, 20th May, 1938.

CASE No. 13.

TLALINYANE MOJAKISANE vs. ALBERT M. C. KHOAPA.

Kokstad: 1st Jnne, 1938. Before E. N. Braatvedt, Esq., Acting President and Messrs. J. Addison and F. E. Pinkerton, Members of the N.A.C.

Marriage—Dowry—Husband failing to pay during subsistence of his marriage—Daughters born and grown up at kraal of uncle—Claim by father for daughter's dowry in possession of uncle—Counterclaim by uncle for dowry in respect of girl's mother—Plea that payment of dowry waived by woman's father—As dowry fixed by Basuto Custom agreement to waive must be proved conclusively—Set off of daughter's dowry against that due for mother—Costs.

(Appeal from Native Commissioner's Court, Matatiele.)
Case No. 162 of 1937.

In this case Plaintiff sued Defendant for the return of his daughter, one Moroana. The particulars of the claim are as follows:—

"1. Plaintiff is the father of a female named Moroana, born to his wife Ellen Nthoesele Mojakisane in or about 1912, and is, under Native custom, the legal guardian of the said daughter.

2. When the said Moroana was about 5 days old, the said Ellen Nthoesele Mojakisane died, and Plaintiff, at the request of the mother of the said Ellen Nthoesele Mojakisane and of Defendant, left the said Moroana with her.

3. Upon the death of the said mother, Ellen Ntshoesele Mojakisane, Plaintiff called upon the Defendant, who was the eldest son and heir to the Estate Khoapha, to return the said daughter to him.

4. Upon representations made to him by the Defendant, Plaintiff agreed to allow the said daughter Moroana to remain with Defendant for a further period to be determinable upon Plaintiff's pleasure.

5. Subsequently thereto plaintiff has called upon Defendant to return to him his aforesaid daughter Moroana, but despite this demand therefor, Defendant has refused to do so, and the said Moroana still resides with the Defendant.

To this he added a further claim for the immediate delivery by Defendant to him of 18 head of cattle or value £90 (later reduced to 14) paid to Defendant by Letibane Majoro Molilokoane and Muso Majoro on account of dowry in respect of the said Moroana.

Defendant pleaded:—

1. As to paragraph 5 of particulars, Defendant states that Moroana is and was at the date of summons a Major and this being so Plaintiff has no legal right to claim her return at all, much less to claim her return from Defendant.

2. That in view of paragraph 1 hereof the allegations in paragraphs 1, 2, 3 and 4 of summons are irrelevant. However paragraph 1 is admitted; paragraph 2 is admitted as substantially correct, save that Defendant made no request as therein stated; paragraph 3 is admitted; paragraph 4 is not admitted.

3. As to paragraph 5, it is admitted that Moroana lives at Defendant's kraal, where, so far as Defendant is concerned, she is very welcome to continue to stay, Defendant denying that he has any control over her whatsoever as she is a major.

Defendant prays for judgment with costs.
and also filed the additional plea:—

(*a*) As to the original claim for a person or Moroana Defendant reiterates his original plea which he prays may be considered as inserted herein.

(*b*) As to the additional claim for Moroana's dowry Defendant states:—

(1) His deceased father duly adopted Moroana as his daughter and her dowry would belong to Defendant who is the eldest son and heir of his father, Moroana being his adopted sister and was brought up as such.

(2) That further in view of the counterclaim herein the Defendant claims the right to set off any dowry received by him for Moroana against the dowry due to him for her mother by Plaintiff in the event of the Court holding that Defendant is not entitled to Moroana's dowry in terms of the preceding paragraph (1).

(3) That in any case Defendant has none of the dowry (which was 14 head of cattle) of Moroana to hand to Plaintiff as she has broken off her engagement and any cattle received have been returned."

Plaintiff in his plea to the claim in reconvention denies that any dowry whatsoever was payable in respect of his marriage to Ellen the mother of Moroana, it having been agreed that no such dowry would be payable on the ground that the observance of the dowry custom was against the tenets of the Paris Evangelical Missionary Society to which the parties to the agreement belonged.

Judgment was entered—

(1) for Plaintiff (in convention) for 11 head of cattle or their value £70;

(2) for Plaintiff (in reconvention) for 20 head of cattle, one horse, 10 sheep or their value £110. No further order as to costs.

Against the first part of this judgment Defendant appealed on the following grounds: —

1. The judgment depriving Defendant of the right to set off Moroana's dowry against any dowry due to him for Ellen was against Basuto Custom in that as the Court holds he was in possession of fourteen head of cattle he could set those off because of that fact. Further he had expended some of the animals. Further in any case according to Basuto Custom he could set off the whole of Moroana's dowry as and when received, or to be received, by him in the circumstances disclosed of record.

2. The judgment that Defendant was not entitled to Moroana's dowry by reason of her adoption was against the weight of evidence and Native Custom.

3. Defendant having succeeded in the disputed claim for Ellen's dowry was entitled to costs in reconvention.

Plaintiff lodged a cross appeal in respect of the second portion of the judgment on the grounds: —

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

2. The Court should have given judgment in favour of Defendant-in-reconvention with costs on both conventional and reconventional claims.

3. The Defendant (Plaintiff-in-reconvention) failed to discharge the onus of proving the claim in reconvention.

4. The magistrate erred in saying that Plaintiff said that "dowry was allowed *after* marriage", and that the witness Shadrack Mojakisane said that "dowry was allowed before but not *after* marriage" by the French Mission. His misconception and misconstruction of the evidence on these points have obviously seriously prejudiced his judgment.

The points which call for decision by this Court are: —

Has Plaintiff established the alleged agreement that no dowry was payable for his wife Ellen, the mother of Moroana?

Has Defendant proved his allegation, that Moroana was adopted by either his father or himself?

Has Defendant the right to set off Moroana's dowry against dowry due to him for Ellen?

The question of costs:

In view of the fact that Basuto Custom provides for the payment of a fixed dowry, the onus of proving a departure from this custom rested on Plaintiff, and in order to set up a state of affairs contrary to Native Custom, clear and conclusive evidence is required to satisfy this Court, that an agreement to waive the payment of dowry, was duly entered into. It is a well known fact that even those natives, who occupy a high place in the social scale, and have come under missionary influence, still strictly observe the dowry custom, even though they marry according to christian rites.

Plaintiff states that he married Ellen in 1889, that he paid no dowry for her, owing to the attitude of disapproval of the Church. He admits, however, that the question of dowry was enquired into by the Chief in 1923, at the instance of Charlie Khoapa, the brother of Ellen, who was demanding dowry. He went on to say that in compliance with this

demand, cattle were offered to Charlie, but in spite of his demand, Charlie refused to accept dowry, saying that it was not in accordance with their custom that dowry should be paid for Ellen, as they were adherents of the French Church. The Plaintiff went on to say: "The Church wishes to avoid cohabition before marriage, but did not object to dowry payment after marriage. It is the same position to-day. We were prepared to pay dowry, but Defendant prevented himself from getting any. Don't know why we were prepared to pay before, and then not prepared to pay after marriage. Won't admit that French Church allowed dowry after marriage. No Minister ever told me that Church did not allow dowry."

Shadrack, a minister of religion and brother of the Plaintiff, is the only witness called to support Plaintiff. He states: "The French Church discountenances payment of dowry. If it found that dowry had been paid *after* a marriage the person who paid the dowry would be excommunicated. The Church did not object to dowry payment *before* marriage." In the face of such contradictory evidence this Court is not satisfied that it was agreed that no dowry was payable for Ellen, particularly as Plaintiff admits that the rule of the Church has not deterred him from claiming and receiving dowries for his own daughter.

There is no satisfactory evidence that Moroana was adopted by Defendant, nor was the matter of adoption seriously pressed on appeal. It is common cause that Moroana was born at Defendant's kraal and has always lived there, and there is little doubt that Defendant expected to benefit by her dowry eventually, as a set off against the dowry due to him for her mother Ellen. Assuming this to be the case, Defendant would be entitled to resist any claim for the delivery of dowry paid for Moroana and this Court is of opinion that, having failed to pay the dowry due for Ellen Plaintiff was not entitled to claim Moroana's dowry of 14 head of cattle, which Defendant admits having received. Defendant has a clear right to set off Moroana's dowry against that due to him in respect of Plaintiff's wife, Ellen.

The appeal brought by Defendant on the question of costs succeeds and that brought by Plaintiff is dismissed and the judgment of the Native Commissioner is altered to read for Plaintiff in reconvention for 20 head of cattle, 1 horse, 10 sheep or their value, £110, less 14 head of cattle or their value £70. (Dowry received for Moroana) with costs in this Court and the Court below.

E. N. Braatvedt, Esq., acting President, dissents.

TLALINYANE MOJAKISANE vs. ALBERT M. C. KHOAPA.

KOKSTAD: Dissenting judgment —in the above-mentioned case.

(Appeal from Native Commissioner's Court, Matatiele).
Case No. 162 of 1937.

The Appellant in convention was the Plaintiff in the Court of the Native Commissioner. He claimed the return of his daughter Moroana.

When the case came into Court he obtained permission to include an additional claim for 18 head of cattle or their

value, £90, being the dowry alleged to have been received by the Defendant in respect of the said Moroana.

In regard to the claim for the return of the girl the Defendant pleaded that she was a major, and that for that reason the Plaintiff had no legal right to claim her. He denied that he had any control over her for the same reason.

With respect to the claim for dowry the Defendant filed a counter-claim for 20 head of cattle, 10 sheep and a horse or alternatively for £5 for each head of large stock and 10s. for each head of small stock, being the dowry which he alleged was due by the Plaintiff for Moroana's mother.

Defendant's plea to the additional claim brought by the Plaintiff was as follows:—

(1) That his late father had adopted Moroana as his daughter and that Defendant as the eldest son and heir of his father was entitled to her dowry.

(2) That in view of the counter-claim he had the right to set off any dowry received by him for Moroana against the dowry due to him for her mother in the event of the Court holding that Defendant was not entitled to Moroana's dowry.

(3) That in any case the Defendant had none of the dowry which was 14 head of cattle) of Moroana to hand to Plaintiff as she had broken off her engagement, and the cattle received had been returned.

Plaintiff in convention is the father of the girl Moroana. The mother of the girl was named Ellen. She was a sister of Defendant's late father Charlie. Ellen died a few days after giving birth to Moroana. She was confined at her father's kraal and died there. Her mother Nolina (grandmother of Defendant) asked the Plaintiff to allow her to keep the child, and he gave his consent. Moroana grew up under Nolina's care in the kraal now in charge of the Defendant (Respondent). Nolina died about two years ago. The Plaintiff (Appellant) went to the funeral, and there told the Defendant who was then in charge of the kraal (his father Charlie having apparently predeceased Nolina) that he wished to take Moroana back to his kraal.

The Defendant and the girl objected to her going back to her father. She remained with Defendant, became engaged to a man and 14 head of cattle were paid for her by her intended husband. The cattle were received by the Defendant. The Appellant thereupon instituted action.

The girl Moroana admits in evidence that she married in January, 1938. She says that the dowry cattle paid to Defendant in convention (Respondent) were not used for her dowry outfit or clothing, and that she does not know what became of them. The Respondent states that he expended five of the cattle on the girl's marriage outfit and that the remainder are in his possession although he made attempts to restore them to the man who is now her husband.

The Appellant married Ellen—the mother of Moroana—in 1889. He admits that he did not pay dowry for her. He states that it was agreed at the time that no dowry should be paid for Ellen. He states that at the time he and Ellen's father belonged to the French Church which was opposed to the payment of dowry, and that it was for that reason that it was agreed that no dowry should be paid.

In 1923, after the death of Ellen's father, the Respondent's father Charlie made a claim before the Headman for Ellen's dowry. The evidence in regard to the Headman's decision is conflicting. Respondent states that the Headman ruled that dowry should be paid, but Appellant states that judgment was given in his favour. Be that it as it may the fact

remains that Ellen married Appellant 49 years ago and that no claim for dowry was brought before any Court during her father's lifetime. Appellant had four daughters by Ellen, and Moroana is the youngest. The girls married and Appellant received their dowry.

The Native Commissioner gave the following judgment:—

For Plaintiff in convention of 14 head of cattle, or their value £70.

For Plaintiff in reconvention for 20 head of cattle, one horse, 10 sheep, or their value £110. No further order as to costs.

Both parties are now appealing against this judgment.

Mr. Walker, for the Plaintiff in convention, argues that the Defendant (Plaintiff in reconvention) failed to discharge the onus of proving the claim in reconvention.

Mr. Zietsman, for the Plaintiff in reconvention, argues that Moroana was adopted, and that his client was entitled to her dowry. He further contends that he was entitled to costs in the reconventional claim.

It is perfectly clear that Respondent (Defendant in convention) has received 14 head of cattle as dowry for Moroana, and also that the girl was never adopted by his father. Her dowry is payable to the Plaintiff in convention.

Coming to the claim in reconvention we find that the marriage of Moroana's parents took place 49 years ago, and that no claim for dowry was made until 33 or 34 years later when the matter was brought before the Headman after the death of Ellen's father.

It is not clear what the Headman's decision was, but no further action has been taken until now. Moroana had three older sisters, and no claim for the dowry alleged to be due for her mother was made, when they married. The proper time to claim such dowry—if due—would have been when the first girl married.

It is admitted by the Plaintiff in convention that he did not pay dowry for Ellen, and, in the absence of any agreement to the contrary, he would be liable at any time since prescription is unknown to Native Law, but in view of the very long time which has elapsed before the institution of action for recovery, and the considerably strong evidence that Ellen's father agreed to waive any claim for dowry, it appears to me that the correct judgment on the reconventional claim should have been an absolution from the instance. The Respondent has brought up and maintained Moroana since she was a baby, and he is entitled to compensation for what he has expended on her behalf, but that claim is not before the Court.

E. N. BRAATVEDT.
Acting President of the Court.

Kokstad, 1st June, 1938.

CASE No. 14.

NKWENKWEMBI GABIYANA vs. VOYIZANA QOLO.

PORT ST. JOHNS: 8th June, 1938. Before E. N. Braatvedt, Esq., Acting President and Messrs. H. M. Nourse and M. Adams, Members of the N.A.C.

Child—Rights in resulting from seduction prior to marriage by man other than woman's husband.

(Appeal from Native Commissioner's Court, Bizana.)
Case No. 83 of 1937.

The Respondent sued the Appellant for a declaration of rights in respect of a child named Nomzingelezo.

The Native Commissioner declared that the Respondent was the child's lawful guardian and entitled to her custody, and ordered the Appellant to hand her over to the Respondent and to pay costs of the suit.

The appeal is brought against this order.

The Respondent married the Appellant's sister Magabiyana in 1934. She was pregnant by a man named Mzantsi at the time of her marriage and in due course gave birth to the child Nomzingelezo. In March 1937 Magabiyana visited Appellant's kraal with her child. When she returned she reported that Appellant was keeping the child. Respondent demanded that Appellant should deliver the child to him, but Appellant refused and summons was then issued against him.

The Appellant states that Mzantsi paid him two head of cattle on account of damages for having seduced and impregnated Magabiyana. He alleges that Respondent eloped with Magabiyana, but later paid five head of cattle as dowry and that consent to the marriage was given on Respondent's promise that when the child was born and weaned it would be handed over to him (Appellant). He admits that according to Native Custom—Pondo—that natural father of the child, namely Mzantsi, will be entitled to it when he has paid full damages, that is, five head of cattle, but that until then, he (Appellant) is entitled to its custody.

Appellant called his two brothers Jamani Gabiyana and Mangala Gabiyana and his mother Magxiza Gabiyana who corroborated his story.

The Respondent states that he was unaware when he married Magabiyana that she was pregnant but that he discovered her condition shortly afterwards, and that she confessed that Mzantsi was responsible. He denies that he agreed to hand the child over to Appellant, and states that no mention was made of the pregnancy when he married the girl. He further states that he paid 9 head of cattle as dowry for her. He is supported in full by Zekani Mzipo who was an entirely disinterested witness, and who impressed the Native Commissioner when giving his evidence. Magabiyana was called but proved hostile and supports the Appellant.

The Native Commissioner in his reasons for judgment states that he was not impressed by Appellant's witnesses, particularly with Magxiza and Mangala. He also mentions that it was quite obvious to the Court that Magabiyana was not speaking the truth, and that he was satisfied that Respondent's story was the correct one. A child born in wedlock would under Native Law belong to the kraal of the husband of the mother, in the absence of a special agreement to the contrary. The onus lay on the Appellant to prove such special agreement and the Native Commissioner who had the witnesses before him was satisfied that his story was not true. This Court can find no reason for differing from his finding.

The appeal is dismissed with costs, and the Native Commissioner's judgment is confirmed.

CASE No. 15.

MHLABENI PALAZA vs. MBUZWENI PALAZA.

PORT ST. JOHNS: 8th June, 1938. Before E. N. Braatvedt, Esq., Acting President and Messrs. H. E. Bunn and M. Adams, Members of the N.A.C.

Estate of deceased twin brother—Heir to—Pondo Custom.

(Appeal from the Native Commissioner's Court, Lusikisiki.)
Case No. 207 of 1937).

The facts as set out in the summons are that Plaintiff (now Respondent) is the eldest son and heir of the late Palaza. Defendant (now Appellant) is Respondent's younger brother in the same house and he had a twin brother named Gabiso, who died leaving two daughters, and no male issue.

Respondent as eldest son and heir of Palaza claims an order of Court declaring him to be the legal guardian of and heir to the said two girls and as such, entitled to their respective dowries.

Appellant in reply states that according to Pondo Custom, he, as a twin brother of the deceased is the lawful heir of the late Gabiso and that all rights in and to the estate are vested in him.

Very definite customs have been accepted and are established on succession to Native Estates and under these, the father and on his death his eldest son, in this case Mhlabeni, should succeed to the estate of any younger brother who dies without male issue. To vary this established custom in the case of twins, as asked for by the Defendant, it is essential to produce the strongest of evidence of the existence of the unknown custom, suggested by Appellant.

What evidence is there on this point?

Firstly, a member of the Royal House of Eastern Pondoland emphatically denies the existence of such a custom.

Secondly, the Native Assessors by a majority of 3 to 2 confirm that no such custom is known to the Pondos. Their opinion is expressed as follows:—

"Mpayipeli Nqwiliso speaking for himself and Mxetyelwa Dzuma and Tata Jiyajiya.

According to our Pondo Custom, the usual form of succession is followed upon the death of a twin brother, that is, the surviving twin does not of right succeed to the estate, which goes to the man who would have succeeded had there been no twin."

Simayile and Xabaniso state:—

"It is Pondo Custom for the surviving male twin to succeed to the estate of his deceased twin brother to the exclusion of all, except the deceased's male issue. They are of the same stomach and are as one."

One of the assessors admitted that prior to annexation (1894) it was not unusual for one of the twins to be killed secretely by the insertion of earth in its mouth at time of birth.

As against the stongly established custom that the eldest brother succeeds to the estate of any younger brother who

dies without male issue—the father being dead—there is the very meagerest of evidence that this is varied in the case of twin brothers.

This Court is of opinion that such evidence does not justify the acceptance of this as an established custom and the appeal is therefore dismissed with costs.

CASE No. 16.

GEORGE PEEL MPONGWANA vs. ELIJAH MQOQI.

Port St. Johns: 8th June, 1938. Before E. N. Braatvedt, Esq., Acting President and Messrs. H. M. Nourse, and H. E. Bunn, Members of the N.A.C.

Claim, by party married by christian rites, for a child, the result of his adulterous intercourse, refused by Court: Conflict of Colonial and Native Laws.

(Appeal from Native Commissioner's Court, Libode)
Case No. 156 of 1937.

In this case Plaintiff, now Appellant, claimed a declaration of rights concerning a girl Nomahlubi and in his particulars of claim states as follows:—

1. That about five or six years ago he caused the pregnancy of one Jerelina, daughter of Defendant.

2. That the said Jerelina gave birth to a female child named Nomahlubi of whom Plaintiff is the father.

3. That Plaintiff duly paid damages to Defendant for the said seduction and pregnancy and Plaintiff is the rightful owner according to Native Custom of the said Nomahlubi.

Defendant while admitting the allegations contained in Plaintiff's summons, pleads specially that both Plaintiff and Defendant are Christian Natives who are living as such and who have ceased to follow Native Custom. That Plaintiff's claim based on Native Custom is not applicable as same is totally opposed to the principles of Christianity and natural justice and consequently Plaintiff has no claim to the child born of his adulterous intercourse with the woman Jerelina.

It is common cause that both the Plaintiff and Defendant were married by Christian Rites.

The Native Commissioner upheld the special plea and Plaintiff appealed.

In the case of Mnintshana *vs.* Ngqingili (N.A.C. 5 p. 20) which is on all fours with the present case, it was held that the Appellant having married according to Christian Rites had no claim to the child born of his adulterous intercourse with another woman; that his relations with her were a breach of the solemn marriage contract and that Native Custom could no apply.

This Court is in full agreement with the decision in that case and the appeal is dismissed with costs.

CASE No. 17.

MGIDI MANTSHUPU vs. MNYAMEZELI KWEBI.

UMTATA: 17th June, 1938. Before E. N. Braatvedt, Esq., Acting President, and Messrs. W. J. G. Mears and C. J. N. Lever, Members of the N.A.C.

Marriage — Desertion of wife — Return of dowry — Claim against receiver of dowry—Agency—Receiver of dowry not liable to payer when he has accounted for the dowry to person entitled thereto.

(Appeal from Native Commissioner's Court, Umtata.)
Case No. 722 of 1937.

Plaintiff, now Appellant, sued Defendant now Respondent, in the duly constituted Court of Chief David Dalindyibo for the return of his wife. After trial judgment was given in favour of the Defendant and against this an appeal was in due course noted to the Court of the Native Commissioner, Umtata. Appellant's claim was formulated as follows:—

"Plaintiff's claim is for the return of his wife Novumile or restoration of the dowry paid for her, 10 cattle which were paid by Plaintiff to Defendant about 6 years ago. The woman deserted Plaintiff 4 years ago and has not returned and has not been restored by Defendant though called upon."

And Respondent's reply stated:—

"That when Plaintiff asked for Novumile in marriage he was that informed she is the daughter of Mazabele of Kentani. That Defendant reported to Mazabele the offer of marriage and received the dowry on behalf of Mazabele to whom the dowry of 10 head of cattle was handed over.

That in these circumstances Plaintiff has no claim against Defendant for the return of his wife or dowry but should sue Mazabele."

The record reads:—

"At a late hour, namely, 4.10 p.m. on 2nd February, 1938 Mr. Hemming desires to call a witness from Kentani."

The evidence of Landingwe Sobozo, son and heir of Mazabele was then recorded after which the case was postponed to 4th February. On this date both parties closed their cases without further evidence having been recorded.

On the 14th February the Additional Native Commissioner gave judgment dismissing the appeal and confirming the judgment of the Court below, with costs.

The appeal from the Additional Native Commissioner's judgment has been noted on the following grounds:—

(1) That the judgment is against the conclusions and inferences to be drawn from the evidence adduced and the probabilities.

(2) That the judgment is against the Native Law and Custom appertaining to the right of action against the person who receives a dowry for a girl and the general custom thereanent."

The Additional Native Commissioner in giving his reasons for judgment said that the following facts were not disputed:—

1. Plaintiff married Novumile, the sister of Landingwe Sobozo, eldest son and heir of Magabele, a resident of Kentani District in 1932, by Native Custom.

2. Plaintiff paid 10 head of cattle, as dowry, to Defendant with whom Novumile was living at the time.

3. Novumile left Plaintiff's kraal.

4. In 1935 Landingwe came to Umtata and found his sister living at Defendan's kraal. He then allotted 3 head of cattle to Defendant and left the remainder with Stanford Kiva in Umtata District, as he was unable to remove them to Kentani on account of East Coast Fever restrictions. He then returned to Kentani taking Novumile and his mother with him.

5. In 1937 he removed the cattle, left with Stanford, to Kentani.

6. Landingwe never met Plaintiff.

With this statement this Court agrees and the point for decision is whether or not Defendant is the proper person to be sued.

After an exhaustive analysis of the relative reported cases the judicial officer concludes "From these decisions it is clear that the husband is entitled to sue the person to whom dowry was paid irrespective of whether or not the wife is under his control, but that he could evade liability where he could satisfy the Court that he had accounted for the dowry to the person entitled thereto."

This Court is in agreement with this statement of the legal portion.

In view of the admitted facts the only point to be decided is whether the Defendant has accounted for the dowry to the person entitled thereto.

From the evidence of Landingwe the person entitled to Novumile's dowry, it appears

(*a*) that the proposed marriage of his sister was reported to him by Plaintiff by a messenger in 1931 and that he gave his consent;

(*b*) that on New Year, 1932, when he heard that the marriage had taken place and 10 head of dowry paid he sent his messenger Vetshu to take the cattle and place them at Defendant's kraal as cattle movements to Kentani were restricted;

(*c*) that in 1935 when he came to Umtata to fetch his mother and see about the dowry he allotted three head to Defendant and left the remaining cattle with Stanford Kiva. At that time he found his sister living with his mother and removed them both to Kentani;

(*d*) in July, 1937, he removed his cattle to Kentani.

It is on record that Plaintiff's attorney did not dispute the above facts except the allegation that Mvetshu came to the Plaintiff's kraal from Kentani.

It is however, significant that no evidence was called for Plaintiff to disprove this assertion. The facts in regard to the delivery of the dowry cattle are within Plaintiff's knowledge and it is curious that the opportunity of discrediting Landingwe's evidence on a most vital issue was not taken, if the evidence is not true.

This Court finds as a fact that Mvetshu was sent as stated and it follows, therefore, that as far back as 1932,

Plaintiff was aware that the heir had assumed control of the dowry. It has also been proved that an apportionment took place in 1935 so that at the time of the institution of these proceedings Defendant was neither in possession of the dowry nor the woman.

There is an entire lack of evidence indicating that Defendant and Landingwe are acting in concert to defeat Plaintiff's claim.

The appeal is, accordingly, dismissed with costs.

CASE No. 18.

MTSHATO NGQANGULA vs. NKANTSELANA MQAYI.

UMTATA: 17th June, 1938. Before E. N. Braatvedt, Esq., Acting President, and Messrs. W. J. G. Mears and C. J. N. Lever, Members of the N.A.C.

Adultery—Evidence in Proof of—Custom—Ntlonze.

(Appeal from Native Commissioner's Court, Umtata.)
Case No. 104 of 1938.

In the Court of the Native Commissioner Respondent sued Appellant for 3 head of cattle or their value £9 in respect of the adultery of the latter with the former's wife Nomunyu.

Judgment was entered for Plaintiff with costs and against this judgment Defendant has appealed on three grounds viz.:—

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

2. That the evidence adduced was insufficient to entitle Plaintiff to a judgment and was inconclusive.

3. That the customary evidence in such cases though available was not produced nor any satisfactory reason given for such failure.

The facts may be briefly cited as follows:—

The woman Nomunyu was on a visit at Xakata's kraal and on the day in question Respondent paid a visit to that kraal. Finding nobody at home he passed on and on observing two people seated together at a stream below the lands approached them. When some 300 yards distant he recognized them as being Appellant and his (Respondent's) wife. Owing to the existence of a fence his progress was impeded and Appellant escaped but he caught his wife who confessed to her adultery with Appellant.

At the spot where these two had been sitting was found a kilt and a can of beer. Respondent at once followed up the customary practices of reporting the case.

The Appellant has all along denied intimacy and disclaimed ownership of the kilt which was produced as Ntlonze.

Now the mere sitting together of two persons is in itself no proof of adultery but the circumstances surrounding such action would materially alter the view to be taken of it and in this case the comparative isolation of the place, the finding of the kilt and the immediate observance of the

normal customary procedure confirm the view that a catch was effected. As against this the Appellant sets up a denial and goes further in that he in his plea challenges the marriage of Respondent and Nomunyu, and denies that the kilt was produced at his kraal.

The failure to call the go-between No-Orange and the woman Nombovana is explained and the reason given is in our opinion not unreasonable.

The judicial officer has examined carefully the testimony of the various witnesses and has given good reasons for accepting the testimony of Plaintiff's witnesses in preference to that of Defendant.

If the Plaintiff's witnesses are worthy of belief then Plaintiff's case is abundantly proved. The Additional Native Commissioner is an experienced judicial officer accustomed to the weighing of evidence and he says "I have no hesitation in accepting the evidence of these witnesses."

The case is one of credibility and one particularly in which a judicial officer would be guided to his conclusions by the impression created by the witnesses who appeared before him.

In the circumstances this Court is not prepared to disturb the judgment of the Court below and the appeal is dismissed with costs.

E. N. Braatvedt, Esq., Acting President, dissents.

MTSHATO NGQANGULA vs. NKANTSELANA MQAYI.

Dissenting Judgment — Native Appeal Court (Cape and O.F.S.) in the abovementioned case.

(Appeal from the Native Commissioner's Court, Umtata.)
Case No. 104 of 1938.

In the Native Commissioner's Court the Respondent sued the Appellant for three head of cattle, or their value £9 on the ground that the Appellant had committed adultery with Respondent's wife Nomunyu.

Judgment was entered for the Plaintiff as prayed with costs.

The Respondent states that during the last ploughing season his wife Nomunyu went to the kraal of one Xakata on a visit. Early in the new year he went to that kraal to visit her. There was no one at the kraal and he passed on. At the Qukuveni stream he saw a woman and a man sitting down. He saw them from a distance of about ½ a mile. They were both dressed. Some children were also in sight of the man and woman. He approached them and when he was about 300 yards from them they got up and ran in different directions. The woman was his wife and the man was the Appellant. Respondent was on horseback. The land was fenced and for that reason he could not catch the Appellant. He caught up to his wife who admitted that the appellant was her lover and that she had committed adultery with him. At the spot where she had been sitting he found a man's kilt and a tin can with beer in it. Men were sent to the Appellant's kraal. He denied the charge.

The woman Nomunyu, states that Xakata's wife (No-Orange) had acted as go-between to bring her and Appellant together and that another woman named Nombomvana had, on the day in question brought her a message from Appellant to meet him at the Qakuwa stream and to bring some beer. The two women mentioned were not called. Nomunyu said they would be hostile. She states that the kilt found by Respondent had been given to her on that day by Appellant. She admits that Notshopolo's and Appellant's kraal are in sight of the spot where she states she and Appellant had sexual intercourse, and states that such intercourse took place in broad daylight.

A woman named Nomadada, who alleges she is Appellant's sweetheart, states that she made the kilt referred to for Appellant.

Appellant denies that he was sitting with the woman and that he has ever had intercourse with her. He denies that the kilt is his.

Briefly the only evidence of intercourse is that of the woman. The story told by her appears to be extraordinary and unbelievable. She states that intercourse took place in broad daylight in full view of two kraals, and apparently with children in full view. She does not call the two women who are stated to have acted as go-betweens. The Appellant, if he was sitting with her as alleged, saw the Respondent while he was several hundred yards away with a fence between them, and yet we are asked to believe that he would leave his kilt which would be evidence against him on the spot.

In my opinion stronger evidence than that given on behalf of the Respondent is required before it can be said that adultery has been proved.

E. N. BRAATVEDT,
Acting President of the Court.

Umtata, 17th June, 1938.

CASE No. 19.

SIKEYI KULU vs. MAKAYA MAHLOBO

UMTATA: 17th June, 1938. Before E. N. Braatvedt, Esq., Acting President and Messrs. W. J. G. Mears and C. J. N. Lever, Members of the N.A.C.

Estate Stock—Widow has no right to deal with without consulting heir—Agent—Liability for losses.

(Appeal from Native Commissioner's Court, Mqanduli.)
Case No. 279 of 1937.

The facts in this case are not disputed and are as follows:

Respondent is the heir of the late Nkebe Mahlobo, a son of Nomgcombolo, wife in the right-hand house of the late Mahlobo. When Nkebe died his widows returned to their own people. Nomgcombolo continued to reside at the right-hand kraal of her late husband where Nkebe had also resided. After Nkebe's death Respondent placed Nomgcombolo and the stock in charge of Gwaqubane, the head of the family of

Appellant. Gwaqubane placed Nomgcombolo and the stock at the kraal of one Nkonkwana where they remained for about a year. Nomgcombolo then returned with the stock to the kraal where she had previously been living and placed the stock with her brother, the present Appellant. When Respondent again came to see the stock he raised no objection to it being with Appellant. In 1937 Respondent demanded delivery of the stock, but Appellant refused to part with it as it had originally been handed to him by Nomgcombolo and not by Respondent. A letter of demand was sent to Appellant and on his again failing to deliver summons was issued. At the time he received the letter of demand Appellant was in possession of five head of cattle and eight sheep belonging to the Estate of Nkebe and never made any tender to deliver them to Respondent. Appellant knew that Respondent was the heir of Nkebe. Nomgcombolo, who appears to be of unsound mind, claims that she is the heir of the right-hand house and entitled to the stock in question.

The claims set out in the summons was for thirty sheep, eight head of cattle, three goats and various other articles or their collective value £52, but the Native Commissioner entered judgment in favour of Respondent only for the stock which Appellant admitted was in his possession at the date he received the letter of demand, or their value £19 and costs of suit.

The appeal against this judgment is on the grounds (1) that Appellant was merely acting as agent for Nomgcombolo and that she is the proper person to be sued and (2) that the Native Commissioner erred in entering judgment against Appellant for three head of cattle which had died since the issue of summons, no negligence having been proved.

In his reasons for judgment the Native Commissioner says that Appellant was the agent of Nomgcombolo and the fact that Respondent ratified her action in placing the stock with Appellant did not make the latter his agent but that the ratification created a contract of bailment as between Respondent and Appellant. We thus have the extraordinary position of Respondent being agent and bailee respectively in respect of the same subject matter for two persons whose interests are diametrically opposed. If the ratification of Nomgcombolo's action by Respondent resulted in the creating of a contract of bailment it follows of necessity that the alleged contract of agency with Nomgcombolo must then have been terminated.

It becomes necessary now to consider whether Appellant was the agent of Nomgcombolo.

Only persons who are *sui juris* and have the management of their own affairs, and in addition have authority to deal with the matter which is the subject of the particular mandate, are entitled to give a mandate. (Maasdorp Institutes of Cape Law, 3rd Edition, p. 295).

Under Native Law a widow does not have authority to deal with estate stock without consulting the heir. In this case she did not consult the heir, and, therefore, could not lawfully make Appellant her agent as against the heir.

A perusal of the evidence makes it abundantly clear that Appellant was adopting his sister's case, which he must have known was unsound, as his own and that he was endeavouring to uphold her right to the stock. If he was acting purely as agent one would have expected him to notify Nomgcombolo of the claim made by Respondent and to obtain her instructions but the evidence shows that he never made any such report to her and that he was acting on his own responsibility. If he wished to escape liability he should have returned the stock to Nomgcombolo and have left her and Respondent to fight out the matter.

The appeal on the first ground must fail.

In regard to the second ground of appeal it is admitted that at the time the stock was demanded from him, the Appellant was in possession of five head of cattle and eight sheep, the property of Respondent. As he did not deliver this stock when he had the opportunity of doing so he is liable to make good any that died subsequently. Mdini Matyesini *vs.* Ntampu Dulo, 3 N.A.C. 102 and Mbulali Manxoyi *vs.* Mqotswana and Nonkonxa, 3 N.A.C. 81).

The appeal is dismissed with costs.

CASE No. 20.

NOMGOGWANA NOMADUDWANA vs. MAKOSI TOTSHOLO.

UMTATA: 17th June, 1938. Before E. N. Braatvedt, Esq., Acting President and Messrs. W. J. G. Mears and C. J. N. Lever, Members of the N.A.C.

Tembu Custom—Marriage—Death of husband shortly after marriage—Widow returning to her own people—Re-marriage—Second dowry received—First dowry is returnable.

(Appeal from Native Commissioner's Court, Elliotdale.)
Case No. 288 of 1937.

In this case, Plaintiff (now Appellant) claims from the Defendant (now Respondent) 9 head of cattle or their value the sum of £36 and costs.

In his particulars of claim Plaintiff states:—

1. That Plaintiff is the heir of the estate of the late Tyadala Nomadudwana.
2. That about the year 1934 the said late Tyadala Nomadudwana married one Noluzile daughter of the late Totsholo and sister of Defendant who is the heir of the said late Totsholo and paid 10 head of cattle as and for dowry for her.
3. That about 4 months after the said marriage Tyadala Nomadudwana died and his said wife Noluzile returned to Defendant who have since given her away in marriage and received dowry for her.
4. That Defendant is not entitled to hold two dowries and Plaintiff is entitled to a refund of the dowry paid to Defendant by his said late brother Tyadala.
5. That Plaintiff has demanded the restoration of 9 head of cattle or £36 from Defendant who refuses to pay same.

Defendant's plea is as follows:—

1. He admits that Plaintiff is the heir of the late Tyadala Nomadudwana.
2. Defendant also admits that about three years ago the late Tyadala married his sister, Noluzile and paid 10 head of cattle as dowry for her.

3. Defendant says that the marriage between the said Tyadala and the said Noluzile was duly consumated and the parties lived together as husband and wife for nearly a year, when the said Tyadala died.

4. That there was no issue of the said marriage and after the death of the said Tyadala the said Noluzile returned to Defendant's kraal, and he admits that he has now again given her in marriage and received dowry for her.

5. In regard to paragraphs 4 and 5 of the said particulars of claim, Defendant admits that he is not entitled to hold two dowries and that Plaintiff has demanded restoration of 9 head of cattle but Defendant says that upon demand he tendered Plaintiff 5 head of cattle out of the dowry paid by him, which tender the Defendant and his attorney refused, before the issue of summons.

6. That Defendant maintains that Plaintiff is not entitled to recover more than half the dowry paid by him for the said Noluzile and again herein tenders Plaintiff, five head of cattle out of the dowry paid by him for the said Noluzile, in settlement of the claim herein.

When the case came before the Native Commissioner for trial the attorneys for the respective parties called no evidence but argued the case on the pleadings as there was no dispute in regard to the facts.

The Native Commissioner gave a considered judgment in the course of which he reviewed many of the leading decisions of the Native Appeal Court on the point at issue and entered judgment for Plaintiff for 5 head or £20 and ordered Plaintiff to pay costs as he had refused a tender of 5 head of cattle.

It is common cause that the parties to the action are resident in Bomvanaland where Tembu Law and Custom are followed but in the course of his judgment the judicial officer stated that he had been unable to trace any pronouncements in regard to Tembu Customs on the point and that the cases which he cited and upon which he based his finding arose in districts outside Tembuland.

Against his judgment Plaintiff has noted an appeal in the following terms:—

1. That according to the pleadings and admitted facts Plaintiff was entitled to a judgment for 9 head of cattle or their value the sum of £36, being 10 head of dowry cattle paid less one beast for the wedding outfit.

2. That the judgment given by the Native Commissioner of Elliotdale herein, on the 28th March, 1938 is bad according to Native Law and Custom as it prevails in Tembuland and he erred in being influenced in his judgment by authorities affecting the Transkei proper, where Fingo and Gcaleka Customs prevail.

3. That the authorities relied upon by the Native Commissioner are not applicable to the circumstances of the present case or in Tembuland or Bomvanaland generally.

On behalf of Appellant there were cited Whitfield, page 232 and the cases of Jilingisi Ziqukwana *vs.* Smit Tyaliti N.A.C. 1933 page 8 and Sulwana Mzilikazi *vs.* Henry Kwaza N.A.C. 1934 p. 42 while the cases mentioned by the Native Commissioner were relied on by Respondent.

The following questions were submitted to the Native Assessors :—

1. A woman marries, bears her husband a child, her husband dies and she returns to her father's kraal. When she remarries how much dowry will be repayable by her father to her first husband's people?

2. A woman marries and her husband dies soon afterwards. She has no children by him. She returns to her father's kraal and later on remarries. What dowry is repayable by her father to her first husband's people?

3. Is the custom in Bomvanaland the same as in Tembuland?

The relative replies were :—

1. All the cattle will be repayable except 2 head, namely one beast for the wedding outfit and one for the child born.

2. All the cattle would be repayable except one beast for the wedding outfit.

   In pure Native Custom the full number was repayable, but now a custom has grown up that one beast is deducted for the wedding outfit.

3. Yes.

In reply to an additional enquiry the Assessors stated that the division of dowry, as practised in the Transkei proper when no children are born after the marriage, was unknown in Tembu Custom.

Following this statement of Custom which is consonant with a previous expression of custom in the case of Jilingisi Ziqukwana *vs.* Smit Tyaliti N.A.C. 1933 the appeal is allowed with costs.

This Court has fixed the alternative value of dowry cattle at £3 per head and sees no good reason for departing from this decision.

The judgment in the Court below is set aside and one entered for Plaintiff for 9 head of cattle or their value £27 and costs.

DANIEL DLIKILILI vs. MCITAKALI and JIM KLAAS.

KINGWILLIAMSTOWN: 29th August, 1938. Before H. G. Scott, Esq., President, and Messrs. J. J. Yates and G. D. Hartmann, Members of the N.A.C.

Seduction and Pregnancy—Action for damages for, against prospective husband who had paid cattle on account of dowry—Denial of seduction by prospective husband—Voluntary return of engagement cattle by prospective bride's people prejudicial to plaintiff's case as raising strong presumption that prospective husband not the seducer—Appeal against judgment of absolution from the instance dismissed.

(Appeal from the Native Commissioner's Court, Lady Frere: Case No. 24 of 1938.)

This was an action for five head of cattle or £25 as damages for the seduction and pregnancy of Plaintiff's (Appellant's) daughter, Hionet, by first Defendant.

The Assistant Native Commissioner entered a judgment of absolution from the instance with costs and the Plaintiff has appealed against that judgment.

It appears from the record that Hionet's mother died in 1918 and from that time onward she went to live with her mother's people and was brought up by Sarah Ntlabati. In June, 1937, Hionet became engaged to first Defendant who paid five head of cattle on account of dowry. Hionet alleges that he had connection with her on three occasions in June, 1937, and went away to work next month. During July she became aware that she was pregnant but made no report of this to anyone. She is supported by Ivy Mbeka in regard to the occasions on which first Defendant is alleged to have had connection.

Sarah Ntlabati states that she did not become aware of Hionet's condition until she was in her seventh month of pregnancy and accounts for the delay in discovering the state of affairs by saying that she was ill and confined to bed for about four months. There is no information as to what the nature of her illness was but she does not allege that her eyes were affected and, if they were not, then there seems to be no reason why she should not have detected the pregnancy sooner. When she discovered the pregnancy she went with Hionet to first Defendant, who denied that he had seduced Hionet. Second Defendant thereupon demanded that the five head of cattle which had been paid should be returned to him. As this was not done the Defendants took the case before the Headman complaining that Sarah Ntlabati refused to hand over the cattle after having agreed to do so. The Plaintiff's witnesses do not deny that the cattle were handed back to the Defendants but say it was only done because of the Headman's order. The Headman denies that he made any such order. In this he is probably not speaking the truth. Even assuming that he did make such an order it is quite certain that the men in charge of Plaintiff's affairs (he being absent at the time) would never have complied with it unless they had been satisfied that first Defendant was not responsible for Hionet's condition. At one time it might have been argued that a Headman's order was one that had to be obeyed, but in these days that is not the case. It is of some significance too, that Imvane, the man who apparently is, with one Mbovane, in charge of the kraal affairs and who agreed to the cattle going back was not called to explain why he agreed. It was argued by Appellant's attorney that the defence should have called him because Imvane, according to the Headman's evidence, had admitted that he had found out that first Defendant was not responsible for the girl's pregnancy and

said that was why he was agreeing to release the cattle. With this contention this Court does not agree. By the return of the cattle a strong presumption was undoubtedly raised that first Defendant was not at fault and it was for the Plaintiff to call Imvane to explain why he acted in the way he did. In the absence of his evidence we are of opinion that the Assistant Native Commissioner was justified in regarding the return of the dowry cattle as prejudicial to Plaintiff's case. If the first Defendant had rendered Hionet pregnant there seems no possible motive for him to deny it. He was engaged to the girl, had already paid five head of cattle and, even if her people claimed the cattle as damages, all he had to do was to proceed with the marriage when the damages would merge in dowry and he would suffer no loss. Having carefully considered the evidence we are of opinion that the Assistant Native Commissioner was fully justified in entering a judgment of absolution from the instance and the appeal is accordingly dismissed with costs.

AUGUST MABOTHE vs. ABEL THAELE.

KINGWILLIAMSTOWN: 31st August, 1938. Before H. G. Scott, Esq., President, and Messrs. J. J. Yates and G. D. Hartmann, Members of the N.A.C.

Illegal Contract—Contract in fraud of Municipal Regulations —Payments or deposits made under such contract not recoverable—Where both parties in the wrong the one in possession subject matter of contract is in the better position.

(Appeal from the Native Commissioner's Court, Bloemfontein: Case No. 2 of 1938.)

In the Court below the Plaintiff (Respondent) claimed from the Defendant (Appellant) certain rent, an order compelling him to transfer certain Stand No. 457, Batho Location, Bloemfontein, an order of ejectment and an order compelling him to pay any accruing or future rent to Plaintiff, alleging in his summons that he had bought the stand in question from one John Thulo in August, 1931, and arranged with Defendant to have it registered in the latter's name on condition that at any time when so required he would transfer it to Plaintiff's nominee, it being agreed that Plaintiff would remain the real owner of the property and entitled to dispose of it at any time.

The plea denied the purchase of the stand by Plaintiff or that Defendant had entered into the alleged agreement and stated that Defendant had purchased the stand and that Plaintiff had no right to it. In the alternative Defendant pleaded that, if the Court held that Plaintiff had purchased the stand and entered into the alleged agreement with Defendant, such agreement was void and illegal and contrary to the provisions of Notices Nos. 20 of 1925 and 48 of 1932 of the O.F.S. *Provincial Gazette* or in *fraudem legis* of the said notices in that Plaintiff was since 1st August, 1931, the registered owner of a stand in the Bloemfontein Location of which he is still the owner.

Notice No. 20 of 1925 promulgated Location Regulations made by the Municipality of Bloemfontein under the authority of Section 23 (3) of Act No. 21 of 1923 and Section 6 thereof provides *inter alia*, that no native shall be entitled to have more than one stand registered in his or her name and that married natives or natives living together as man and wife shall be entitled to one stand only which shall be registered for their joint occupation.

Notice No. 20 of 1925 was repealed by Notice No. 48 of 1932, published in the *Official Gazette of the Orange Free State Province*, dated 17th June, 1932, which promulgated new location regulations in which the provision above mentioned was repeated.

Plaintiff's own version of the transaction is as follows: "In August, 1931, I bought 457 from Thulo. I knew Municipality would not register 2 houses in my name, so I called Mabote for to use his name on the Stand ticket" and in cross-examination: "£65 was deposit I gave to Mabote as we neared the town office and he had to tell a lie and say he was the buyer. I knew I could not buy house because of Municipal regulations and to beat them we did this. I was prepared to let them lie and I knew the oath was not necessary . . . I admit I defrauded Municipality over this matter as regards name of owner".

The Defendant asserted that he had bought the stand in question from John Thulo for himself and an agreement of sale dated 6th August, 1931, drawn up by an attorney and signed by Defendant and Thulo was put in which showed that the purchase price was £65 in cash payable on registration of the stand in the name of the purchaser. The stand was registered on that date in the name of Defendant and his wife and has remained so registered to the present date.

On the evidence the Native Commissioner came to the conclusion that Plaintiff had purchased the stand and entered judgment in his favour.

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

1. That the Native Commissioner erred in holding that Plaintiff had discharged the onus of proving that he bought and paid for the stand in question and not the Defendant, especially in view of the Deed of Sale and the registration of the said stand in Defendant's name.

2. Alternatively to the above Defendant says that if Plaintiff did buy the said stand such purchase was illegal and void or in *fraudem legis* of the provisions of Government Notice No. 20 of 1925 and No. 48 of 1932, relied on in the Court of the Native Commissioner and that any collateral agreement between Plaintiff and Defendant in regard to the said stand was likewise illegal and void or in *fraudem legis* and unenforceable and that Plaintiff's claim is, therefore, bad as he relies on an illegal and void contract.

3. The Native Commissioner erred in holding that the doctrine of enrichment applies in illegal contracts such as this.

4. In any event Plaintiff should not have been awarded costs seeing that the whole transaction on his own showing was based on fraud and deceit on his part.

On the alternative ground of appeal it was strenuously argued by Respondent's attorney that the agreement between Thaele and Mabothe was not illegal or in *fraudem legis* in that Thaele only purchased the improvements on Stand No. 457, that such improvements have been held to be movables and there was nothing in the Municipal regulations to prohibit such transaction. This argument could not be quarrelled with if Thaele purported to purchase the improvements with a view to their removal but that is not the case he sets up. He maintains in his summons that he bought the stand and the house on it and claimed the right to have both transferred to his nominee and also claimed an order to have Appellant ejected. While, of course, the Respondent was not able to acquire the dominium in the stand itself as it was Municipal ground it is quite clear that he bought, or thought

he bought, the right to the occupation of the stand and, as he knew that the regulations would not permit of having it registered in his own name seeing he was already in possession of one, he entered into an agreement with a view to evading the regulations.

It is quite clear from the regulations that the intention of the Municipality was that one Native should not be entitled to more than one stand. The good government of the location would undoubtedly be interfered with if one Native were allowed to acquire the right to a number of stands and to put in fictitious owners in order to evade the regulations.

That Respondent was under the impression that he bought the right to the occupation of the stand is clear also from the fact that he asked in his summons for an order compelling Appellant to transfer the said stand to his nominee to whom he alleged he had sold it.

He certainly had no right to any such order. He could only sell the improvements on the stand and the purchaser would have been at liberty to remove them, but could not claim that he should allow them to remain on the stand and to occupy it.

A number of authorities were quoted in support of the argument put up for Respondent but they are not really in point, the one most greatly relied on being the case of Dadoo, Ltd., and Others *vs.* Krugersdorp Municipal Council (1920 A.D. 530). This case dealt with the interpretation of Statutes prohibiting Asiatic or Coloured persons from owning land and it was held that the provisions of the particular statutes did not apply to joint stock companies even though their shares were held by Asiatics or Coloured persons because a registered company is a legal persona distinct from the members who compose it. In the course of his judgment in that case, Innes, C. J. said (at p. 547): "An examination of the authorities, therefore, leads me to the conclusion that a transaction is in *fraudem legis* when it is designedly disguised so as to escape the provisions of the law, but falls in truth within those provisions."

That is exactly what has happened in the present case. Respondent knowing he was not entitled to two stands in his own name entered into a fraudulent agreement in order to circumvent the law.

A case exactly in point in respect of the present enquiry, which was not referred to by counsel on either side, is that of Singama *vs.* Jeyi (1916 E.D.C. 444), which, so far as this Court is aware, has never been overruled and which appears to be decisive.

The facts of that case are that the East London Municipal regulations provide that land in the location shall not be held in the names of non-resident or absent persons. The Plaintiff was lessee of land in the location, and desiring to be absent for a period, entered into an agreement with the Defendant by which he ceded all his rights under the lease to the Defendant, the Defendant undertaking to re-transfer such rights when called upon. Thereafter the Defendant obtained transfer of the lease to himself. The transfer permit recited that the Plaintiff renounced all his rights and was signed by the Plaintiff. The Plaintiff having returned, and the Defendant having refused to re-transfer the lease, the Plaintiff sued him to compel him to do so. The agreement between the parties provided that "although he is about to transfer same into my name, I wish it definitely understood that this property remains his own, and is only placed into my name for his convenience as he is about to leave East London for the time being".

This was signed by Defendant and witnessed by the Location Superintendent. The Court held that the agreement, even though one of the Municipal officers was aware of it,

had been entered into in fraud of the Municipal Regulations and was null and void as being against public policy and refused to grant the order applied for.

In the opinion of this Court the agreement which the Respondent says he entered into was one in fraud of the Municipal Regulations and was knowingly entered into and cannot be enforced. If, under such a contract, payment or deposit has been made by the contracting party, and he has been concerned in the offence, what was paid or deposited cannot be recovered, things accessory to an illegal contract being also illegal (Nathan Common Law of South Africa—Second Edition, Vol. II, page 603). A guilty party cannot take advantage of his own wrong by going to the Court and asking to be relieved of his contract for where both parties are in the wrong the person in possession of the subject matter of the transaction is in the better position (*ibid*).

It seems to us, also, that it is extremely doubtful whether the Native Commissioner was right in finding in Respondent's favour on the facts. It is not, however, necessary to go into this question nor to deal with 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.

JOSEPH MATLA vs. THE AFRICAN PRESBYTERIAN CHURCH (also known as THE AFRICAN PRESBYTERIAN BAFOLISI CHURCH).

KINGWILLIAMSTOWN: 31st August, 1938. Before H. G. Scott, Esq., President, and Messrs. J. J. Yates and G. D. Hartmann, Members of the N.A.C.

Church—Claim for ejectment of Minister from Church property—Minister originally legally in occupation—Failure to prove that occupation illegal at time of institution of action—Where change has occurred in name of Church whether secession had taken place—On facts found not to have occurred—Expulsion of Minister from church without enquiry—No opportunity of being heard—Rules for trial of Ministers laid down by Church Constitution not followed—Expulsion of no force or effect.

Practice—Application that Plaintiff's church furnish security for costs owing to some of its members being resident outside Union—Where Headquarters in Union and property owned therein, not necessary to provide security for costs—Plaintiff's title to sue—Objection to should be taken in Court below and cannot be raised for first time on appeal.

(Appeal from the Native Commissioner's Court, Bethlehem: Case No. 5 of 1937.)

The Plaintiff in this action, a Native Church Organization, with its administrative office at Kroonstad, O.F.S., sued the Defendant for ejectment from certain Stand No. 158 in the Native Location at Bethlehem, O.F.S., and in his particulars of claim stated:—

1. On the 24th September, 1927, the Plaintiff duly acquired for its local Resident Minister the rights of residence on and occupation of certain Stand No. 158, in the Native Location at Bethlehem, District Bethlehem, and still holds such rights.
2. In May, 1936, the Defendant ceased to be a Minister of the Plaintiff Church and has been since then and still is in wrongful and unlawful residence on and occupa-

tion of the said Stand, and notwithstanding lawful demand duly made by Plaintiff, Defendant wrongfully and unlawfully fails, refuses or neglects to vacate the same.

At the outset of the case the Defendant's attorney asked for an order upon Plaintiff to furnish a list of the names, occupations and addresses of all the members of the African Presbyterian Church Association.

The Plaintiff's attorney then handed in a document on which appeared the names and addresses of some twenty ministers of the African Presbyterian Church.

Defendant's attorney objected to this list as it did not disclose the names and addresses of all the members but the Native Commissioner held that it was adequate for the purpose and accepted it.

Defendant's attorney thereupon applied for an order upon Plaintiff to furnish security for costs on the ground that several of the members of Plaintiff's organisation as shown on the list above-mentioned are resident outside the Union of South Africa. The application was refused.

Defendant pleaded as follows:—

1. That the Stand No. 158, Bethlehem Location, was acquired by the Church of which the Defendant is a member and which is not the Plaintiff's church, and
2. That the Defendant has never been a member of the Plaintiff's church and could, therefore, never have ceased to be a member or minister of such church.

Application was then made for particulars as to—

(1) the date of acquisition by Defendant's church of the location stand in question; and

(2) who or what is the Defendant's church?

Particulars were supplied as under:—

1. The stand in question was acquired by the Defendant's church as far as he knows prior to the year 1918; and
2. That the name of the Defendant's church is the "African Presbyterian Bafolisi Church" which church has been in lawful occupation of the said stand ever since.

The case then went to trial and after hearing evidence the Native Commissioner granted an order of ejectment against Defendant with costs.

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

1. That the Plaintiff being an unincorporated body, the Defendant was entitled to know who his opponents are, to obtain the names of all the members, otherwise such members are not before the Court and there is no effective judgment against them; and the Native Commissioner erred in holding that the giving of a few names out of the thousands sufficed.
2. That the Native Commissioner erred in refusing the application for security for costs.
3. That the Native Commissioner erred in refusing Defendant's application for absolution from the instance.
4. The Plaintiff, on whom the burden of proof lay, has not proved his case, and the finding of the Court is against the weight of both the oral and the documentary evidence.

The history of this movement is as follows: A Native Congregation was established at Lovedale in the Cape Province under the jurisdiction of the Free Church of Scotland. In May, 1898, certain differences arose between the Xosa and Fingo sections of the Congregation of which the Revd.

Jeremiah Mzimba was the pastor. As a consequence Mzimba and many of the deacons, elders and office bearers connected with the church seceded and formed a body known as the Presbyterian Church of Africa (see Stewart and Others *vs.* Mazimba and Others, 9 C.T.R. 96).

In 1908 the Revd. E. J. Marumo and Revd. Y. D. Magwaza resigned from the Presbyterian Church of Africa and formed another Church body to which they gave the name "The African Presbyterian Church" with headquarters at Harrismith, in the Orange Free State and Congregations were established at, amongst other places, Kroonstad and Bethlehem in that province.

The Revd. E. J. Marumo was elected first Moderator (also referred to in the Constitution of the Church as General Overseer and General Officer) and held that office until his death in 1918.

On the 28th December, 1918, the Revd. J. H. Mokalapa was elected Moderator in his stead. In 1917 the word "Batolisi" was added to the title of the Church which then became known as the African Presbyterian Bafolisi Church.

This was merely a change in name and did not signify any break away from the African Presbyterian Church. One witness explained that the addition was made so that the Basuto would understand that the Church believed in healing the sick by means of prayer.

In 1932 there was a dispute between Mokalapa and Moloantoa, then pastor in charge of the Kroonstad Congregation, and a meeting was held and a vote taken, the majority voting to retain Moloantoa and the Church building at Kroonstad. Moloantoa then changed the name of the Church at Kroonstad to the "African Presbyterian Barapeli Church".

In 1927 permission was granted by the Location Superintendent at Bethlehem to the African Presbyterian Bafolisi Church to occupy Stand No. 158, in the Bethlehem Location, and to erect a dwelling-house thereon. The house was duly erected and was occupied by Revd. A. Phutsisi, a Minister of the African Presbyterian Bafolisi Church, until 1935 when he was transferred to Maseru and the house was then occupied by Revd. Joseph Matla who was sent there by the Conference of the Bafolisi Church.

In June, 1937, summons for ejectment was issued against Joseph Matla.

It will be seen that Mokalapa claims that he is the Moderator of the African Presbyterian Bafolisi Church and that Moloantoa seceded from that Church in 1932 and consequently has no rights in the stand in question. On the other hand Moloantoa claims that he is the Moderator and that both Mokalapa and Defendant have been expelled from the Church and, therefore, have no right to the occupation of the said stand.

The evidence in this case calls for consideration under several heads, namely:—

1. Did Moloantoa secede from the African Presbyterian Bafolisi Church and form an entirely separate and distinct body under the name of the African Presbyterian Barapeli Church?

2. Was Moloantoa duly appointed Moderator of the African Presbyterian Bafolisi Church?

3. Was Mokalapa deposed from his position of Moderator and were he and Matla expelled from the Church in accordance with the Constitution?

The first question is by no means free from difficulty as there are indications in the evidence which point either way.

If Moloantoa did secede then his Church is not entitled to any of the property of the Church from which he seceded as against those who did not secede. (See Dwane *vs.* Goza and Others, 17 E.D.C. p. 8.)

It will be remembered that the dispute between Mokalapa and Moloantoa occurred in March, 1932. In February, 1933, Moloantoa writing to Petrus Sithole, one of the Ministers of the Church, says: (Exhibit A. 7): "I hear you are coming to my Committee at Kroonstad. Whom are you coming to? Because Moloantoa is out of your lot now. If you have come to make dissension here where I am in power you will bring dissension here and you will go out of Kroonstad without looking back and the Government will break it up because it is a Church of disputes. Mokalapa does not speak the truth. Attorney Loubser on 15th September, 1932 separated us . . . The house at Kroonstad goes to the Kroonstad Congregation. Mokalapa took another attorney Vorster, who wrote that I (Moloantoa) must go out of the house, but I took the letter to Attorney Loubser who said I must stay. Then I got summons. Then Loubser asked Superintendent of Locations who took a vote. At teh meeting of Kroonstad Moloantoa got the majority. Attorney Vorster then left the matter at that. Attorney Loubser on 15th September, 1932, called me. I went. He said the meeting must give the sum of £4. 10s. to Mokalapa and he must give another name because we cannot keep the name of Bafolisi . . . The Congregation has now been given another name and I am working under that new name, viz.: African Presbyterian Barapeli Church. In the Magistrate's Office I do not take the permit for sacramental wine under the name of Bafolisi as the white men have fixed up the thing in the Municipality. From now onward we can, therefore, not speak any further to you. Mokalapa has no document *re* application to Municipality for stand and the Government does not recognize the Church of Mokalapa—We want another Moderator".

Writing again to the same man on 28th December, 1933 (Exhibit A. 9), Moloantoa says: "Now I let you know that I have received your notice per David Sillo . . . He said you say we must come together again in one Church . . . When Mokalapa is no longer Moderator of the Church you can come back . . . If it was you and other ministers appointed by Marumo I could understand it, but the Ministers appointed by Marumo are no longer in the Church except . . ."

Now in this letter while Moloantoa speaks about them coming together again in one Church it is plain that he still regards himself as belonging to the Church founded by Marumo and his objection is merely to Mokalapa as Moderator.

Another letter which might possibly be regarded as showing that there had been a secession is one from the Superintendent of Locations at Kroonstad, dated 23rd July, 1937, to the Defendant's attorneys (Exhibit A. 11). This letter is as follows:—

"Re *African Presbyterian Barapeli Church, 69 D. Location Kroonstad: Revd. Samuel Moloantoa, Pastor in charge.*

Further to our phone conversation of even date, I have to advise that the above-mentioned Church was originally registered in the name of the African Presbyterian Church. In 1932 the Revd. Moloantoa had an argument with his Bishop the Revd. Mokalapa of the African Presbyterian Church. On the 7th December, 1932, the Bishop Mokalapa asked me to arbitrate in the dispute, and I called attorney J. W. Loubser to assist. The whole Congregation attended the proceedings in the Location Hall. On the ballot, which the Bishop and Moloantoa agreed to abide by, an overwhelming majority voted retaining Moloantoa and the church building they had put up and seceding from the old Church of Mokalapa.

The section seceding called itself and its church building 'The African Barapeli Church', and the name of the Church was duly changed from African Presbyterian Church to African Presbyterian Barapeli Church on Hut Transfer Certificate No. 606 of the 7th. December, 1932.

I believe that the full title of the old African Presbyterian Church under the Bishopric of Mokalapa was the African Presbyterian Bafolisi Church . . ."

These letters regarded by themselves do undoubtedly suggest the possibility of there having been a secession in 1932, but when regard is had to other factors and other documentary evidence this suggestion is negatived. The Church as originally founded by the Revd. Marumo was called simply "The African Presbyterian Church" to which the word Bafolisi was subsequently added. No change, however, was effected either in the religious tenets of the members or in the Constitution. When the split occurred in 1932, which appears to have been purely personal between Mokalapa and Moloantoa, the latter added to the name of his Church at Kroonstad the word "Barapeli". The evidence clearly shows that the words "Bafolisi" and "Barapeli" are really synonymous, meaning "healing by prayer" or "Faith-healing". In his oral evidence Mokalapa denies that this is so, but in a letter written by him on the 17th December, 1936, as representing the African Presbyterian Bafolisi Church to the Superintendent of the Bethlehem Location (Exhibit D. 3), the following passage occurs: "The Cabinet Committee of the above Church at a meeting held at Warden on 1st July, 1936, passed a resolution that the African Presbyterian Bafolisi Church and the African Presbyterian Barapeli Church are one and the same, the words Barapeli and Bafolisi in Sesuto having the same signfication, namely, 'Healing by prayer'."

Since 1932 ministerial credentials and certificates of membership of the Women's Society of the Church issued by Moloantoa bear the superscription "The African Presbyterian Church" "Established 1908. Founder E. J. Marumo", thus showing that he still regarded himself as belonging to the same Church which Marumo had founded, the same Church to which Mokalapa belongs.

Finally we find that Moloantoa on 20th April, 1936, wrote to the Native Commissioner at Harrismith that Mokalapa had been expelled from the African Presbyterian Church.

His letter was apparently referred to Mokalapa or his attorney for on the 16th July, 1936, Mr. Attorney Cloete wrote to the Native Commissioner [Exhibit S (b)] that Moloantoa had dissociated himself from the African Presbyterian Bafolisi Church in 1932 and consequently had no right to make any representations on behalf of that Church. This letter was referred to Moloantoa by the Native Commissioner. Moloantoa sent a reply signed by him and twenty-one ministers who were supporting him emphatically denying that they had dissociated themselves from the African Presbyterian Church.

Having carefully considered all the evidence we are of opinion that there was no secession in the real sense of the word and that the dispute that arose was merely one between two ministers each of whom claimed to be the leader of the Church.

These rival claims must now be considered. It can be accepted that Mokalapa was duly appointed as Moderator in succession to Marumo. The pamphlet (Exhibit I) in which is printed the Constitution of the Church contains the following statement: "We, the undersigned ministers and members of the above Church in assembly at Kestell, Orange Free State, on 28th December, in the year of our Lord (1918), have according to our Constitution and being gathered for

that sole purpose, duly elected, nominated, and appointed our brother Minister, the Revd. J. H. Mokalapa, to the position as Moderator of the African Presbyterian Bafolisi Church of South Africa."

Appended to this are the names of the Synod Officers. From that time until 1936 Mokalapa was recognized as the Moderator, and it is clear that his appointment was made in accordance with the Constitution at a meeting specially called for the purpose.

We deal now with Moloantoa's claim to the Moderatorship. His claim is based on the following document, which has been inserted as an extra page in the pamphlet containing the Constitution: " We, the undersigned ministers of the African Presbyterian Church have nominated and elected our Brother, the Rev. S. J. Moloantoa, as Moderator in a directional position of the above-mentioned Church and the same was confirmed by the Rev. J. Q. Mokuena, of the Apostolic Faith Mission Church, on the 30th March, 1934. We have granted him the Rights of Representative and General Moderator of the African Presbyterian Church in the five Provinces in the Union of South Africa."

Appended to this are the names of seventeen persons styling themselves Synod Officers.

There are several points in connection with this document which call for comment. In the first place there is nothing to show where and when the meeting at which the election took place was held, nor is there any indication that the meeting was called in accordance with the Constitution or, if it was not at an Annual Conference, that due notice of the date, place and object of the meeting was given. There is certainly no evidence that Mokalapa and the church members who supported him were notified. Moloantoa admits that this document was printed in 1934, yet we find that even after that date he recognized Mokalapa as Moderator. For instance, there is a letter [Exhibit Q (*a*)], dated 27th July, 1936, signed by Solomon Mabola for Revd. J. Moloantoa to Mokalapa, addressing him as Right Reverend and advising him of a meeting of the S.A.P.B. Church at Fouriesburg Location on 31st August, 1936, and asking him to be present with his ministers and saying this would solve the difficulty and proceeding: " A resignation can also be made but this will not help if our ministers do not come together and put right what is wrong."

The only resignation he could have been referring to was that of Mokalapa and it would seem that Moloantoa and his supporters had kept secret the fact of his so-called election. The suggestion of secrecy is further borne out by the fact that notification of the appointment was not sent to the Secretary for Native Affairs until the 9th December, 1936 (Exhibit A. 1), about two years and nine months after the so-called election and *after* the letter of demand had been sent to Defendant in this case.

Then again no explanation has been offered as to what connection the Apostolic Faith Mission Church had with the African Presbyterian Church or why the appointment had to be confirmed by a minister of the first-mentioned Church. If this matter had been probed a good deal of light would probably have been thrown on the case.

The Constitution of the Church does not lay down definite rules in regard to the supersession or election of Moderators, but it would appear from a reference to Section 12 of the Constitution that a Moderator would hold office so long as his " life and teaching correspond with the Gospel and Philanthropist Nation ", whatever that may mean.

It is, however, only in accordance with the rules of natural justice that before an official of the Church is removed from his post and another put in his place that the fullest enquiry

should be made and due notice given to him of such enquiry to enable him to defend himself (see Cohen *vs.* Committee of Harrismith Hebrew Congregation O.P.D. 9/11/23, reported in 2.P.H.-M. 42).

As a matter of fact the Constitution does lay down rules for the trial of ministers and lay members. These, however, will be considered when dealing with the third question propounded above, namely, the expulsion of Mokalapa and Matla.

In so far as Moloantoa's claim is concerned we are of opinion that he has failed satisfactorily to prove that he was appointed Moderator of the African Presbyterian Church in due form.

We come now to the third question. It is somewhat difficult to gather from the evidence the exact date when Mokalapa is alleged to have been deposed from the Moderatorship. The witness Phutsisi says: "Mokalapa was on 16th May, 1935, no longer Moderator of our Church, he had then already been removed from his post."

Moloantoa says: "Ek ken Joseph Matla—die verweerder in hierdie saak. Hy is nie langer predikant in die Kerk wat ek genoem het daar hy dit verlaat het in Mei 1936. Die Sinode van my genoemde Kerk het Mokalapa afgesit—Hy was destyds die Moderator van ons Kerk. Matla het toe Mokalapa gevolg en ons Kerk verlaat."

The plain meaning of this is that Mokalapa was deposed in May, 1936, yet later on in his evidence he says: "Mokalapa en sy ander volgelinge het uit ons Kerk gevlug in 1935", and he repeats in another portion of his evidence that he was put out (uitgesit) in 1935.

On the 20th April, 1936, Moloantoa writes to the Magistrate, Harrismith, reporting that Mokalapa had been expelled from the Church. Unfortunately Moloantoa's letter has not been put in so that it is not known whether he indicated when and in what manner the expulsion took place.

More definite evidence is afforded by a letter written to the Town Clerk, Bethlehem, on 30th April, 1936 (Exhibit D. 1) by the Synod Officers of the African Presbyterian Church in which this passage occurs: "I instructed about the Resolution have been passed by our Synod held at Tsime, Buthabuthe, Basutoland, on the 9th April, as Revd. John H. Mokalapa of Harrismith have been expelled by the Synod on many reasons we therefore request your Councillors to remove the Revd. Joseph Matla from Site No. 158 . . ."

Taking this in conjunction with the letter to the Magistrate, Harrismith, it seems clear that the final suggestion is that the deposition or expulsion was effected at a meeting of the Synod held on 9th April, 1936.

Whatever date is accepted this one fact clearly emerges, namely, that Mokalapa was not removed from the Moderatorship before 1935. That being so, still further doubt is thrown on the legality of the appointment of Moloantoa in 1934, for it is not possible to have two Moderators of the same body at one time.

Moloantoa is very uncertain as to whether or not Mokalapa and Matla (Defendant) are still members of his Church. He says in one place that they left the Church in 1935 and later that they are still members (i.e. on 6th July, 1937, when he was giving evidence).

He is quite definite, however, that they were expelled from the ministry. It then becomes necessary to ascertain whether the alleged expulsion was carried out in accordance with the Constitution. If it was not the expulsion has no force or effect.

The Constitution is not too clearly worded, but the procedure to be followed in the trial of ministers and lay members against whom complaints are made appears to be as follows: —

The complaints must first be examined by five ordained ministers as a Committee of Investigation who shall report to the Annual Conference (s.s. 14). Before the Annual Conference deals with the matter, apparently, the accused person must be reported by the elder-in-charge of the district to the Senior Overseer, or the Overseer next in seniority, if the senior be the accused, who shall appoint a Committee of one overseer and four elders to conduct the trial. This Committee must place in his (accused's) hand a "bill of complaint or charges" at least one week before the date set for trial.

If an Overseer is found guilty of crime the Committee has power to suspend him from all official functions until the ensuing Annual Conference. If the Annual Conference determine in his favour it shall have power to reverse the decision of the Committee and restore him to his former function; if it shall find him guilty, it shall continue his suspension until the next ensuing General Conference, which has the power to suspend or expel him from his Episcopal function (s.s. 24).

Throughout the record of this case there is nothing to show that any one of the requirements of the Constitution in regard to the trial and expulsion of Mokalapa and Matla were fulfilled and whatever action was taken was *ultra vires* and of no effect and consequently they are still ministers of the African Presbyterian (Bafolisi) Church.

Mokalapa says in his evidence that Defendant was appointed as minister at Bethlehem by the Conference of the African Presbyterian Bafolisi Church, and this statement receives strong support from one of the Plaintiff's witnesses, namely, the Location Superintendent at Bethlehem. On the 9th October, 1936, Mr. Attorney Canisius, on behalf of Moloantoa, wrote to the Town Clerk at Bethlehem (Exhibit D. 10) alleging that the Location Superintendent had ejected the Revd. Phutsisi from Stand No. 158 and allowed Matla (Defendant) to take possession. The letter proceeded: "The latter has no connection whatever with the African Presbyterian Church and has no right whatever to occupy the Stand which has been allocated to the Church and on which the rates have been paid by the Church."

This letter was replied to by the Superintendent of Locations on 12th October, 1936 (Exhibit D. 11) denying that he had ejected Revd. Phutsisi from the stand and proceeded: "I can definitely state that he was transferred to Maseru and Rev. Matla to Bethlehem by the Conference of the Church." This actually shows that Matla's original occupation of the stand in question was quite lawful, and before he can be ejected it must be shown that since that date his occupation has become unlawful.

Moloantoa claims that his occupation has become unlawful because he ceased to be a minister of the Plaintiff Church in May, 1936.

This Court has found that Plaintiff has failed to prove that he was expelled from the Church. In these circumstances a judgment of absolution from the instance was the most that should have been granted, leaving it open to Plaintiff to reopen the matter and produce proper proof of illegal occupation.

In view of the decision at which this Court has arrived it is unnecessary to consider the first ground of appeal.

In so far as the second ground of appeal is concerned it appears from the record that the headquarters of the African Presbyterian Bafolisi Church are situate and the Church has property within the Union of South Africa.

In these circumstances we are of opinion that the Native Commissioner correctly refused to order the Plaintiff to furnish security for costs. The appeal on this ground must fail.

Before this Court Appellant's Counsel argued that Plaintiff in the Court below, had not proved his title to sue. He submitted that this point had been raised by Plaintiff's attorney when he asked to be supplied with the names and addresses of all the members of the Congregation. This, of course, is not so. An application for information as to the members of a church body can by no stretch of imagination be regarded as an objection to the title of the Moderator of that body to sue.

If it had been intended to attack the Plaintiff's title to sue, this should have been done crisply.

It is also contended by Appellant's counsel that, even if it was held that the point had not been taken in the Court below, he was entitled to raise it for the first time on appeal as it was a point of law. Now there are a number of cases where a Court of Appeal has allowed new points to be taken on appeal but this case is not one where that can be done.

"Where a new law point involves the decision of questions of fact, the evidence with regard to which has not been exhausted, or where it is possible that if the point had been taken earlier it might have been met by the production of further evidence, then a Court of Appeal will not allow the point to prevail. Because it would be manifestly unfair to the other litigant to do so." (Innes, J. in Cole *vs.* Government of the Union of South Africa, 1910 A.D. at p. 273.)

In the case of Gerber *vs.* Richter (3 Menzies 424) it was laid down that where objection to the Plaintiff's title to sue has not been taken in the Court below, it cannot be taken on appeal. If the Plaintiff's title to sue in the present case had been challenged in the Court below, it is possible that he might have produced further evidence to meet the point. As this was not done it is not competent to raise the point on appeal.

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

1947 (T+N) 142.

MOSES KHOLOANI vs. XOTYANA and THOMAS XINIBE.

KINGWILLIAMSTOWN: 30th August, 1938. Before H. G. Scott, Esq., President, and Messrs. J. J. Yates and G. D. Hartmann, Members of the N.A.C.

Appeal—Practice—Appellant in default—Rule 13, *G.N. No.* 2254 *of* 1928 *provides that appeal shall lapse unless prosecuted at next session of Native Appeal Court after appeal noted—Appeal noted* 30*th March*, 1938, *and no reason advanced for failure to prosecute timeously—Appeal struck off roll with costs.*

(Appeal from Native Commissioner's Court, Lady Grey: Case No. 3 of 1938.)

There is no appearance for Appellant.

Mr. Atherstone, who appears for Respondent states he has been requested to apply for a postponement of the appeal to the next session of this Court.

Rule 13 of the Rules of the Native Appeal Court provides that the party noting an appeal or cross-appeal shall prosecute such appeal at the next session of the Native Appeal Court

and in default of such prosecution the appeal or cross-appeal shall lapse, provided that the Court of appeal may permit such appeal or cross-appeal to be prosecuted at any subsequent session of such Court.

The appeal in this case was noted as far back as 30th March, 1938, and no reason whatever has been advanced why it should not have been proceeded with at this session of the Native Appeal Court.

The appeal is struck off the roll with costs.

SITWAYI vs. BANGANI DOKODA.

BUTTERWORTH: 26th September, 1938. Before W. J. G. Mears, Esq., Acting President, and Messrs. E. F. Godfrey and H. F. Marsberg, Members of the N.A.C.

Appeal—Procedure—Failure of Judicial Officer to record findings in regard to inspection of stock at trial—Remittal of record for completion and re-submission to Appeal Court.

(Appeal from the Native Commissioner's Court, Idutywa: Case No. 116 of 1938.)

Before addressing the Court on the merits of the case, Mr. Warner, for Appellant, applies that it be remitted to the Native Commissioner for an entry to be made on the record of the Judicial Officer's findings in regard to the earmarks found on Plaintiff's cattle which were produced to the Court for inspection. He states that the record is silent on this point, that it is material and the omission is prejudicial to his client.

Mr. Ellis, for Respondent, admits that the judicial officer did, at the request of the parties, inspect certain cattle and their earmarks, produced on Plaintiff's behalf but opposes the application on the ground that there are references to such inspection and the earmarks in the evidence of certain witnesses.

This Court will exercise its inherent powers and remits the record to the judicial officer for completion and re-submission thereafter to this Court.

There will be no order as to costs.

SONKU NTSUNDUSHE vs. NQWILISO TUTU.

BUTTERWORTH: 26th September, 1938. Before W. J. G. Mears, Esq., Acting President, and Messrs. E. F. Godfrey and H. F. Marsberg, Members of the N.A.C.

Damages—Adultery—Insufficiency of proof.

(Appeal from the Native Commissioner's Court, Idutywa: Case No. 2 of 1938.)

This is a claim for 5 head of cattle or £20 as damages for adultery and pregnancy.

Plaintiff established that he was away from home from November, 1935, to December, 1937.

On arriving home he found his wife in her third month of pregnancy. Defendant, to whom Plaintiff's wife was sent both before and after his return, denied liability to the messengers.

A certificate from a medical practitioner established that on 14th December, 1937, the woman was suffering from a recent miscarriage.

Plaintiff's wife Noseveni gave evidence of intimacy with Defendant and her resulting pregnancy.

She further stated that after having made a denial to the messengers Defendant discussed the matter of her pregnancy with her and gave her medicine in a tin with a view to procuring a miscarriage which actually took place after her husband's return.

Nokamile, Plaintiff's other wife, states that she acted as go-between, received a fee and corroborated Noseveni in regard to her meeting with Defendant.

Defendant denied intimacy and liability and produced documentary evidence to show that he was at work from Frebuary to June, 1937. He admits that the woman was twice sent to him but alleges that the woman on the second occasion stated she was then following her monthly courses.

The Assistant Native Commissioner refers to various discrepancies in the evidence of Plaintiff's two chief witnesses, both wives of Plaintiff, but states that they do not warrant dis-belief in them.

He, however, does not elaborate his reasons for accepting the evidence of these women and rejecting that of Defendant.

Nokayiloti the only other witness called for Plaintiff gave testimony which was of no evidential value and contradicted the evidence of the other two women.

This Court has repeatedly laid down that in cases of this nature, Plaintiff must prove his allegations beyond reasonable doubt and in our opinion the Assistant Native Commissioner has failed to give sufficient consideration to the discrepancies which he admits exist in the evidence of the women and their unreliability as tested on an issue which can be definitely proved.

Noseveni states that during a long intimacy of twelve months Defendant was never away from work. Nokamile admits that he was away for a month or two. Defendant in fact was away over four months.

These witnesses also disagree as to details on the occasion of Defendant's visits to Noseveni.

The crucial test in the case is the evidence in regard to the tin of medicine.

On this point, Plaintiff only states that he sent the tin to the medical practitioner. Noseveni herself admits that she produced the tin to her husband only after the miscarriage whereas Nokamile state that Noseveni actually confronted Defendant with the tin when sent with messengers to him. Defendant denies knowledge of the medicine.

In our opinion it is highly improbable that Defendant after his denial of liability would place in the hands of the woman such damning evidence against himself.

In view of Noseveni's proved untruthfulness in regard to Defendant's absence and her obvious desire to make the case against him as serious as possible coupled with the conflicting evidence of Nokamile, this Court is not prepared to accept the evidence tendered on this point.

There is no " catch " in this case and the evidence adduced is meagre and most unreliable. The appeal is accordingly allowed with costs and the judgment altered to one for Defendant with costs.

TWALINDWE and NXOWA NEKU vs. NQOTO MONI.

BUTTERWORTH: 27th September, 1938. Before W. J. G. Mears, Esq., Acting President, and Messrs. E. F. Godfrey and H. F. Marsberg, Members of the N.A.C.

Adultery—Damages—Plea that no marriage existed between Plaintiff and woman with whom intercourse took place—Marriage arranged in Plaintiff's absence—Payment of dowry on account—Woman remaining at Plaintiff's kraal after being twdaed and dressing as and performing duties of wife—Plaintiff's subsequent return and occupation of same hut as woman—Held to constitute valid marriage under Native Custom.

(Appeal from Native Commissioner's Court, Kentani: Case No. 190 of 1937.)

In this case the Plaintiff in the Court below claimed from the two Defendants jointly and severally, the one paying, the other to be absolved—the second Defendant as head of the kraal—eight head of cattle or their value £40 as damages for alleged adultery by the first Defendant with his (Plaintiff's) wife, Notabile, *alias* Monde.

The plea was a denial that any marriage took place, existed, or exists between Plaintiff and the woman in question and he had no grounds of action.

The Assistant Native Commissioner entered judgment for Plaintiff as prayed with costs.

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

(*a*) That the finding of the Assistant Native Commissioner is not supported by the evidence adduced.

(*b*) That the finding of the Assistant Native Commissioner is contrary to Native Law and Custom in that the evidence adduced by the Plaintiff failed to establish and prove that there was a marriage between Plaintiff and Monde.

(*c*) There is no evidence whatsoever of the consent of the Plaintiff to the marriage, nor did he on his return take any steps to confirm or otherwise, arrangements said to have been made for him.

(*d*) The only evidence of consent by the woman Monde is that she would have been content to stay had she been properly received by Plaintiff.

(*e*) There is no satisfactory evidence of the consummation of the marriage except for that of Plaintiff which evidence is directly contradicted by the evidence of his so-called wife, whose evidence is to a large extent corroborated by the absence of pregnancy or issue; and in the event of the Appeal Court ruling against the Appellant on the question of marriage.

(*f*) That the Assistant Native Commissioner erred in allowing eight head of cattle as damages in the peculiar circumstances of this case.

During argument the attorney for the Appellant, on reference by the Respondent's attorney to paragraph (*f*) of the Notice of Appeal, remarked that he was not pressing this and was abandoning it.

From the evidence adduced it appears that during the absence of the Respondent at work about the year of the locusts (1935) he wrote to his maternal uncle, Mashini, to arrange for his marriage with the woman in question.

That Mashini negotiated the marriage with Mdlungu, the natural guardian of the girl, who demanded eight head of cattle as dowry.

That in winter of that year (May-June, 1935), the girl was twalaed to Respondent's home, and five head of cattle were taken away on account by the guardian's messengers, Quadalele and Mqulo.

That the girl was given the name of Notobile, remained at Respondent's home, put on the breast cloth and wore a handkerchief over her eyes and performed the usual duties of a wife at the kraal.

That Respondent returned home after Christmas (1935) following this winter.

That he stayed only three weeks during which period he occupied the same hut as the girl in question.

That owing to pressure of debts he returned to work on the Rand.

That the girl in question left the Respondent's home during the month known by natives as " msinsi " (September, 1936).

That soon after more dowry was demanded and a black heifer tendered by word of mouth.

That in January, 1937, on receipt of a letter from Mr. Attorney Neethling it was found that the girl Monde, *alias* Notobile, was living in adultery with the first Appellant.

That in the absence of Mdlungu, Qudalele, the man left in charge, offered to return the five dowry cattle—one original and four substitute—which were refused.

That Nqoto, the Respondent, was advised by letter of the position and he returned in November, 1937, after issue of summons on instructions of Mashini.

For Appellants the facts as disclosed by the Respondents are almost in every instance supported by them and their witnesses.

In fact, first Appellant, on the 25th March, 1937, in answer to a demand, admitted liability for the first adultery in three head of cattle. The girl herself admitted that she remained at Respondent's kraal as a wife before and after the visit of the Respondent, but contends that he never had carnal intercourse with her.

It was only after she became enamoured with first Defendant and he, evidently, was able to offer more dowry that the consummation of the marriage between Respondent and the girl was questioned.

The facts as disclosed in the evidence were placed before the five Native Assessors and they were unanimous in their decision that this was a marriage in accordance with Native Law and Custom.

This Court considers that the essentials of a Native marriage have been complied with; dowry has been paid and accepted and the Plaintiff and woman have lived together as man and wife at Plaintiff's kraal.

The appeal is accordingly dismissed with costs.

H. F. Marsberg, Esq., Member, dissents.

DISSENTING JUDGMENT IN THE CASE OF TWALINDWE and NXOWA NEKU, Appellants, *vs.* NQOTO MONI, Respondent.

(Appeal from the Native Commissioner's Court, Kentani: Case No. 190 of 1937.)

I regret I find myself unable to assent to the view taken by my brothers in this case, the more so as they are supported by the unaminous opinion of the Native Assessors. With the

main facts as outlined in the majority judgment I find myself in agreement but I am unable to arrive at the conclusion that from such facts it can clearly be held that a Native customary union took place between Plaintiff and the woman Monde. The facts, briefly, are that Plaintiff, while working at the mines wrote to his people to get Monde as his wife, that his people negotiated with Monde's people, that she then took up residence at Plaintiff's kraal (still in his absence, be it noted), that cattle passed, that Monde thereupon regarded herself—by dress, performance of household duties and so forth—as a wife. In this state she lived on at the kraal for a period of ten months before Plaintiff returned from the mines. He remained for three weeks and again left for work for an indefinite period. There is no clear evidence that Plaintiff returned to his home from work for the express purpose of consummating the union and Plaintiff and Monde contradict one another as to whether intercourse took place. The question naturally arises: At what point of time did the customary union take effect? Two obvious occasions suggest themselves. Firstly, when Monde originally went to Plaintiff's kraal, and secondly, when Plaintiff returned to his kraal.

In regard to the first point I infer from the expression of opinion of the Native Assessors that they support the idea that union would be regarded as having taken effect from the time when the girl was handed over to Plaintiff's people.

At this stage Plaintiff, the man, was away at work with no definitely expressed intentions in regard to the time for his return. Had he not returned he would, according to the Native Assessors, be regarded as having deserted his wife. If this alliance between the Plaintiff and the woman is then to be regarded as customary union, it is, in my opinion, a negation of the fundamental ideas of marriage as embodied in the statutory definition of customary union which means the association of a man and a woman in conjugal relationship according to Native Law and Custom.

In the other case the taking effect of the union would depend on the return of the man to the kraal. This could depend on the whim or caprice of the man or it might be purely accidental. In this case Plaintiff returned to his kraal and stayed there for a period of only three weeks, when he left again for an indefinite term. There is no evidence to show that he returned expressly in connection with this alliance with Monde. Had she been absent from the kraal for any reason during his short stay it is questionable what would then have been the position between them.

This Court is asked, therefore, to hold that the consummation of the marriage was dependent purely on the happening of a very uncertain event, the return to the kraal of the Plaintiff, who on that occasion may or may not have found his wife awaiting him.

Again, then, the whole transaction is so in conflict with the practice of all civilized peoples which demands that there shall be no uncertainty in regard to the celebration of marriage, that this Court ought not on the grounds of public policy to give its approval to this type of alliance. Nor is there lack of authority for this proposition.

In the case of Sofiba *vs.* Gova (1 N.A.C. 7) the dangers inherent in marriages by proxy were hinted at. There the Court felt that it could not uphold a marriage where the consent of the husband to the contract had not been given, where he was not even at the kraal to which the girl had been sent and there was nothing to show that he was likely to be there within a reasonable time.

The very nature of the marriage contract requires that both parties must be at hand to give effect to it.

It is significant that there is no other reported case of marriage by proxy than the one quoted which was decided in 1896.

Were it true that such marriages are valid it is unbelievable that no cases should have been brought before the Courts where frequent actions could be expected for damages on the grounds of adultery on the part of the wives in the absence of their proxy husbands. Rather, is it not a fact that the absence of reported cases indicates that proxy marriages are universally known to be invalid.

In my opinion the facts of this case do not suggest that there was more than a proposal for marriage between Plaintiff and Monde.

Such proposals are a regular feature of Native Custom and the practice is well understood.

Judgment should have been given for Defendant.

H. F. MARSBERG.

Butterworth, 27th September, 1938.

NQALAGA DLULA vs. MBUYISELO ZIBONGILE.

Butterworth: 27th September, 1938. Before W. J. G. Mears, Esq., Acting President, and Messrs. E. F. Godfrey and H. F. Marsberg, Members of the N.A.C.

Native Estate—Formalities essential for adoption of child and heir by Native Law—Fingo Custom.

(Appeal from the Native Commissioner's Court. Tsomo: Case No. 60 of 1938.)

In this case Plaintiff claimed to be the brother and heir of the estate of the late Tiyana Mayaba who died, leaving no issue.

Defendant claimed to be the adopted son of the said Tiyana and his heir.

Alternatively he claimed that the cattle and sheep referred to in the summons were his property, being acquired by his own earnings and that the pigs were no longer in existence.

It is common cause that Plaintiff is the eldest and only surviving son and heir of the Great House of the late Mayaba and also heir to the late Tiyana, if Defendant is not his adopted son and heir as claimed.

The Native Commissioner found that adoption had taken place.

In regard to the alleged adoption the following are the chief features in Defendant's case:—

He was given when weaned by his father to be Tiyana's heir. At baptism Defendant was given Christian names by Tiyana and also the family name of Dlula by which he is still registered for tax purposes. The baptismal ceremony was followed by a feast at which the judicial officer finds the adoption was made known in the presence of neighbours, not specially invited, including only one person related by blood to Tiyana.

The finding of the Native Commissioner is appealed against for the reasons that—

(*a*) in the absence of a Chief in Fingoland, the headman was not informed of the adoption;

(*b*) only three witnesses attended the alleged meeting. No neighbours were called nor were Malo Dlula and his two sons, members of the family, though available in the district, present.

Plaintiff himself states that he knew nothing of the meeting and was not present, but this Court sees no reasons to disagree with the judicial officer's finding that he was warned but declined to attend.

The Headman was not present nor was he advised of the adoption.

The facts of the case were submitted to the Native Assessors who state:—

"In any case of adoption it is necessary that the blood relations should be called no matter how far distant they are. When blood relations have agreed then the matter is taken to the Great Place. Nowadays as there are no paramount chiefs for Fingo Land, we refer to the Headman's—as the 'Great Place': That is an independent man and would help to settle any dispute which may arise later.

In this case such steps have not been taken. The childless man adopting should have referred the matter to the Great Place, even if the heir of the Great House did not attend although asked to do so. It would also be reported to the Great Place that such a person refuses to attend the adoption gathering.

The baptism in connection with Church Rites is not Native Custom. On such occasions feasts are commonly held and relatives are not necessarily called. We, therefore, hold that the alleged adoption is not in accord with Native Custom. The taking of names is nothing. Even if there is ill-feeling between the parties by going to the Great Place it could have been settled or made known: The adoption would then have been carried."

It has repeatedly been laid down by this Court that an adoption is attended with much formality: The relatives of even distant degree and neighbours being assembled and a formal declaration made. The subsequent notification to the Chief is of great importance. As a matter of practice such report is verbally made to the Headman who is regarded as the Chief's representative, and he in turn conveys the news to the Chief.

The statement of customs expressed by the Native Assessors is in accord with previous decision of this Court.

The appeal is accordingly allowed with costs.

As the evidence led was confined to the question of the adoption the case is remitted to the judicial officer to dispose of the issue in regard to the estate property if it is so desired by the parties.

DUBULA MANTANGA vs. MZAMO MANTANGA.

Butterworth: 27th September, 1938. Before W. J. G. Mears, Esq., Acting President, and Messrs. E. F. Godfrey and H. F. Marsberg, Members of the N.A.C.

Practice—Enquiry in terms of par. (3) *of Regulation* 3 *of G.N. No.* 1664 *of* 1929—*Evidence heard in absence of parties to enquiry—Irregularity—Proceedings set aside and enquiry ordered to be proceeded with* de novo.

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

On the 21st January, 1938, the Native Commissioner at Tsomo commenced an enquiry regarding the status of the three wives of the late Mantanga with a view to ascertaining the rightful heir to arable allotment No. 270, Location No. 7, Tsomo.

G.P.-S.11058—1938—500.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(CAPE AND O.F.S.)

1938.

Volume 10.

(Part IV).

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Certain evidence was taken and the enquiry adjourned *sine die* for the evidence of one Zazini Sakiti. This witness was found on the 25th January, 1938, but neither of the parties now figuring as Appellant and Respondent respectively, was present.

An appeal was noted against the finding of the Court, on the ground of various irregularities and application was made at the same time for a condonation of the late noting of the appeal.

As Appellant is in no way responsible for the delay the Court is prepared to allow the appeal to be heard.

The Native Commissioner purported to conduct the enquiry in terms of paragraph (3) of regulation three of Government Notice No. 1664 of 1929, which reads *inter alia* a "Native Commissioner *shall* summon before him all the parties concerned".

In the course of his reasons for judgment the Native Commissioner states, referring to the alleged irregularities mentioned in the grounds of appeal, it is correct to state that Mzamo Mantanga (present Respondent) was not present at any stage of the enquiry. Both he and Dubula now cited as Appellant are young men who could not be of any assistance in determining the matter in issue, namely the status of Noposi. The terms of the paragraph quoted are peremptory and although the young men may not have been in a position to give evidence, nevertheless they were the rival claimants for the lot in question and were definitely parties concerned. The conduct of the enquiry without having summoned Mzamo (Respondent) before him is a grave irregularity.

The appeal is, therefore, allowed and the proceedings before the Native Commissioner set aside; the enquiry should be conducted *de novo*.

There will be no order as to costs.

This Court would draw attention to the fact that it has been greatly hampered apparently by the omission from the record of certain statements made before the Land Clerk on 2nd April, 1937. These statements possibly supply the key to the geneological tree provided, without which it is not possible to appreciate why the respective claims of certain landless persons have been passed over in favour of the present parties.

RAWLINS LENGOLO vs. XOLO and DIP MADUNA.

Kokstad: 6th October, 1938. Before H. G. Scott, Esq., President, and Messrs. F. C. Pinkerton and R. W. Hancock, Members of the N.A.C.

Child, illegitimate—Subsequent marriage of parents by Christian Rites legitimizes—Allegation by Defendant that child not that of mother by her husband but by another man—Number of facts adduced in favour of contention that child is that of her reputed parents · Strong evidence required to rebut.

Dowry—Parties married by Basuto Custom liable to pay dowry fixed under that Custom.

(Appeal from the Native Commissioner's Court, Matatiele: Case 272/37.)

In this case the Appellant sued the Respondent for 20 head of cattle, 1 horse, 10 sheep and an Mqobo beast or their collective value £115 being dowry due in respect of one Agnes.

In his summons appellant alleges that he is the eldest son, and Agnes is the daughter of A. L. Phirimana and Scholastica, born Mafolo; that he is entitled to the dowry of Agnes who became engaged to marry the second Defendant, son of the first Defendant, who promised to pay dowry; that Agnes has married second Defendant and that both by reason of the aforesaid promise as well as by Basuto Custom the Defendants are liable for the dowry claimed or its value.

The plea is a denial that Agnes is the daughter of A. L. Phirimana or that any promise to pay dowry was made by first Defendant.

The following facts are clear from the record:—

1. That Scholastica Mafolo was rendered pregnant and gave birth to the girl Agnes.
2. That about twelve months thereafter Scholastica was married by Christian Rites to Phirimana.
3. That the marriage certificate shows that consent to this marriage was given by the bride's father.
4. That the sum of £12 and three head of cattle were paid to Scholastica's father by Phirimana.
5. That Agnes was baptised as the child of Phirimana and Scholastica.
6. That Agnes has lived all her life with Scholastica and Phirimana.
7. That Scholastica declares that Phirimana is the man who caused the pregnancy which resulted in the birth of Agnes.

This is a formidable array of facts in favour of the Appellant's contention that Agnes is the child of Phirimana and Scholastica and requires very strong evidence to rebut it.

Three witnesses belonging to Scholastica's family, Mosala, Jack Nuka and Motiki Nuka are called by Defendant and they all state that it was never ascertained who was the father of Agnes and that, consequently, no fine was paid for the pregnancy. Defendant (respondent) himself says, however, that Scholastica's seducer was a Tembu and this was well known by everyone including Motiki. He thus gives the lie direct to his own witnesses and casts very material doubt on their credibility. The three witnesses mentioned also deny any knowledge of the marriage by Christian Rites.

As already pointed out the marriage certificate, the correctness of which has not been challenged, shows that the consent to the marriage was given by the bride's father. If he knew and approved of the marriage it is in the highest degree unlikely that the members of his family were unaware of it.

Motiki's evidence also must be regarded with caution for he has a substantial interest in the issue of the case. First Defendant has already paid him 13 head of cattle on account of Agnes' dowry and if it is found that he is not the person entitled thereto he will have to return them.

In the opinion of this Court the evidence in favour of Agnes being the child of Phirimana and Scholastica is overwhelmingly strong and has not been rebutted and that being so, although she was born prior to the marriage of her parents, the payment of dowry and subsequent marriage would confer rights in her dowry on her father and, in the event of his death, on his heir who, in this case, admittedly is the Appellant.

The marriage of Agnes and second Defendant was one according to Basuto Custom and not by Christian Rites. That being so the Defendants are liable to pay the fixed dowry according to that custom.

In argument before this Court the Appellant's attroney waived the claim to the Mqobo beast.

The appeal is allowed with costs and the judgment in the Court below is altered to "Judgment for Plaintiff for 20 head of cattle, one horse and ten sheep or their collective value at £110 with costs of suit".

1947(T+N)63.

GERTRUDE NCUME vs. ELINA LEBONA.

KOKSTAD: 6th October, 1938. Before H. G. Scott, Esq., President, and Messrs. F. C. Pinkerton and R. W. Hancock, Members of the N.A.C.

Damages—Defamation—Actual words used need not be proved but use of words of same effect and meaning must be proved—Privilege—for plea of, Defendant must establish his interest in or duty towards person to whom communication is made and that latter had an interest to receive it—Measure of damages.

(Appeal from Native Commissioner's Court, Mount Fletcher: Case 324/38.)

In the Court below Respondent sued Appellant for £50 as damages for defamation of character.

She complained that on the 3rd March, 1938, at Fletcherville in the District of Mount Fletcher in her presence and in the presence and hearing of one Mark Mbusi appellant made use of the following malicious and defamatory words of and concerning her:—

"Lomfazi akafanele kuza emtandazweni kuba lidikazi ulala no Mfundisi u Ncume, u sisi febe", and "Amapambili alomfazi adumbile, ekubuyini Komfundisi u Ncume uzakuya kulala naye".

The translation of these words is given in the summons as follows:—

This woman (referring to the Plaintiff) is not fit to come to the prayers because she is a dikazi and cohabits with Revd. Ncume and is also a loose woman. This woman's (referring to the Plaintiff) private parts were swollen and on the return of Revd. Ncume he is going to cohabit with her (meaning Plaintiff)."

In her plea Appellant denied making use of the words complained of but admitted that on enquiring from Mark Mbusi by what right he included Respondent in his class as she was still a member of her (Appellant's) class and on his replying that he did so by authority of Revd. Ncume, who would "put it right" she (Appellant) replied that her husband, Revd. Ncume, "cannot put this right as he has committed adultery with this woman" (meaning Plaintiff).

She pleaded further that she is the wife of Revd. Ncume and that she and Mark Mbusi are members and class leaders of the church to which Revd. Ncume is attached as a minister of religion.

Appellant further pleaded that the words used by her were used on a privileged occasion, she bona fide believing them to be true in substance and in fact and having reasonable grounds for such belief.

After hearing evidence the Native Commissioner entered judgment in favour of Respondent for £10 and costs.

The appeal against this judgment is on the following grounds:—

1. Plaintiff failed to prove that the defamatory words alleged by her in her summons to have been uttered by Defendant were in fact so uttered.
2. Having failed to prove the several words set forth in her summons, Plaintiff was not entitled—to enable her to succeed in the action—to rely upon words acknowledged by Defendant to have been uttered by her but in special circumstances.
3. Even if Plaintiff was so entitled, an abundance of evidence was adduced by Defendant to prove that the occasion on which she spoke of her husband (and only indirectly of Plaintiff) was privileged and that the words used by her were privileged, she bona fide believing them to be true in substance and in fact and having reasonable and probable cause and grounds for such belief.
4. The damages awarded are, in any event, excessive.

The Native Commissioner found the following facts proved:—

1. Plaintiff is a class member of the Methodist Church.
2. Defendant is a class leader.
3. Mark Mbusi is also a class leader.
4. At one time Plaintiff was a member of Defendant's class.
5. On the 16th February, 1938, at a class meeting, Defendant asked that defendant should be removed from her class, which request was granted.
6. Revd. Neume, the Minister in charge, then made arrangements for the Plaintiff to attend the class conducted by Mark Mbusi.
7. On the 3rd March, 1938, Plaintiff attended a class held by Mark Mbusi.
8. Defendant appeared at this class and wanted to know why Plaintiff was attending it, stating that the transfer had not yet been confirmed.
9. When Mark Mbusi replied that he was acting under instructions from Revd. Neume, Defendant replied that Plaintiff and Revd. Neume had been committing adultery together.
10. Defendant had no interest in making her statement to Mark Mbusi nor had the latter any interest in receiving it.
11. Defendant made the statement recklessly and maliciously, without reasonable grounds for believing it to be true.

In regard to the first and second grounds of appeal there can be no doubt that Plaintiff had failed to prove the use of all the words set out in the summons, but she has proved that Defendant charged her with having committed adultery with Defendant's husband.

In an action for damages for slander it is not necessary to prove the use of the exact words alleged in the declaration, but it is necessary to prove the use of words to the same effect and having the same meaning [Smith *vs.* Gradwell 16 E.D.C. 79; see also Wilson Mzinyati *vs.* Ely Mzinyati 1930 N.A.C. (Cape & O.F.S.) 18 and Conway *vs.* Westwood 1936 N.P.D. 1936 (1) P-H.J. 26] or a material and defamatory part of them [van der Schyf *vs.* Loots 1937 W.L.D. 1937 (2) P-H.J. 24].

The most serious item in the summons is that Appellant charged Respondent with committing adultery with the Revd. Ncume which is a material and defamatory part of the words alleged to have been used and we are of opinion therefore that in these circumstances the Native Commissioner was correct in holding that it was immaterial whether the actual words complained of were used.

The appeal on the first and second grounds must fail.

To deal with the third ground of appeal. In order to establish privilege the Appellant must establish that she had a duty or an interest, legal, social or moral, to make the communication and that there was an interest in the person to whom it was made to receive it. The question is not whether Appellant thought there was such an interest or duty but whether the interest or duty did in fact exist (Holzgen *vs.* Woolwright 1927 T.P.D. 10 P-H.J. 11) and the onus of proving that the occasion was a privileged one is upon the Appellant [Erasmus *vs.* Scott & Prigge *vs.* Scott 1933 D & C.D.L. 1933 (1) P-H.J. 4].

The Appellant made not the slightest attempt in her evidence to show that she had a duty or interest to make the communication to Mark Mbusi or that he had an interest to receive it. The mere statement in her plea that they are both class leaders is insufficient to show such mutual interest without evidence to show that there actually was such an interest.

We are of opinion, therefore, that the Native Commissioner rightly held that the occasion was not privileged. It is consequently, not necessary to consider whether the Appellant had reasonable grounds for believing the statement to be true particularly as justification was not pleaded. At the same time we are not prepared to say that the finding of the Native Commissioner that the statement was made recklessly and maliciously, without reasonable grounds for believing it to be true, is wrong.

The fourth ground of appeal is that the damages are excessive.

In the circumstances of the case and in view of the fact that a plea of privilege had been raised in the Court below and had failed the damages awarded were not excessive (see Donovan *vs.* Mudge 1927 T.P.D. 5. P-H.J. 7.).

The appeal is dismissed with costs.

GERTRUDE NCUME vs. ELIJAH LEBONA.

Kokstad: 7th October, 1938. Before H. G. Scott, Esq., President and Messrs. F. C. Pinkerton and R. W. Hancock, Members of the N.A.C.

Defamation—Absolution granted—Inadequate reasons given by Judicial Officer for rejecting evidence of Plaintiff's witnesses—Judgment reversed on Appeal—Damages—Assessment of by Appeal Court.

Practice and Procedure—Objection to summons should be raised in due form and at proper time and not merely in argument after case for both parties has been closed.

(Appeal from Native Commissioner's Court, Mount Fletcher: Case 417/38.)

This was an action for damages for defamation.

The Native Commissioner entered a judgment of absolution from the instance with costs on the grounds that—

(1) the evidence for the Plaintiff was unsatisfactory; and

(2) the summons did not set out the "ipsissima verba" alleged to have been used in the language which was employed.

The appeal is against this judgment on these grounds:—

1. That the evidence adduced on behalf of Plaintiff clearly and convincingly established that she had been defamed by Defendant as set out in her particulars of claim.

2. The Magistrate (evidently an error as the case was tried in the Native Commissioner's Court) erred in holding that Plaintiff was not entitled to succeed by reason of the fact that the Native words used by Defendant in defaming Plaintiff were not set out in the summons more especially as this objection was only raised by Plaintiff's attorney for the first time in argument after both parties had closed their cases.

3. The judgment is bad in law and is against the weight of evidence.

The Plaintiff, Gertrude Lebona, Defendant's niece, and Joseph Molife gave evidence and stated that the following words were spoken to Mokebe Mosuhlo by Defendant: "Do not go to that woman. She is a thief. She has stolen the money which belongs to the teachers. A constable was here yesterday." When Plaintiff asked if she was the person who stole the teachers' money he replied: "Yes, the money was found by the Policeman."

Defendant admits that he was at the house of Plaintiff's husband with one Mokebe on the day in question and that when Plaintiff called Mokebe to go to her he (Defendant) said: "Do not go, you are walking with me. If you go to that woman you will become a witness. Some money was lost day before yesterday and that money has been found. While you are with me I do not want you to go to that woman because she once beat me."

The Native Commissioner has rejected the evidence of Gertrude Lebona because she is living with the Plaintiff, and of Joseph Molife because he appears to be under Plaintiff's influence, as he states that he would not believe anything against Plaintiff. The reasons given for rejecting the evidence of these witnesses appear to this Court to be inadequate. The mere fact that Gertrude Lebona is living with Plaintiff is insufficient to discredit her in the absence of anything tending to show that she is untruthful.

In regard to Joseph Molife the Native Commissioner is incorrect in stating that he said he would not believe anything against Plaintiff. What he did say was that he did not believe the Defendant when he said she was a thief, which is a very different thing. It is a somewhat startling doctrine that because a witness who hears a defamatory statement made of another person states he does not believe that statement he should be regarded as being under the influence of the defamed without any further indication of such influence.

As already pointed out the Defendant admits that he was at the place on the day in question and made some reference to money having been lost but denies the accusation of theft. He was accompanied by Mokebe. This witness was not called by Defendant and no explanation was offered for the failure to do so.

The evidence of Plaintiff and her witnesses is clear and this Court is of opinion that the Native Commissioner has not given sound reasons for rejecting it and that judgment should have been entered for Plaintiff.

The Native Commissioner appears to have regarded the fact that Plaintiff had not issued her summons until after the receipt of a summons against her from Defendant's wife, as a point against the Plaintiff. If the Plaintiff had been asked for an explanation of the delay she may have been able to give an entirely satisfactory one. In the absence of any evidence on the point we are of opinion that the Native Commissioner was not justified in allowing the fact to influence him against her.

In view of the conclusion at which this Court has arrived on the evidence it is not necessary to deal with the other grounds of appeal. It is desired, however, to point out that any objection to the summons should be raised in due form and at the proper time and not merely in argument after the case for both parties has been closed.

On the question of damages this Court is of the opinion that it is unnecessary to incur the extra expense which would be involved in remitting the case for the amount to be assessed by the Native Commissioner and will do so itself.

The statement made by the Defendant is clearly defamatory *per se* and was made in the presence of several witnesses without any justification. In the circumstances we consider that the amount of £10 would be fair and reasonable.

The appeal is allowed with costs and the judgment in the Court below altered to one in favour of Plaintiff for £10 and costs of suit.

THOMAS MAFOLO vs. JOHN DAMBUZA.

KOKSTAD: 7th October, 1938. Before H. G. Scott, Esq., President, and Messrs. F. C. Pinkerton and R. W. Hancock, Members of the N.A.C.

Landlord and Tenant—Sub-lease—Where agreement of lease does not take effect until premises taken over by lessee latter is not in a position to sub-let—Claim for rent on alleged sub-lease where evidence shows Plaintiff was merely a guarantor and had not himself paid to landlord—Absolution from the instance.

(Appeal from Native Commissioner's Court, Matatiele: Case 290/37.)

In the Court below Plaintiff (Appellant) claimed from Defendant (Respondent) the sum of £14. 17s. 3d., being £14 as rent for certain Native Eating House premises for the months of July and August, 1937, sub-let to Defendant by Plaintiff, and 17s. 3d. electric current supplied to the premises during Defendant's tenancy which he agreed to pay to Plaintiff and for which Plaintiff was in turn liable to the owner of the premises.

Defendant denied that Plaintiff had sub-let to him but alleged that Plaintiff held the licence during the period in question and had engaged him as assistent at a wage of £4 per month but had not paid him and he counterclaimed for £8.

The Acting Assistant Native Commissioner entered judgment for Plaintiff in convention for 17s. 3d. and costs and for Defendant in re-convention with costs.

An appeal has been noted against this judgment in so far as it does not award Plaintiff £14 rent on the following grounds:—

1. It is common cause that the Defendant did not hire the premises from its owner, Sorour.

2. Plaintiff proved—

   (*a*) that he had leased the premises from its owner, Sorour, for July and August, 1937, guaranteeing him the rent for those months and that Defendant had promised to pay him (Plaintiff) the rent and

   (*b*) that Defendant was in occupation of the premises.

3. The Court found that the Defendant did run the business in the premises on his own account and Plaintiff did not hire Defendant as pleaded by Defendant.

In these circumstances Plaintiff is entitled to judgment for July and August rent.

The premises in question belong to J. J. Sorour, now deceased. Plaintiff apparently leased the premises from Sorour but it is not at all clear from his evidence when that lease was to take effect. He says "Sorour agreed to lease 'house' to me from 1st June, 1937. I thought a licence was required. I told Sorour I would wait for the result of my licence application before taking over. Sorour said he would lose his rent if I did not take over from 1st June, 1937. I suggested that Defendant carry on until my licence was granted. Sorour said he had sacked Defendant as he had had a lot of trouble and told me I had to guarantee rent. Rent was £5 for eating house and £2 for dwelling. Sorour told me this. This arrangement went through."

It is quite clear from this that the lease was not to take effect until he had taken over the premises and in the meantime he was merely a guarantor for the rent. This is further borne out by the fact that when he obtained a certificate for the issue of the licence he endeavoured to obtain possession but Defendant refused to leave and Plaintiff then had to obtain Sorour's assistance to get Defendant out of the premises and he actually obtained possession only on the 1st September, 1937.

Plaintiff has not paid the rent to Sorour for July and August, 1937, and has, apparently, never been called upon to do so; a further indication that he was not regarded as a lessee for that period.

If his lease did not take effect until the 1st of September, 1937, then he was not in a position to sub-let to Defendant in July.

In the opinion of this Court the finding of the Acting Assistant Native Commissioner that there was no sub-lease between Plaintiff and Defendant is correct.

As it is possible that Plaintiff may yet be called upon to implement his guarantee for the rent it is considered advisable to alter the judgment in regard to the claim for £14 so that he will not be precluded from bringing any action against Defendant to which he may be entitled.

The appeal is dismissed with costs but the judgment in the Court below is amended by adding thereto the following words:—

> "Absolution from the instance with costs in regard to the claim for £14."

NJAYINUNI MCITAKALI vs. CAWENI SIBAXA.

PORT ST. JOHNS: 13th October, 1938. Before H. G. Scott, Esq., President, and Messrs. J. H. Nicholson and P. C. Tweedie, Members of the N.A.C.

Native Appeal Court—Procedure—Application to produce fresh evidence is refused as no provision therefor in Rules—Native Commissioner's Court Practice and Procedure—Evidence—Application by Plaintiff after close of Defendant's case to call evidence of previous statement by Defendant inconsistent with present testimony—Circumstances of supposed statement must be referred to sufficiently to designate particular occasion—Application to call rebutting evidence—Statement by Judicial Officer in reasons for judgment that it would be "irregular" to admit further evidence after case for both parties had been closed—Provisions of Rule 5 (4) *Order XVII Proc.* 145 *of* 1923 *overlooked.*

Appeal on facts—Where evidence did not satisfactorily establish ownership in any particular person judgment of Court below for Defendant altered to absolution from the instance.

(Appeal from Native Commissioner's Court, Ngqeleni: Case 91/1938.)

Before this Court Mr. Birkett, for Respondent, applied to make use of an affidavit, made since the hearing of this case in the Court below by Constable Lombard who investigated a charge of theft against Respondent.

Mr. Bouchet for Appellant opposed the application.

The rules of the Native Appeal Court do not provide for the production before that Court of fresh evidence.

The application is accordingly refused.

Plaintiff claimed three sheep or their value £1. 10s. from Defendant . Judgment was entered in favour of Defendant with costs. The appeal against this judgment is on the following grounds:—

1. That the Assistant Native Commissioner should have given credence to the evidence of both Tshozi and Blayi, the previous owners of the sheep claimed, who were impartial witnesses and who are both men of standing.
2. That the judgment is against the weight of evidence and the probabilities of the case.
3. That the Assistant Native Commissioner erred in disallowing the application of Plaintiff's attorney to call rebutting evidence after the close of Defendant's case in order to show that Defendant had made a previous statement inconsistent with his present testimony in regard to the manner in which he acquired the sheep in question, which statement bears directly on the subject matter of the proceedings.
4. That the Assistant Native Commissioner has stated in his reasons for judgment that in view of the evidence before the Court an absolution judgment was granted. This is not so.

A judgment for Defendant was granted in spite of the fact that Plaintiff's attorney opposed same on the grounds that if the Native Commissioner was not satisfied with the evidence of Plaintiff and his witnesses in proof of the ownership, the judgment should not have been for the defendant but one of absolution from the instance.

Plaintiff's case is that he bought a ewe sheep from one Tshozi bearing the following marks:—

Three skeys on right ear and black dots on both ears. He bought another ewe from one Blayi which had a stump right ear and skey top and bottom of left ear. This ewe had a lamb after it came into Plaintiff's possession. These sheep were lost in the Spring of 1937 and eventually three sheep, two of which bore identical markings to those plaintiff had lost, were found in possession of Defendant who lives some eight or ten miles from him.

Both Tshozi and Blayi were called and identified two of the sheep as being those sold by them respectively to Plaintiff some three years ago.

It is admitted that one Kalinkuku had also laid claim to the sheep which Plaintiff says is the one he got from Tshozi and that Defendant was prosecuted for theft at the instance of Plaintiff and Kalinkuku and was acquitted. It is also admitted that the earmarks on the sheep had been in no way tampered with.

At first sight it would appear more than a coincidence that Defendant should possess sheep, the markings on which are identical to those plaintiff says he lost, but when we find that Kalinkuku also lays claim to one sheep which has earmarks that are somewhat unusual and has further natural distinguishing markings it would seem that in so far as this sheep is concerned there is the possibility that Plaintiff and the other witnesses who identify it are mistaken. It cannot be said, therefore, that Plaintiff has satisfactorily established his ownership to this animal.

In regard to the other sheep Blayi describes the earmark on the right ear as a stump and when asked to explain what he meant by a stump stated that half the ear was cut off. Defendant describes the stump as a piece off the tip of the right ear, and says this is one of the sheep he inherited from his father. The sheep were not brought before the Court so some doubt exists as to which of these witnesses were correct. There is further considerable discrepancy between the witnesses whether, at the time the sheep were claimed by Plaintiff and Kalinkuku, the Headman placed a distinguishing mark on all three or only one or whether he placed no mark on any of them.

In these circumstances we are of opinion that Plaintiff has failed to establish his claim to the ownership of the sheep in question. At the same time the Defendant was not entitled on the evidence to a final judgment.

In regard to the third ground of appeal it appears from the record that the Defendant was asked in cross-examination whether he had not told the Police or the Headman that he had inherited all the sheep in question from his father. He denied that he had done so, but said he may have said that two of the sheep were inherited from his father. At the close of Defendant's case Plaintiff's attorney applied to call evidence to rebut this denial but the application was refused.

In his reasons for judgment the Assistant Native Commissioner stated that he had refused the application to call further evidence "on the ground that the evidence could have been called at the right time and in any case was likely to be of no value".

The Assistant Native Commissioner does not explain what he means by "at the right time", but presumably he intended to convey that the evidence could have been called during the course of Plaintiff's case. If that is so then he is clearly wrong because at that time Plaintiff had no knowledge as to the line of defence Defendant was going to pursue seeing that his plea was a bare denial that he was in possession of sheep belonging to Plaintiff nor was any indication given in cross-examination.

His remark that the further evidence was "likely to be of no value" is unfortunate as it shows that he prejudged the value of evidence which he had not heard, which is irregular. After the appeal was noted the Assistant Native Commissioner furnished the following additional reasons for judgment on this point:—

"The inconsistency was not apparent during the proceedings nor has the Appellant furnished any details but on a point of law it would have been irregular to admit further evidence after the case for both parties had been closed as the point at issue was not of an unusual nature and was not required by the Court."

It is difficult to follow this reasoning which discloses some confusion of thought. Naturally the inconsistency could not be apparent during the proceedings for the Assistant Native Commissioner by refusing to allow further evidence had prevented that inconsistency from being disclosed. He does not explain either what details he expected the Appellant to furnish. As to it being irregular to admit further evidence it is apparent that the Assistant Native Commissioner has overlooked the provisions of sub-rule (4) of Rule 5 of Order XVII in the second schedule to Proclamation No. 145 of 1923 which provides for the calling of further evidence by either party, with the leave of the Court, at any time before judgment subject to the proviso that such leave shall not be granted if it appears to the Court that such evidence was intentionally withheld out of its proper order.

It may be remarked that if the Assistant Native Commissioner is correct in his statement that it would be irregular to allow the calling of further evidence after both parties had closed their case it would never be possible to call rebutting evidence, for by its very nature it can only be called after the party whose evidence it is desired to disprove has closed his case.

By these remarks this Court does not wish to infer that the Assistant Native Commissioner erred in refusing the application in the present case but merely that his reasons for doing so were inadequate and faulty.

The rule on the point at issue in this case is thus stated in Salzman *vs.* Holmes (1914 A.D. at p. 477): "Every witness under cross-examination, in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject matter of the proceedings and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it."

In the present case the alleged previous inconsistent statement was relative to the subject matter of the proceedings but the circumstances under which it was made were not, in the opinion of this Court, referred to sufficiently to designate the particular occasion on which it was made. The Defendant was merely asked whether he had not made a certain statement to the Police or Headman but there was nothing to show where, on what occasion and under what circumstances it was made. The omission to do so takes the case out of the rule above quoted and we are of opinion that the Assistant Native Commissioner was justified in refusing to allow the calling of rebutting evidence. The appeal on this ground must fail.

The fourth ground of appeal is a mere statement of fact and need not be considered. If it was contended that the Assistant Native Commissioner had erred in granting a final judgment for Defendant instead of absolution from the instance that should have been stated.

It is clear from the record that there is a genuine dispute as to the ownership of these sheep. The Plaintiff has failed to prove his case but there is no doubt that further evidence could be called finally to settle the matter.

This Court is satisfied that it has not been proved satisfactorily who the owner of the sheep is and in these circumstances considers that a judgment of absolution from the instance should have been entered in the Court below.

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

GQWETA MAGWENKWE vs. MTIYWA MKELWANA.

Port St. Johns: 13th October, 1938. Before H. G. Scott, Esq., President, and Messrs. J. H. Nicholson and P. C. Tweedie, Members of the N.A.C.

Appeal—Late noting—Application for condonation—Delay due to failure to furnish written judgment before expiry of period prescribed for noting appeal—Belated noting not due to fault of Appellant or his attorney—Condonation granted—Adultery—Native Commissioner's judgment on facts reversed—Necessity for proper proof of adultery in absence of a catch.

(Appeal from Native Commissioner's Court, Bizana: Case No. 217/1937.)

The judgment in this case was delivered on the 22nd April, 1938, and the appeal was not noted until the 18th July, 1938, 57 days after the period prescribed by Rule 6 of the Native Appeal Court rules had expired.

Application is now made for a condonation of the irregularity.

The record discloses the fact that application was made for a written judgment in terms of Order XXIX in the second schedule to Proclamation No. 145 of 1923, shortly after judgment was delivered. The written judgment was not furnished until the 18th July, 1938, and the appeal was noted on the same day. It is clear, therefore, that the delay was not due to any fault on the part of the Appellant or his attorney.

In the circumstances, and as no objection was offered by Respondent's attorney, this Court is of opinion that indulgence should be granted.

The late noting of the appeal is accordingly condoned and the hearing proceeded with.

This was an action for damages for adultery, the summons alleging that Defendant had committed adultery with Plaintiff's wife at divers times and places but more especially from the month of December, 1935, to June, 1936, and as a result she gave birth to twins.

The Native Commissioner entered judgment in favour of Plaintiff for five head of cattle or £20 and costs of suit and the appeal is against this judgment.

The Native Commissioner states in his reasons for judgment:—

"It is essential, for the purposes of this case, to determine when the twins were born—in winter of 1936 or in that of 1937. If they were born in the winter of the latter year then the Defendant could not have been the father for the documentary evidence shows that he was away at work from a few days before the 20th December, 1935, to a few days after the 12th April, 1937. If they were born in the winter of 1936 then it was possible for Defendant to have been the father."

The Native Commissioner has evidently given careful consideration to this case and has found as a fact that Plaintiff returned from work in or about early part of the winter of 1936, having been away for about a year, and that it was not long after his return home that twin daughters were born to his wife.

This finding is perfectly sound if it is satisfactorily proved that Plaintiff returned in 1936 and the whole case really hinges on that fact.

Plaintiff did not produce his mine papers which would have fixed the length of his absence and the approximate date of his return and has made no attempt to explain his omission to do so. In the absence of that evidence we are thrown back on his verbal testimony and that of his wife on this point. An examination of their evidence discloses a number of contradictory statements which leave only two things definite and those are that when Plaintiff returned his wife was pregnant and that shortly thereafter she gave birth to twins but the date of these events is by no means certain. The Native Commissioner says that Plaintiff and his wife are quite uneducated and that it would not be fair to bind them down to any specific time or date. That, of course, is quite a reasonable attitude to adopt in the case of raw Natives, but it should not be allowed to excuse such a very wide margin of error as is apparent in this case, especially where the matter of time is such an important factor.

The case was tried in the Native Commissioner's Court on the 21st April, 1938, and all dates given are calculated as from that date.

This is what Plaintiff says: "I returned just about this time two years ago" (i.e. about April, 1936). "On my return my wife was in an advanced state of pregnancy. She gave birth to twins, both daughters, last year" (i.e. 1937). "I returned from work after reaping year before last" (that would be sometime after June, 1936). "It was during the winter that my wife gave birth to the twins—in the winter of the same year that I returned from work." This shows that he fixes the birth of the twins by the date of his return from work.

Again Plaintiff says: "I questioned my wife about her pregnancy and she named Defendant. I took the pregnancy to Defendant but he denied being responsible."

Presumably by this Plaintiff means that as soon as he discovered the pregnancy he went, as is customary, to charge Defendant with it. If the pregnancy occurred in 1936 he could not have then gone to Defendant as the latter was away at work. It seems much more likely that the pregnancy was discovered in 1937 and that that was when Defendant was taxed with it and that likelihood is rendered greater by Plaintiff's evidence under cross-examination where he says:—

"I took the pregnancy to Defendant after the birth of the twins . . . I went personally to see Defendant after the birth of the twins. That was about two months after the birth of the twins. Defendant was at home then. I went to the Headman immediately after I went to Defendant."

If Plaintiff is correct in saying he went to Defendant two months after the birth of the twins, then it is clear that the twins were born in the early part of 1937, or, allowing a fairly large margin of error, the latter end of 1936 and not in the winter of 1936 as alleged by him and his wife. It is evident that no great reliance can be placed on Plaintiff's evidence in endeavouring to fix the date.

Let us see whether any assistance is lent by the evidence of Plaintiff's wife. She contradicts herself considerably but this might be excused if there was not such a wide divergence between the dates she gives and those approximately fixed by events to which she refers. Her evidence is as follows:—

"I last gave birth to a child in the winter of last year. I gave birth to twin daughters then. Both died. The one was about five or six months old when it died. The other did not live more than a week. I do not know how long it is since the second twin died. It died last spring. It died some months before this last Christmas. This coming winter will be the first winter since I gave birth to the twins. I am mistaken this coming winter will be the second one since the twins were born." In cross-examination she says: "The second twin died the day after the Headman gave judgment in the case."

The date of hearing by the Headman was just shortly before the 8th October, 1937, the date on which summons was issued. Now while Plaintiff's wife corrected her statement as to the date when she gave birth she made no change as to that of the death of the second twin and its age at the date of death. If she died at five or six months and was born in the winter of 1936 it could not have been alive in October, 1937. If it was alive on the latter date then, accepting her statement as to its age at death, it must have been born early in 1937. If the child was born in the winter of 1936 then at the time of the Headman's enquiry it would have been about fifteen months old. Now the Plaintiff's wife may be ignorant and uneducated but she is hardly likely to have made such a great error in regard to the age of the child when it died.

It is of some significance too, that no witness other than Plaintiff and his wife was called in regard to the birth and death of those twins. The witness, Mandanti, who supports Plaintiff's wife as to the adultery and who lives at the same kraal, makes no mention of the twins. If the second twin was alive when the case came before the headman some reliable person could have been called to give an estimate of its age.

It will be seen that if the date of birth is accepted as being in the winter of 1936 great difficulty is experienced in making the evidence—as to the age of the twins, when Defendant was charged with the adultery and the age of the second twin on death—fit in and then only can be effected by allowing a very wide margin of error.

If, however, the date actually is 1937 that difficulty entirely disappears.

The Native Commissioner has clearly based his finding on his acceptance of the Plaintiff's evidence in regard to the date of his return from work. He says in his reasons for judgment that Defendant was away and, therefore, is not in a position to contradict Plaintiff's evidence. It is the duty of Plaintiff to prove his assertion and when it is found that the evidence he produces leaves considerable doubt on that point then, obviously, the Defendant must have the benefit of that doubt and should not be expected to prove a negative.

The only witnesses in regard to the alleged adultery are Plaintiff's wife and Madanti. This is not very convincing and, in view of the unsatisfactory nature of the rest of the case, is insufficient to establish the accusation.

In the opinion of this Court the Plaintiff has failed to prove that Defendant committed adultery with and caused the pregnancy of his wife.

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

In earlier times Native Custom demanded that a husband should personally effect a catch before he could claim damages for adultery; latterly this custom has been somewhat relaxed, no doubt, owing to the frequent and lengthy absences of husbands at the mines and the consequent impossibility of them making a catch personally; but even then it was required that the catch should be made by some male relative. Even this safeguard is being done away with and the tendency is growing of relying on the evidence of the wife and a "go-between" only. This is unsafe and leaves the door open to the bringing of false charges.

It is the easiest thing possible to make a charge of adultery and in the majority of cases the unfortunate Defendant can only deny the charge. His only chance of succeeding is by tripping up the witnesses in cross-examination and where there are only two witnesses that chance is considerably reduced. If proper proof of adultery were more strictly insisted upon the number of adultery cases brought before the Courts would most probably be substantially reduced.

JULY GETSE and MYOLWA MTOBAZI vs. LAKENI SIGABU.

Port St. Johns: 13th October, 1938. Before H. G. Scott, Esq., President, and Messrs. J. H. Nicholson and P. C. Tweedie, Members of the N.A.C.

Adultery—Damages—Discretion of Judicial Officer to refuse absolution at close of Plaintiff's case—Evidence of woman —Corroboration of—Sufficiency of—False denials by Defendant of material facts capable of innocent explanation may be regarded as.

(Appeal from Native Commissioner's Court, Flagstaff: Case 10/38.)

Plaintiff (Respondent) in the Court below sued the Defendants (Appellants) for five head of cattle or £25 alleging that from the autumn to the end of winter of 1936 or thereabouts first Defendant committed adultery with and caused the pregnancy of his wife, Mamhlamveni, as a result of which she gave birth to a child at the commencement of March, 1937. Second Defendant was sued as head of the kraal at which both Defendants reside and as such the guardian of first Defendant and responsible for his torts.

The plea denied the adultery and admitted that first Defendant resided at the kraal of second Defendant who accepted Kraal Head responsibility for his torts but denied that he was his guardian.

The Native Commissioner entered judgment for Plaintiff as prayed with costs and the appeal is against that judgment.

The following facts are spoken to by Plaintiff's witnesses: —

1. That first Defendant (referred to as " July " by Plaintiff's wife throughout her evidence) made love to Plaintiff's wife for some months and thereafter had connection with her and rendered her pregnant.
2. The first act of connection took place at a stream (variously referred to as Mdonyeni and Ngwenyeni in the evidence) and the second in a bush.
3. When the pregnancy was discovered the stomach was taken to July at Myolwa's kraal and the former then admitted his liability and agreed to pay five head of cattle as damages.
4. Thereafter Plaintiff's father Sigabu and one Siguva went to Myolwa's kraal and found July was away. Damages were demanded from Myolwa for the pregnancy and he said July should pay as Plaintiff's wife had brought the pregnancy and he had admitted it.
5. A case was brought before the Headman, Ntata, against Myolwa where he admitted that the woman had brought the pregnancy and admitted his responsibility.
6. That July has been residing in Ntata's Location for some four or five years in close proximity to the kraal where Plaintiff's wife was living at the time the adultery is alleged to have taken place.

At the close of Plaintiff's case Defendants' attorney applied for absolution from the instance but this was refused.

As there was evidence on which a reasonable person might have given judgment for Plaintiff at the close of Plaintiff's case, we are of opinion that the application was correctly refused.

Evidence for the defence was then called.

First Defendant denied that he had ever seen Mamhlamveni or Manjilondi, the woman who corroborated her in regard to the adultery. He asserted that he had only been two weeks in the location and during that time had never visited any other kraal than Myolwa's, that he never heard of the case before the Headman, that the women had never brought the pregnancy to him and that he had never admitted his liability; that he was only at Myolwa's once, that he does not live with Myolwa but with one Malumko, that he does not know the stream mentioned by Mamhlamveni except by its name (Ngwenyeni) but has never been near it; that he is known by the name July only in Lisikisiki District and that where he was living in Flagstaff District he was always called Mqolo.

First Defendant is corroborated very largely by Myolwa and Malumko, but the latter says that the women did bring the pregnancy to Myolwa's kraal and that Myolwa was present.

It is very significant that both Myolwa and first Defendant should so strenuously have denied that the women ever came to the kraal. Again while Myolwa and first Defendant are positive that the latter was only two weeks at Myolwa's kraal and then went to the mines Malumko says he was there two years before going to the mines. This evidence supports that of the Headman and discredits both Myolwa and first Defendant. Furthermore, if first Defendant had been at Myolwa's kraal for only two weeks the latter would never have admitted in his plea that he was an inmate of his kraal or have accepted responsibility for his torts.

A careful consideration of the evidence leaves this Court with the impression that first Defendant was at Myolwa's kraal for a period of some years and, if that is so, then his pretended ignorance of the identity of people living in close proximity and of the physical features of the surrounding country, and his denial of the length of his residence in the location are clearly dishonest.

The Plaintiff's case certainly was not strong, depending as is did largely on the evidence of the two women, but it received support from the unsatisfactory nature of the defence evidence.

The Assistant Native Commissioner was entitled to assume that first Defendant's false denials of facts which, while capable of an innocent explanation, were made because he desired to conceal the truth and to say that those false denials constituted corroboration of the women's story. (See Nolte *vs.* Rowe, 1926 T.P.D., reported in Vol. 8, Prentice-Hall M.24.)

In Van der Merwe *vs.* Nel (1928 T.P.D., reported in Vol. 13, Prentice-Hall M.2), Barry, J. (dealing with the question of corroboration of the woman's word in seduction cases) said: "Or again, if the man's statements are proved to be false on a question which is material to the issue, his denial may give a different complexion to the case."

The principles laid down in these cases would be equally applicable to adultery cases.

In the opinion of this Court the Assistant Native Commissioner was justified by the evidence in entering judgment in favour of Plaintiff and the appeal is accordingly dismissed with costs.

NO-OFFISI MBINZWA vs. GOLI MBANYARU.

UMTATA: 19th October, 1938. Before H. G. Scott, Esq., President, and Messrs. J. H. Steenkamp and R. Wronsky, Members of the N.A.C.

Marriage—Claim by wife for dissolution and declaration that dowry forfeited—Compromise by parties during course of action—Fulfilment by Defendant of his part of agreement —Frivilous excuse by wife for failing to return—Absolution judgment.

(Appeal from Native Commissioner's Court, Mqanduli: Case No. 394/37.)

In the Court below Plaintiff (Appellant) claimed a dissolution of her marriage with Defendant (Respondent) on the ground that he had rejected her and driven her away from his kraal and that he had failed to support her. In addition she asked for an order that Defendant had forfeited the dowry paid by him for her.

Defendant denied having driven her away and stated that he was quite willing to maintain Plaintiff and to receive her back.

The Assistant Native Commissioner entered judgment of absolution from the instance with costs and the appeal is against that judgment on the ground that it is against the weight of evidence.

The case came on for hearing on the 9th April, 1938, and Plaintiff gave evidence in which she said she was prepared to go back to her husband.

At the conclusion of her evidence a compromise was arrived at and the following note was made on the record:—

"At this stage parties compromise and agree that Defendant establish a new kraal at a site away from locality where Tsheleza resides and that the case be postponed 'sine die' so as see if Defendant did established such site and whether or not Plaintiff would return to him."

Thereafter Defendant built a kraal and Plaintiff was duly advised thereof but she refused to return to Defendant. Her evidence is rather instructive as indicating her state of mind. She says:—

"Remember case was adjourned for Defendant to build hut for me. He notified me through my attorney that hut was built. I object to that hut as I do not like spot where it is built. . . . I don't know where I want kraal built. . . . I did not go to consult with Defendant. He came to me when wall of hut was built and I refused to assist."

This evidence clearly shows that Plaintiff had no intention of returning to Defendant and that no matter where the kraal was built she would still have refused to occupy it. She does not give any satisfactory reason for her dislike of the spot beyond a vague statement that it is near the woman whom she alleges Defendant is living with and that she does not agree with the people of that neighbourhood.

Now whatever may have been the position previously the compromise arrived at on the first day altered the whole complexion of the case. Defendant has carried out his part of the agreement.

In the opinion of this Court, Plaintiff's excuse for not returning to Defendant is frivilous in the extreme. It is surprising that the judicial officer proceeded further with the case after the conclusion of her evidence.

The appeal, which, in the opinion of this Court, is one which should never have been brought, is dismissed with costs.

GANA DLABA vs. ALFRED MAQUBA.

UMTATA: 20th October, 1938. Before H. G. Scott, Esq., President, and Messrs. J. H. Steenkamp and R. Wronsky, Members of the N.A.C.

Engagement cattle—Placed in possession of payer to avoid attachment and for grazing purposes—Claim by payee for return—Plea of rejection by girl—Onus on Defendant to prove—Inability of bridegroom to carry out engagement by marrying another woman—Forfeiture.

(Appeal from Native Commissioner's Court, Qumbu: Case No. 157/37.)

From the record it appears that Respondent's daughter, Girlie, became engaged to Appellant's nephew, Penrose, and certain cattle were paid on account of dowry. Respondent says twelve were paid and Appellant says ten.

In 1936 a judgment was obtained against Respondent by a Mr. Winkworth and six of these cattle were attached. Appellant laid claim to them on the ground that the marriage between Girlie and Penrose had not yet taken place. The cattle were released to him on the 15th December, 1936,

he obtained a permit to remove them to the Respondent but they were not taken to him as he asked Appellant to keep them seeing he had other liabilities and feared they might be attached again and also because the grass at Appellant's was better.

In April, 1937, Respondent demanded these cattle from Appellant and as he did not hand them over sued him before the sub-headman and the Headman and obtained judgment in both Courts. As these judgments were not complied with, summons was issued in the Native Commissioner's Court on the 21st October, 1937, and judgment was entered in favour of Respondent for thirteen head of cattle or their value £3 each and costs.

The appeal is against that judgment on the ground that it is against the weight of evidence.

The Appellant resisted the claim on the ground that Girlie had refused to marry Penrose and thereafter Respondent had returned the dowry in view of that refusal.

At the outset it may besaid that Appellant's evidence is at variance with his plea that Respondent returned the cattle in consequence of Girlie's refusal to marry Penrose. It is clear that the cattle came into his possession long before the alleged rejection and for the reasons which have already been stated.

The allegation of rejection is based on a letter which Penrose says he received from Girlie in February, 1937, (Exhibit. A), in which she says she is tired of his people always abusing her and she does not want to become his wife and that she has returned his cattle.

Girlie denies having written this letter and the only witness as to it being in her handwriting is Penrose. Girlie's evidence appears to be supported by another letter admittedly written by her and which Penrose says he received in May, 1937. In this she says, inter alia, " I have been asking you for a long time to come back so that we can be married."

The whole tone of this letter goes to show that there had not been any previous rejection by her.

In the absence of any evidence other than that of Penrose as to the authorship of Exhibit " A " this Court is of opinion that the Assistant Native Commissoner was fully justified in doubting its authenticity.

The doubt as to Girlie having rejected Penrose is strengthened by Appellant's own evidence. He says that he got a letter from Penrose in the weeding season of 1937 containing information directing him to keep the cattle.

Presumably this information was the alleged rejection. That letter is not produced and Appellant admits that he made no mention of it either to Respondent or before the sub-headman or headman nor did he tell the latter why he was retaining the cattle. He further says he never heard locally of any rejection by Girlie.

If Penrose had written to him that he had been rejected Appellant's natural course was to set up that defence when sued before the headman or to have claimed from the Respondent the balance of the dowry which was not in his possession. He takes neither of these courses, but keeps complete silence and even when sued in the Native Commissioner's Court does not make any counter-claim.

If his defence is correct then he is entitled to the return of all the cattle paid. The Appellant it is true avers that the cattle belong to Penrose but when six of them were attached he claimed them in his own name and this seems to show that he was the actual payer.

Penrose has put it out of his power to carry out his engagement to Girlie by marrying another woman, so that unless he can prove a prior rejection by Girlie the dowry paid is liable to forfeiture.

The onus is upon Appellant to prove that rejection and if he does not succeed in doing so the Respondent is entitled to judgment.

In the opinion of this Court Appellant has failed to discharge the onus upon him and the appeal is accordingly dismissed with costs.

GWIJI GONTSI vs. NOMTEBE SAZELA.

UMTATA: 21st October, 1938. Before H. G. Scott, Esq., President, and Messrs. J. H. Steenkamp and R. Wronsky, Members of the N.A.C.

Practice and procedure—Information supplied in reply to request for further particulars should be correct and not calculated to deceive opposite party—Evidence—Onus of proof—Failure by Plaintiff to call witness on matter put in issue at commencement of proceedings—Judgment for Plaintiff altered to absolution from the instance.

(Appeal from Native Commissioner's Court, Qumbu: Case No. 11/1938.)

In the Court below Plaintiff (Respondent) claimed from Defendant (Appellant) (1) four head of cattle or their value £20, and (2) £7 cash lent and 18s. cost of a bag of wheat.

Judgment was entered in favour of Plaintiff as prayed with costs and the appeal is against that judgment on the following grounds:—

That as the matter was one purely of credibility, the Native Commissioner erred in finding that Plaintiff in the Court below had discharged the onus that was upon him. In view of the numerous discrepancies in the Plaintiff's case particularly the variance of the Plaintiff's testimony when opposed to the information contained in his particulars of claim and further particulars it is submitted that the Native Commissioner's judgment was against the weight of evidence and probabilities of the case.

In his particulars of claim Plaintiff alleged that about November, 1937, he exchanged with one Mapungo two horses for four head of cattle; that he delivered the horses and took delivery of the cattle but could not remove them because the locality where he lived was in quarantine; that Mapungo died before the stock was removed and Defendant, who is Mapungo's heir, took possession of the stock and now refuses to deliver them.

In regard to the second claim Plaintiff alleged that at about the time of the exchange of the horses he lent the late Mapungo the sum of £7 and sold him a bag of wheat for 18s. and as Defendant had taken possession of the late Mapungo's estate he was liable for these amounts.

Before pleading to the summons Defendant asked for the following particulars:—

1. Where the transaction of exchange took place and who was present.
2. Who was present when the sum of £7 was lent to the late Mapungo.

The particulars furnished were:—

1. The transaction of exchange was completed at the kraal of the late Mapungo Gontsi, the Defendant being amongst others present at the time.
2. The amount of £7 was lent to the late Mapungo at the kraal of the Plaintiff. There were several people at the kraal amongst them being Plaintiff's wife and Jiloyi. One Mpandana came with the late Mapungo.

Certain further particulars were asked for as to the description of the two horses and the cattle. But as the Appellant's attorney specifically stated that he was not basing his argument on the difference in the description given in the further particulars and that given in the evidence it is not necessary to refer further to this matter.

Defendant then pleaded denying the contract of exchange, the loan of £7 or the sale of wheat.

He stated that about February, 1936, his late father hired Plaintiff to go to Basutoland to buy certain three horses for him and that he paid for these horses and is under no obligation to Plaintiff for same.

He stated further that during November, 1937, his father was extremely ill and completely unable to transact any business of the nature described by Plaintiff.

It is very difficult to ascertain from the Plaintiff's evidence when the alleged transaction of exchange actually took place. In the summons he says it was in November, 1937, while in his evidence he gives the date variously as the ploughing season of 1936 and winter of 1936. His witness, Makutswana, the only one called to corroborate him, is unable to give any idea as to when the transaction took place. In regard to this witness it is of some significance that his name was not mentioned in the further particulars given by Plaintiff. He was an important witness and it was to be expected that Plaintiff would have named him. Instead of that he contents himself with the statement that the Defendant was amongst others present at the time.

There are discrepancies in the evidence of these two witnesses also, which, while perhaps not of very serious import, lead this Court to regard their statements with caution.

Defendant's evidence on this aspect of the case is a denial that any exchange ever took place. He says that after reaping season of 1936 his father hired Plaintiff to go to Mount Fletcher district to fetch three horses which he had previously bought from one Lamani Pasmani.

Plaintiff also alleges that he purchased the horses from Lamani.

There is no doubt that the horses were in the possession of the late Mapungo and that possession raises the presumption of ownership. That presumption the Plaintiff has endeavoured to rebut by the allegation that he gave them in exchange for cattle.

We have the position here that both Plaintiff and Defendant assert that the horses were purchased from Lamani Pasmani. This man is the one who could settle the matter without any doubt and should have been called. The question is as to who should have called him.

The Native Commissioner seems to think that Defendant should have done so, but he has overlooked the fact that the onus was on Plaintiff to prove his case and that the matter as to who purchased the horses from Lamani was put in issue at the very commencement of the case. In these circumstances this Court is of opinion that it was the duty of the Plaintiff to produce this witness. In his absence it is not possible to say with any certitude who is telling the truth. As he was not called the Plaintiff has failed to discharge the onus which rested upon him and judgment of absolution from the instance should have been entered.

The evidence on the second portion of the claim is also far from satisfactory.

It will be seen that in the further particulars furnished Plaintiff stated that his wife and one Jiloyi were present at the loan of the money and that Mpandana came with the late Mapungo.

In his evidence Plaintiff denied that he had told his attorney this. He states also that Mpandana was not there and his wife says the same and Mpandana who was called for the defence also says he was not there. This Court is not prepared to believe Plaintiff in his assertion that he did not tell his attorney about Mpandana.

The statement was made and it could have come from no one else but Plaintiff.

Jiloyi is also mentioned as a witness present at this loan but he is not called and the Plaintiff says that while he was about the kraal he was not present when the matter was discussed.

It was argued by Respondent's attorney in this Court that he was not obliged to divulge the names of his witnesses in reply to a request for further particulars. Be that as it may it is certain that if he does disclose the information it should be correct and not calculated to deceive the opposite party. If he does disclose false information he must not be surprised if it is used to test his genuineness.

The two witnesses whom Plaintiff had mentioned as having been present were admittedly not so present and a witness Hlapezulu, who was never mentioned before, is called to substantiate Plaintiff's story. This witness was a mere passer-by who called in at the kraal at the very moment when the Plaintiff's wife was bringing the money out of the hut to hand over to Plaintiff who then handed it to Mapungo. One peculiar feature about this man's evidence is that he does not know for what purpose the money was being paid. A Native is notoriously curious and it seems extremely unlikely that he would have made no enquiries. Apart from this it is impossible that Mapungo would have gone alone to affect such a substantial loan.

The evidence in regard to the wheat is also unsubstantial being that only of the Plaintiff and his wife.

In all the circumstances of the case we are of opinion that Plaintiff has also failed satisfactorily to discharge the onus upon him of proving these transactions.

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

MBAWULI NGQANGO and EIGHT OTHERS vs. KETANI GQUKUZA.

UMTATA: 22nd October, 1938. Before H. G. Scott, Esq., President, and Messrs. J. H. Steenkamp and R. Wronsky, Members of the N.A.C.

Damages—Injury causing death—Action by son of deceased—Not proved that defendants responsible for death of deceased—Absolution granted—Calculable pecuniary loss—Difficulty of proving in Native cases—Suggestion that matter be brought to notice of Legislature—Costs of appeal on Higher Scale granted.

(Appeal from Native Commissioner's Court, Umtata: Case No. 279/1937.)

Plaintiff who is a minor and assisted by his grandfather is suing Defendants jointly and severally for the sum of

£100 being damages sustained by him by reason of the death of his father caused by the Defendants who acting in concert, did wrongfully and unlawfully fight or attempt to fight and during which wrongful and unlawful act Plaintiff's father was killed.

A plea in abatement was filed which was dismissed and Defendants have not appealed against this decision. Defendants in their plea denied that they all attempted to fight and denied generally that they were responsible for the death of deceased and further maintain that Plaintiff sustained no damages, and that even if he did, they were not liable therefor.

The Defendants and three others were committed for trial on a charge of culpable homicide (reduced from murder) in respect of the death of deceased.

The case was remitted by the Solicitor-General under Section 90 of Act No. 31 of 1917 and the Defendants were charged with the crime of Cupable Homicide or alternatively Fighting or attempting to fight and were convicted for *Attempting to Fight* by the Assistant Magistrate.

The record of the Criminal Case was handed in by consent.

Judgment was entered by the Additional Native Commissioner in favour of Plaintiff for £20 with costs against the Defendants jointly and severally, the one paying the others to be absolved.

An appeal against this judgment has been noted on the following grounds:—

(1) That the finding of the Court that Defendants were responsible for the death of deceased is against the weight of evidence and probabilities of the case.

(2) That the award of damages is also against the weight of evidence and probabilities of the case, or there is no evidence of any real calculable pecuniary loss upon which a judgment for Plaintiff could be founded and there is no proof of any damage to Plaintiff and the judgment is based on surmise and not on real evidence.

(3) That Plaintiff has failed to prove his case.

(4) That in any event the damages are excessive.

The Additional Native Commissioner in his careful and able reasons for judgment has found the following facts, amongst others, proved:—

1. That the Defendants acting in concert were about to fight with some other boys when the deceased and other young men intervened.

2. That deceased was struck by an assegai thrown from the side of the Defendants inflicting a wound from the result of which he died.

He gives the following resume of the events on the occasion in question:—

"No evidence of the events leading up to the injury and death of the deceased was called, the parties relying on the evidence in the criminal case, the record of which was put in. According to the recorded evidence a number of young men, including deceased and some boys were attending an intonjane at Makunqa's kraal when the defendants arrived, armed with assegais, iron-shod sticks and knob-kerries. A fight was about to take place between Defendants and the boys at the kraal when the deceased and other young men ran in between the opposing sides with the object of separating them. An assegai was then thrown from the side of the Defendants. It was apparently aimed at the opposing side, but it struck the deceased causing an injury from the effects of which he died.

Matshona and Kupiso stated that it was thrown by second Defendant (Wantusi Mgxoti). He, however, denied that he was at Makunqa's kraal and his evidence is supported by other witnesses, but his evidence is very unsatisfactory. The reasons he gave for leaving surreptiously for the mines immediately after the incident are unacceptable. He was identified as one of the parties who took part in the attack by four Crown witnesses. The other Defendants stated that they were attacked and ran away; and it was suggested that the deceased was disliked and was deliberately stabbed by one of the young men with him. This suggestion is unsupported by facts and must be rejected. Whichever party started the trouble it is clear from the evidence that all the Defendants took part in the attempted fight; that while the two sides were facing each other assegai and things were being thrown from Defendants' side; and that it was at this stage that the deceased was struck.

The Defendants and the boys of the kraal were engaged in an illegal act which resulted in the death of the deceased. This being so, the Defendants are liable jointly and severally to the Plaintiff. . . ."

It is clear from this passage of the reasons for judgment that the Additional Native Commissioner accepted in its entirety the evidence given by the Native Crown witnesses to the effect that the only persons armed with assegais were those on the Defendants' side while they themselves had no such weapons and that the only assegais thrown came from the Defendants' party. The evidence for the defence, however, was just the opposite, namely that they had no assegais and that the Crown witnesses were so armed and threw assegais at them. The Additional Native Commissioner does not say what he finds was the position. It is not improbable that some of the Crown Witnesses were armed with assegais in view of the fact that they were proceeding to intervene between parties one of which were in possession of lethal weapons.

If the finding of the Additional Native Commissioner that the death of deceased was caused by an assegai thrown by the Defendants' party is correct then clearly they were all guilty of culpable homicide.

The Assistant Magistrate who tried the Criminal Case evidently was of opinion that this fact had not been sufficiently proved otherwise he would have convicted them on the major charge.

This Court is of opinion that the evidence does not establish that deceased met his death as the result of an assegai thrown by any of the Defendants. A perusal of the record shows that nearly all the Crown witnesses speak of deceased having been stabbed, while two state that they did not see any assegais being thrown.

The District Surgeon stated that the point of the assegai which killed the deceased is rounded off and considerable force would have been required to penetrate the organs to the extent they were penetrated and expressed the opinion that the wound was caused by a stab at close quarters while not eliminating the possibility of it having been caused by throwing the assegai.

It is unfortunate that evidence was not recorded as to the direction of the wound internally as this might have helped considerably in deciding what actually happened.

If the defence evidence that assegais were being thrown at them is correct then the possibility of deceased having been accidentally injured by one of his own party cannot be disregarded.

As already pointed out this Court is not satisfied that the Defendants were responsible for the death of the deceased and judgment of absolution from the instance should have been entered.

The appeal therefore succeeds on the first ground.

This being so it is not necessary to consider the other grounds of appeal but this Court wishes to state that it is very doubtful whether Plaintiff has succeeded in proving any material loss to have been suffered by him.

There have been several cases before this Court of a similar nature and in every one of them it has been found that the Defendants have been unable to prove any pecuniary loss. In the circumstances and under the conditions in which the generality of Natives live there is no basis on which to assess damages such as is possible in the case of Europeans who usually have a more or less fixed income. The very large majority of Natives have no regular income and subsist mainly from the produce of their lands and also from earnings on the mines at irregular intervals.

In the event of the death of the bread winner through negligence or malice his lands are cultivated by some other member of the family so that no loss occurs to the dependents on that account. Even where a man has been in the habit of going to the mines this has only been, probably, at irregular intervals and it is impossible to say whether, or when, he would go again.

Even when he did send money down it was used for the family generally and it is difficult to estimate with any degree of accuracy how much was spent on the persons actually dependent upon him. Enough has been said to show the hardship under which the dependents of a Native labourer in trying to prove material loss.

That they do suffer some loss cannot be questioned but how to prove it is the almost insuperable difficulty.

It is thought that the matter might be brought to the notice of the Legislature with a view to steps being taken towards ameliorating the position.

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

MBISHE MENZI vs. NTSHONTSHO MAGWEKE.

UMTATA: 24th October, 1938. Before H. G. Scott, Esq., President, and Messrs. J. H. Steenkamp and R. Wronsky, Members of the N.A.C.

Native Appeal Court—Procedure—Failure of Clerk of Native Commissioner's Court to notify parties of date of hearing—Rule 18, *Government Notice No.* 2254 *of* 1928—*Case struck of roll—Application to restore case to roll granted.*

Adultery—Insufficiency of evidence to establish charge of—Judgment for Defendant altered to absolution from the instance where defence evidence unsatisfactory and further evidence for Plaintiff available.

Costs of appeal—No order made where Appellant's attorney intimated that judgment not being attacked on the ground that absolution should have been granted in Court below.

(Appeal from Native Commissioner's Court, Cofimvaba: Case 188/37.)

This case was on the roll at the session held at Umtata on 15th June, 1938, but as there was no appearance for either Appellant or Respondent it was struck off the roll.

Application has now been made for the case to be reinstated on the roll on the ground that Notice of Hearing had not been furnished to the attorneys of the parties as required by Rule 18 of the Native Appeal Court Rules (Government Notice No. 2254 of 1928).

As the omission to prosecute the appeal was not due to any neglect on the part of the Appellant or his attorney the application is granted and the case restored to the roll.

The Plaintiff sued Defendant for 5 head of cattle or thier value £20 being damages for adultery with Plaintiff's wife Notembile and pregnancy.

It is alleged in the summons that during or about Spring of 1936 and on divers occasions thereafter Defendant committed adultery with Plaintiff's wife as a result of which she became pregnant and gave birth to a female child on or about the 21st September, 1937.

Defendant in his plea denies the allegation.

Judgment was entered by the Acting Native Commissioner in favour of Defendant with costs.

An appeal has been noted on the ground that the judgment is against the weight of evidence.

It is clear from the record that the Plaintiff cannot be the father of the child born of his wife in view of the fact that he was absent at the mines from September, 1934 to August, 1937. On his return he found his wife pregnant at her people's kraal. She returned with him to his own kraal and named Defendant who is a cousin of Plaintiff, as being reponsible for her condition.

The only evidence of the actual adultery is that of Plaintiff's wife Notembile. The go-between Notimite corroborates her in respect of the various appointments made on behalf of the Defendant.

It is further alleged in the evidence that a woman by the name of Nondini also arranged two meetings for Defendant but this woman has not been called as a witness. Both Notembile and Notimite state that the various appointments were made for the adultery to take place at Plaintiff's kraal where his wife was residing.

Notimiti alleges that she made appointments for two occasions and that she took Defendant to Notembile on the first occasion and left him there after he had given her a shilling and on the second occasion she also went to the kraal and found Defendant there and after he had given her some tobacco she went home.

There is no evidence that Defendant and Notembile were found in compromising circumstances at any time. The only other evidence is that of Plaintiff's minor son who states that Defendant visited their kraal on four occasions during night time.

Evidence was given by Plaintiff's messengers as to what took place at Defendant's kraal when Notembile was taken there with the charge but there is a good deal of discrepancy between these witnesses and Notembile and Plaintiff's case is consequently weakened.

The Courts have laid it down from time to time that the clearest proof of adultery is required but in the present case we have only the evidence of the Plaintiff's wife as to the specific act, nor is her evidence supported by surrounding circumstances from which it may be assumed that adultery actually took place.

This Court after careful consideration of the evidence is of opinion that Plaintiff has failed to establish the charge of adultery, but, at the same time, that the Defendant was not entitled to a final judgment in view of the fact that there is other evidence which can be called on behalf of Plaintiff and the fact that the defence evidence was not very satisfactory. The more correct judgment would, therefore, have been one of absolution from the instance.

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

In regard to the costs of appeal as the Appellant's attorney before this Court intimated that the judgment was not being attacked on the ground that absolution should have been granted in the Court below it is considered that there should be no order as to costs of appeal.

ALDEN QINA vs. HENRY QINA.

UMTATA: 24th October, 1938: Before H. G. Scott, Esq., President, and Messrs. J. H. Steenkamp and R. Wronsky, Members of the N.A.C.

Appeal—Practice and procedure—Objection in limine *to hearing of—Failure to serve copy of Notice of Appeal on Respondent forthwith—Rule* 9 (1), *G.N.* 2254 *of* 1928—*Objection upheld—Requirements of Rule* 9 *indicated—Leave to apply for condonation of irregularity at next Session of Court granted.*

(Appeal from Native Commissioner's Court, Umtata: Case No. 633/37.)

Respondent's attorney objected *in limine* to the hearing of the appeal on the following ground:—

That Appellant has failed to comply with Rule 9 (1) of the Rules of the Native Appeal Court made by His Excellency the Governor-General of the Union of South Africa in terms of sub-section (5) of Section 13 of Act No. 38 of 1927 in that although the notice of appeal is dated 6th July, 1938, the copy of such notice was served upon Respondent's attorney on 19th July, 1938, only.

Attached to the notice of objection are affidavits dated 20th July, 1938, by Mr. E. A. Ensor at that time an attorney in the employ of Respondent's attorney, and Miss Esme Hemming, a clerk also in the employ of Respondent's attorney, to the effect that the copy of the notice of appeal was served on the 19th July, 1938, and not before.

The rule referred to in the notice of objection reads:—

"9. (1) After the noting of an appeal or cross-appeal a copy of the notice of appeal or cross-appeal shall forthwith be served upon the other party. Such copy may be served, free of charge, by the party who noted the appeal or cross-appeal, in person, by delivery to the other party personally

in the presence of a witness; or at the request of the party noting the appeal or cross-appeal, such copy shall be served by the Messenger of Court concerned, upon prepayment by such party, of the Messenger's fees for service."

It has been held by this Court in the cases of B. Gxagxa *vs.* S. Maku (1932 N.A.C. 3) and J. Ketabahle *vs.* M. Mpamba (1937 N.A.C. 193) that service by the legal representative of the Appellant on the legal representative of the Respondent is a good one, but it is desired to point out, in case the matter should be made the subject of objection at some future time, that the rule requires that where service is made by a party, which, as has been pointed out in the cases mentioned above, includes the legal representative of the party, this should be done in the presence of a witness. It is realised that the almost universal practice in these matters is to serve a copy of the notice of appeal on the legal representative of the Respondent and obtain his acknowledgement on the original. While no one has up to the present raised the objection that this is not a compliance with the rule such objection may at some future time be raised. It is, therefore, desirable to point out exactly what the rule requires to be done. Firstly the appeal or cross-appeal must be noted with the Clerk of the Court, after noting the appeal a copy of the notice of appeal or cross-appeal must be served forthwith upon the opposite party and finally, if the service is effected by the party who noted the appeal in person, such party shall *forthwith* notify the Clerk of the Court with whom the appeal or cross-appeal was noted of the time, place and manner of such service, and such service shall have no force or effect until the Clerk of the Court has been so notified.

It will be seen from what has been said above that the rule is imperative and failure to carry out its provisions strictly may result in technical objections to the hearing of appeals being raised and possibly allowed.

During the course of his argument the Respondent's attorney referred to the following cases in which the question of failure to serve a copy of the notice of appeal on the opposite party was considered, Karro & Dansky *vs.* van der Spuy (1919 C.P.D. 293); Mtshali *vs.* Sishuba (5. N.A.C. 141) and B. Gxagxa *vs.* S. Maku [1932. N.A.C. (C. & O.) 3.]. In all these cases mentioned it would appear that service on the opposite party had not been made at all.

It is argued in the present case that the principle is the same whether no service at all has been effected or whether service is affected otherwise than forthwith.

The Appellant's attorney bases his argument in opposition to the objection on, practically, three grounds:—

(*a*) That Respondent's attorney knew on the 6th July, 1938, that an appeal was being noted as he was so informed in a letter of that date.

(*b*) That the Court should take cognizance of the fact that it is the routine practice in his office to send a carbon copy of the notice of appeal to the opposite party at the same time as the appeal is noted.

(*c*) That as the Clerk of the Court noted on the record that an appeal had been noted the maxim *omnia praesumuntur rite esse acta* must apply and it must be accepted that he had satisfied himself that service on the opposite party had been effected.

In regard to (*a*) all that need be said is that notification of intention to appeal is not sufficient. A party may intend to appeal and then alter his mind. In the absence of a definite notice that an appeal has been noted the other party is entitled to assume that such alteration of intention had taken place.

In regard to argument (*b*) this Court cannot take notice of a statement *ex parte* of the routine of a particular office especially where that practice does not conform to the requirements of the rules.

The argument under heading (*c*) is ingenious but unsound. The maxim referred to would apply only if it were the duty of the Clerk of the Court to satisfy himself that service of a copy of the notice of appeal had been effected. No such duty is cast upon the Clerk of the Court by the rules. All that he is required to do is to see that the notice of appeal is properly stamped and approved security furnished.

It is the duty of the Appellant's attorney to satisfy this Court that he has complied with the rule. In this case he clearly has not done so.

The rule referred to requires that service of the copy of the notice of appeal should be made upon the opposite party *forthwith*, which is defined in the Concise Oxford Dictionary of Current English as "immediately", "without delay". Service of notice thirteen days after noting the appeal cannot be regarded as complying with the rule and, in the opinion of this Court, the objection is a good one. The objection is accordingly allowed with costs and the appeal struck off the roll.

Mr. G. Hemming, for Appellant, asks that the Court should add to the judgment that leave is granted to make application at the next session of the Court for condonation of the irregularity.

Mr. Q. Hemming opposes.

In view of the fact that no prejudice was sustained by the Respondent the application is granted and the following words added to the judgment: —

> "Leave is granted to Appellant to apply at the next session of this Court at Umtata for condonation of the irregularity in noting the appeal and, if such application is granted, that the appeal should be heard at the same session."

JOHN MARMAN vs. MAKENKESI BLAKFESI and BLEKFESI NCAMILE.

KINGWILLIAMSTOWN: 12th December, 1938. Before H. G. Scott, Esq., President, and Messrs. M. L. C. Liefeldt and H. B. Myburgh, Members of the N.A.C.

Damages—Seduction and pregnancy—Conception as result of incomplete penetration.

(Appeal from Native Commissioner's Court, Lady Frere: Case No. 29/1938.)

In the Court below Plaintiff (Appellant) sued Defendants (Respondents) for five head of cattle or their value £25 as damages for the seduction and pregnancy of his daughter Nonayi by first Defendant. The second Defendant being sued as kraal-head of first Defendant.

In his summons Plaintiff alleged that about the winter of 1937, the first Defendant seduced and carnally knew his daughter Nonayi in consequence whereof she became pregnant and was delivered of a male child which has recently died.

In the plea the seduction was denied but it was admitted that second Defendant was the kraal-head of first Defendant.

After hearing evidence the Assistant Native Commissioner entered a judgment of absolution from the instance and the appeal is against that judgment on the ground that it is against the weight of evidence.

It appears from the Plaintiff's evidence that the girl Nonayi gave birth to a child in March, 1938, and that she then accused first Defendant of being the father. Plaintiff then sent messengers to second Defendant who denied the allegation, but first Defendant admitted he was in love with her and that he metshaed with her. The matter was then taken before the Headman where first Defendant again admitted that he slept with the girl but denied having had intercourse with her.

The Headman gave no judgment but ordered the parties to go to the Native Commissioner.

That same evening second Defendant came to Plaintiff's kraal saying he was going to his friends at Umhlanga and asking for time to pay. Second Defendant went to Umhlanga and as he did not pay one Stompie Mtshilelo was sent to him. He told Stompie he could not pay as his friend at Umhlanga had died but he would see what he could do when his sons returned from work. Thereafter Gasmeni Jantu, who was acting Headman then, saw second Defendant and asked why he did not pay. He replied that he had no cattle and Gasmeni then said that he should have spoken nicely to Plaintiff and asked for time to pay.

There is abundant evidence on behalf of Plaintiff that Nonayi and first Defendant have been sweethearts for years and that they used to metsha when attending boys dances and that this continued up to about June, 1937, when Nonayi became pregnant.

The first Defendant while admitting that he did metsha with Nonayi denies that he ever had actual connection with her or that he caused her pregnancy. He says that he ceased metshaing with her when he went to school. His sister, Nongangam, states that he went to school about seven years ago and she, first Defendant and second Defendant state that since that time he has never attended boys' dances. Now it appears from second Defendant's evidence that first Defendant is only about fifteen years of age and consequently he would only have been about eight years old when he went to school. At that age he would not be attending dances and it is much more probable that the evidence for the Plaintiff on this point is correct.

Second Defendant, while admitting that he went to Plaintiff on several occasions, that Gasmeni did come to him and that he has friends at Umhlanga states that he never asked for time to pay, that he never went to Umhlanga and that Gasmeni did not suggest he should have asked Plaintiff for time to pay. His explanation of the visits to Plaintiff was merely to ask for time in order to question his son.

This explanation is not satisfactory in view of his statement that he had questioned his son and was satisfied with his explanation. That being so there was no need for any further questioning and the reason given for the visits to Plaintiff does not bear the stamp of truth.

The witness Nongangam says that she saw Nonayi on two occasions under one blanket with one Mpapa and that she told the Headman about this. If this evidence is true it is strange that no mention of it was made by the other witnesses. Nonayi denied having been caught under one blanket with Mpapa. In the opinion of this Court the unsupported evidence of Nongangam is wholly insufficient to show that Nonayi metshaed with anyone else than first Defendant.

We find as a fact that first Defendant did " metsha " with Nonayi for a considerable time before and up to about June, 1937, but the question still remains whether he caused her pregnancy.

In his reasons for judgment the Assistant Native Commissioner states: —

" Although the Plaintiff (evidently a clerical error for Defendant) admitted ' metsha ' this is not concrete evidence of seduction (see Qabazayo *vs.* Nciso—Native Appeal Court Reports, Transkei, 1910-11). The Court here stated: ' The Court in the absence of any examination, can only conclude that the girl was not seduced but was with the Appellant under the custom of ukumetsha for which a claim for damages cannot be admitted.'

In view of the fact that the custom of ukumetsha is not proof of seduction and that the Plaintiff had failed to establish that the parties had metshaed the previous winter, the Court decided that the Plaintiff had not proved his claim and gave a judgment of absolution from the instance."

The case quoted is not in point. In that case apart from the statement of the girl (which was denied by the Defendant) that she had been seduced, there was no evidence in support of the seduction and the girl had not been examined by the women in accordance with Native Custom. The present case is very different. Here the girl has given birth to a child and there can be no more " concrete evidence " of seduction than that fact.

As there is conclusive proof of seduction it remains only to decide whether first Defendant can be held responsible for the pregnancy. He admits that he metshaed with Nonayi but denies actual connection. Nonayi says he did have connection and her word is supported by the fact that she actually gave birth to a child. Under the custom of ukumetsha full intercourse does not, as a rule, take place but semen is emitted between the thighs of the girl in close proximity to the vagina and it is, therefore, possible that some of the spermatozoa may find their way into the womb and so cause pregnancy.

That conception may take place as the result of incomplete penetration is clear from the case of Selbourne Bokwe *vs.* Dorothy Kabane (1933, N.A.C. 43).

This Court is of opinion that the evidence clearly proves that first Defendant caused the pregnancy of Nonayi.

The appeal is accordingly allowed with costs and the judgment in the Court below altered to read: —

For Plaintiff as prayed with costs against both Defendants, jointly and severally the one paying the other to be absolved.

HOWARD TABOSHE vs. SIGWAGWAGWA and JUBILISI RASMENI.

KINGWILLIAMSTOWN: 13th December, 1938. Before H. G. Scott, Esq., and Messrs. M. L. C. Liefeldt and H. B. Myburgh, Members of the N.A.C.

Damages—Seduction and pregnancy—Conception as result of incomplete penetration—Corroboration of woman's evidence—Paternity—Sufficiency of proof of—Magistrate's Court has no jurisdiction to hear case between Natives.

(Appeal from Native Commissioner's Court, Lady Frere: Case No. 32/1938.)

This was an action for five head of cattle or their value £25 as damages for the seduction about May or June, 1937, of Plaintiff's ward, Mfumfu, by first Defendant as a result of which she became pregnant and was delivered of a female child about February, 1938. Second Defendant was sued as Kraalhead of first Defendant.

The Assistant Native Commissioner entered judgment for Defendants with costs and Plaintiff has appealed on the grounnd that the judgment is against the weight of evidence.

The Plaintiff is the cousin and guardian of the girl Mfumfu. He says that he returned from Johannesburg in the winter of 1937 and found the girl pregnant and went to second Defendant. The first Defendant was then absent but second Defendant undertook to communicate with him. After a time as he got no satisfaction he took the matter to the Headman's Court where both Defendants appeared. The first Defendant admitted having metshaed with Mfumfu but denied having caused her pregnancy. He was asked whether he suspected any other man but said he saw no other man with her. The Headman gave judgment against both Defendants for five head of cattle. Subsequently, the Plaintiff states the Headman re-opened the case and reversed his previous judgment. It is suggested that certain evidence had come to light which satisfied the Headman that first Defendant was not the guilty party but the Headman was not called and the first Defendant makes no mention of the case having been before the Headman at any time. The Headman's action is thus left untirely unexplained.

Mfumfu's evidence is to the effect that she and first Defendant have been lovers for a matter of four years. He used to come and fetch her at night from Plaintiff's kraal, where she was staying, that they used to have intercourse from time to time and that she used to return from these outgoings at dawn. She became pregnant about May or June, 1937, and gave birth to a female child about February, 1938. She reported her pregnancy to first Defendant. She denies that she has had relations with any man other than first Defendant. Mfumfu's statement as to first Defendant coming to fetch her at night is corroborated by Nogenise, Plaintiff's wife.

First Defendant admits that he metshaed with Mfumfu, but denies ever having had connection with her or ever having visited Plaintiff's kraal. He says he discharged semen on her thighs but did not penetrate her and that he stopped metshaing with her year before last, i.e. in 1936. Later on, however, he says that they were still "metshas" at the time his evidence was given.

The only other witness for the defence is a girl Nokakade, who says that she does not know who is Mfumfu's metsha. She says that Mfumfu metshaed with Zakeyi and also told her that she was in love with Dodo and Keke. Further that first Defendant last metshaed with Mfumfu on the Christmas before last Christmas, i.e. 1936.

In his reasons for judgment the Assistant Native Commissioner states:—

"The Defendant admits 'metsha', a common practice amongst Natives. He denies that he met the girl the previous winter and is corroborated by an independent witness.

In the face of these facts it would appear to me that the requisite amount of corroboration required to establish that the boy is the father of the child has not been produced.

I consider that the independent testimony of the aunt is not sufficient corroboration and that the Court has a reasonable doubt regarding paternity."

In regard to the first paragraph of this excerpt from the Assistant Native Commissioner's reasons for judgment this Court is of opinion that Nokakade's evidence is of little weight because it is vague and improbable. She makes the bare statement that Mfumfu "metshaed" with Zakeyi, but gives no details whatever. Her statement that first Defendant "last metshaed with Mfumfu on the Christmas before last Christmas" is not worthy of belief for she could not possibly know what he did unless she was continuously with him from that time up to the present. Her statement was clearly made recklessly and without regard as to whether or not it was true and leaves the impression that she was told what to say on this point.

As this witness is unreliable there is left only first Defendant's bare denial that he actually penetrated Mfumfu as against her statement that he had intercourse with her from time to time as a result of which she became pregnant. The onus of proving that she had had relations with other men, who might have caused her pregnancy, rests upon the first Defendant and this onus he has signally failed to discharge.

It is true that where a Defendant denies the seduction his word is to be preferred to that of the woman unless the latter is corroborated. The rule of law is that by corroboration is meant some evidence in addition to the woman's which, in some degree, is consistent with her story and inconsistent with the innocence of the Defendant (Mackay *vs.* Ballot, 1921, T.P.D. 430); evidence which justified the Court in believing the former rather thau the latter would be sufficient (Sholtemeyer *vs.* Potgieter, 1916, T.P.D. 188, referred to in Dubois *vs.* Fraser, A.D., 12th October, 1925—P.H. J. 7).

What is the position in the present case? Mfumfu's statement as to her being taken out at night is corroborated by Nogenise. That she reported her pregnancy to first Defendant is not denied. That she was seduced by someone is conclusively proved by the fact of her pregnancy.

First Defendant admits that he metshaed with her and expended semen between her thighs. There is no reliable evidence that she had intimate relations with any other man. In these circumstances the almost irresistible conclusion is that first Defendant was responsible for the pregnancy. It is possible that he did not fully penetrate the girl but it is possible to cause pregnancy without doing so [Selbourne Bokwe *vs.* Dorothy Kabane, 1933, N.A.C. (C. & O.) 43].

This Court is of opinion that first Defendant's denial of having ever visited Plaintiff's kraal where Mfumfu was living is false and this can also be regarded as corroboration of her statement (see van der Merwe *vs.* Nel, 1929, T.P.D. 551; Jacobs *vs.* Henning, 1927, T.P.D. 324 and Nolte *vs.* Rowe, 1926, T.P.D. 615).

As first Defendant has admitted metshaing with Mfumfu and as it is possible for preguancy to be caused in that way it is for him to show that he could not have been the father of the child or to satisfy the Court that the woman is not worthy of belief (see van der Westhuizen *vs.* Maritz, 1927 C.P.D. at p. 109). He has failed to do either.

This Court is prepared to go further and to say that it is satisfied that Mfumfu is worthy of belief and that it accepts her statement that actual intercourse took place.

In these circumstances this Court is of opinion that the Assistant Native Commissioner erred in coming to the conclusion that there was insufficient proof of paternity and in entering judgment for the Defendants.

It is admitted in the pleadings that second Defendant is head of the kraal of which first Defendant is an inmate and he, therefore, in accordance with Native Law and Custom is liable for the torts of the latter.

The appeal is accordingly allowed with costs and the judgment in the Court below altered to one in favour of Plaintiff as prayed with costs against both Defendants, jointly and severally, the one paying the other to be absolved.

It is observed that throughout the record, except in the certificate of authentication, the judicial officer has subscribed himself as A.R.M. (an abbreviation for Assistant Resident Magistrate) or Assistant Magistrate. This Court wishes to point out, as it has done in many previous cases, that this being a case between Natives it is cognisable only in the Native Commissioner's Court and that the Assistant Magistrate, as such, had no jurisdiction to hear it.

RICHARD SIMANGA STAMPER vs. JOHN STAMPER.

KINGWILLIAMSTOWN: 13th December, 1938. Before H. G. Scott, Esq., and Messrs. M. L. C. Liefeldt and H. B. Myburgh, Members of the N.A.C.

Claim for possession and delivery of property between persons living in relationship of father and son—Contributions by youth towards cost of erection of hut on Guardian's property whether refundable—Offer before issue of summons to return certain property but not delivered—Costs—Gifts by bride's relations to bridegroom's relatives not claimable by bridegroom—Oxen belonging to Plaintiff hired out by Defendant and proceeds used for kraal purposes—Whether claimable by Plaintiff—Claim for balance of proceeds of Plaintiff's cow sold by Defendant by public auction—Where Plaintiff accepted amount paid over at time of sale without demur he is estopped from disputing it three years later—Claim for statement of account in respect of money remitted for purchase of immovable property— Onus on Plaintiff to prove amount actually remitted—Removal by Plaintiff of materials from hut on Defendant's property towards cost of erecting which he had contributed—Whether Plaintiff a bona fide possessor—Damages.

(Appeal from Native Commissioner's Court, Peddie: Case No. 12/1936.)

In the Court below the Plaintiff (Appellant) claimed from Defendant (Respondent):—

1. Possession of a certain wattle and daub building situate in the Durban Mission Location, Peddie, or its value £8. 10s. alleging that the hut is his own property but is in possession of Defendant who refuses to hand it over.
2. Delivery of a certain wagon sail or its value £5.
3. Payment of the sum of £10, which was paid by one Mfanelo Jakavula on behalf of Nzenza Jakavula about June, 1932, for and on behalf of Plaintiff which Plaintiff requested Defendant to hold for him in safe custody but which he now refuses to pay to Plaintiff.

(4) Payment of the sum of £2. 12s. being an amount received by Defendant for the hire of three oxen belonging to Plaintiff about January or February, 1935, which he now refuses to hand over.

5. Delivery of certain reims, or their value 10s. 6d.

6. Payment of the sum of 10s. balance of proceeds of a cow belonging to Plaintiff which was sold by Defendant which Defendant refuses to pay to Plaintiff.

7. A statement of account and debate thereof and payment of such sum not exceeding £200 as shall be found to be due to Plaintiff alleging that during the years 1927 and 1928 he remitted sums of money from Cape Town to Defendant from time to time for the purpose of the purchase by Defendant on behalf of Plaintiff of Lot No. 72, Hamburg, district of Peddie; that Defendant purchased the said Lot for the sum of £65 but neglects or refuses to furnish a full and true statement, with all items properly specified and supported by proper vouchers although this has been demanded from him.

Paragraphs 1, 3, 5, and 6 are denied by Defendant in his plea.

In regard to paragraph 2 he admits being in possession of a sail but alleges that this was a gift to him by Plaintiff which he offered to return to Plaintiff before issue of summons and actually did so after receipt of summons and he denies liability for any costs in connection therewith.

In regard to paragraph 4 Defendant admits that about January, 1935, he hired four oxen to one J. Gewugula for ten days at 1s. per diem and that three of these oxen belonged to Plaintiff, but denies any liability to hand over the proceeds to Plaintiff alleging that in his capacity as kraalhead and guardian of Plaintiff in accordance with Native Law and Custom, he was entitled to the use of any stock at the kraal and to appropriate the proceeds derived therefrom for mutual kraal purposes.

4. In regard to paragraph 7 defendant alleges that on 7th October, 1936 (i.e. before the issue of summons), he duly furnished Plaintiff with a statement of expenditure and receipts in connection with the purchase and subsequent dealings of Lot No. 72, Hamburg, and denies liability to furnish any further account.

In re-convention Defendant claimed £7. 10s. as damages to the wattle and daub hut referred to in paragraph 1 of the summons, which he claims as his property, alleging that Plaintiff had removed three sheets of iron from the roof of the hut about July, 1936 (the plea gives the year as 1931 but this quite evidently a clerical error) and as a consequence the rains caused extensive damage; also that in August, 1936, Plaintiff locked the door of the hut and deprived Defendant of possession thereof.

In the event of Plaintiff's claim in paragaraph 4 of the summons being allowed Defendant made a further counterclaim for £19. 19s. but it is not necessary to set out the details in view of the conclusion at which this Court has arrived on the claim in convention.

On the claim in convention the Native Commissioner granted absolution from the instance with costs and on the claim in reconvention for Plaintiff in reconvention for £1. 18s. with costs.

The appeal is against the whole judgment on the ground that it is against the weight of evidence.

Very voluminous evidence was taken in this case but the facts are comparatively simple.

Plaintiff is the illegitimate son of one Maude Mfongosi, sister of Molosi Mfongosi and his father is an illegitimate son of Annie Stamper, an aunt of Defendant. For a number of years Plaintiff resided with his mother's people. When it was time for him to undergo circumcision rites he was taken to Defendant who made all necessary arrangements for the ceremony. This was about 1922 or 1923. After completion of the initiation ceremonies Plaintiff lived with Defendant for a matter of 13 or 14 years and there is not the slightest doubt that during that time the relationship of father and son existed between them.

About 1924 Plaintiff went to Johannesburg to work and subsequently to Cape Town. From time to time he remitted money to Defendant and with some of this Defendant bought cattle for Plaintiff and also Lot No. 72 at Hamburg and some of the money was used for kraal purposes.

About 1929, Plaintiff became engaged to be married and a hut was put up for him on Defendant's allotment towards the cost of which Plaintiff contributed. Plaintiff alleges that this hut was put up on his allotment but this Court is satisfied that that was not the case.

While in Cape Town on one occasion Plaintiff purchased a wagon sail and sent it to Defendant. This is the sail referred to in paragraph 2 of the summons.

In 1933 Defendant sold a cow belonging to Plaintiff on the Peddie Stock Fair for £3. 15s. He paid over to Plaintiff the net amount of the purchase price producing at the time the sales note.

About 1931 Plaintiff got married and the bride's people presented the sum of £10 to be divided amongst the relations of the bridegroom. After his marriage Plaintiff continued to live on Defendant's allotment in the hut which had been put up for him.

In 1935 Defendant told Plaintiff to remove to another allotment and undertook to put up a hut for him and arranged with one Vivane Nhlonhlo to do the building. During the Defendant's absence Plaintiff prevailed on Vivane to build a larger hut than Defendant had arranged for. On Defendant's return he refused to pay the contractor and a quarrel arose between Plaintiff and Defendant. The hut being unfinished Plaintiff took three sheets of iron off the roof of the hut on Defendant's allotment which he had previously occupied and he also locked the hut and kept the key.

This is a general outline of the facts of the case as arrived at by this Court after a careful consideration of the evidence.

For the sake of clarity, however, it is desirable to deal with the Plaintiff's claims seriatim:—

Claim No. 1.—As already stated this Court is satisfied that the hut was built on the Defendant's allotment. It is clear that the Plaintiff did contribute a certain amount towards the cost of erection and it was argued by Mr. Cook for the Appellant that judgment should at least have been given in his favour for that amount on the principle that no man may enrich himself at the expense of another.

That principle of law is well recognised but, in the opinion of this Court, is not applicable to the present case. The relationship in which the parties lived must not be lost sight of. It is quite clear that Plaintiff made these contributions in accordance with the usual Native Custom and there was no suggestion that Defendant should refund anything to Plaintiff. Apart from this Plaintiff claims the whole hut as his property which he was not entitled to do.

In the opinion of this Court he has failed to prove this claim.

Claim No. 2.—Defendant admits that he received from Plaintiff a wagon sail but states he was under the impression that it was a gift. On the 14th September, 1936, Plaintiff's attorney wrote to Defendant demanding, among other items, the delivery of this sail. In reply Defendant's attorneys pointed out that the sail was really a gift but that if Plaintiff desired to cancel the gift he might do so, and it would be handed over.

Again on 1st October, 1936, Defendant's attorneys wrote:—

"*Re wagon sail*: You have not mentioned whether your client still desires to cancel this gift to our client. Please let us know so that it can be delivered you if necessary."

No reply was sent to these letters and summons was issued on the 28th October, 1936, claiming, inter alia, the delivery of the sail. The sail was then delivered to Plaintiff's attorney.

It has been argued before this Court that as no legal tender was made before the issue of summons Plaintiff should have been awarded costs on this claim.

With this contention this Court cannot agree. Had Plaintiff clearly intimated, in response of the letters above referred to, that he had not made a gift of the sail and demanded its delivery there can be no doubt that it would have been handed over.

In these circumstances we do not consider he was entitled to costs, particularly as it would be almost impossible to allocate costs in respect of this claim.

Claim No. 3.—Whoever may have a claim to this money it certainly is not the Plaintiff. The gift was made, not to him, but to certain of his relations. He bases his claim to the possession of the money on the fact that he contends that he, and not Defendant is the right person to distribute the money. If there is any substance in that contention it is remarkable that he did not assert his supposed right at the time instead of waiting a matter of six years before doing so.

There is no substance in this claim and Appellant's attorney frankly admitted that he was unable to support it.

Claim No. 4.—It is clear from the evidence of Jafani Gwengula, Plaintiff's own witness, that the amount paid for the hire of the oxen was only £2, so that at the utmost Plaintiff's share would be only £1. 10s. Defendant states that the amount received was expended to buy food for the whole family in which Plaintiff and his family shared. The Native Commissioner states that this explanation is reasonable and we agree. It is quite clear that at the time Plaintiff laid no claim to this money and apparently acquiesced in it being used by Defendant. That being so he cannot now claim a refund. In any case he has not proved how much, if any, was used by Defendant for his own purposes.

Claim No. 5.—In regard to this the Native Commissioner states in his additional reasons for judgment:—

"Since giving my written judgment on 8th August last appeal has been noted in this case and I have perused the evidence and my judgment. On page 16 of the judgment I stated that the reims (item 5 of claim) were actually made from the hide of a beast given by Defendant for slaughter at the wedding feast. This is not the position. The beast from which the reims were made belonged to the Plaintiff. Defendant admits this. William Mlakalaka, one of Plaintiff's witnesses states that the skin from this beast was given to him by Defendant, that Defendant wished to buy the skin from him but that he (Mlakalaka) from a desire to make a contribution, actually gave the skin to Defendant. These facts are admitted by Defendant in his evidence. Defendant states that Mlakalaka as a messenger was entitled to the skin. He did not consult Plaintiff before handing

the skin to Mlakalaka but told him when he and Plaintiff were making reims out of the skin that Mlakalaka had handed back the skin. Plaintiff says he was unaware that the skin of the beast was given to the dowry messenger and says that if it was he objects. He admits, however, that if the messenger pays all the swazis then he is entitled to the skin. It is a fact that the skin was given to the messenger. He bears out Defendant's story in this connection and is one of Plaintiff's witnesses. If this be the case it is strange that Plaintiff should, as he states, have been unaware of the gift having been made. The probabilities are I thiuk that Plaintiff knew that the skin had been given to the messenger as a gift in respect of his services which were in fact carried out for the benefit of Plaintiff himself. He appears to have raised no objection at the time."

This is exactly the impression left on the mind of this Court by the evidence. In these circumstances Plaintiff has no claim to the reims or their value.

Claim No. 6.—The cow was sold for £3. 15s. Plaintiff says he received only £2. 10s. from Defendant and he *estimates* the balance due to him at 10s. Defendant states that the amount he paid over was something over £3 and that he produced the sales note to Defendant at the time. If this statement is correct, and the evidence supports it, then Plaintiff has no claim.

It is argued before this Court that as Defendant pleaded payment it was his duty to have produced the sales note showing exactly what amount was realized, the expenses incurred and the balance due to Plaintiff. This seems somewhat unreasonable seeing that at the time of the transaction the sales note was produced aud Plaintiff was apparently satisfied. If there was a balance due he should have raised the matter at the time and cannot now be heard to say that he did not receive the full amount after the lapse of three years. The fact that no protest was raised in this matter as well as the other claims uutil after the dispute giving rise to these proceedings, indicates that Plaintiff is raking up these old matters irrespective of whether there is any sound foundation for his claims in the hope that Defendant will have to pay some of them at least.

Claim No. 7.—Plaintiff alleges that during 1927 to 1929 he sent Defendant £100 in all for the purchase of Lot 72, Hamburg, which he was told was the purchase price and it was when he received the title deed that he found the purchase price was only £65. Here he is not telling the truth for he admits the declaration of purchaser was sent to him in Cape Town for signature and consequently he must have been aware at the time of the amount.

Defendant, at Plaintiff's request, furnished him with a statement showing that he had received in all only £65 and had actually expended £98. 5s. 10d. He admits having received a further £10 in addition to the £65.

He seems to have been quite careful and honest in this matter for he paid to his attorneys the various amounts received by him, except the last £10, and got them to keep an account of his transactions in connection with the land.

The Plaintiff asserts that he sent first £25, then £30, then £20, then £15 and lastly £10, but he gives no idea as to the dates when or in what manner the various amounts were sent.

If he sent bank notes these would be registered and he should have been able to produce the registered slips from the post office.

If he sent postal notes he should have the counterfoils.

He has given no evidence as to what his earnings were from which it might have been possible to deduce whether or not he could have saved the very large amount he claims to have done.

It must be remembered that in addition to the £100 he bought a sail and sent other money to buy cattle, also, if his statement is to be believed, that he spent quite a large sum on his wedding.

His story certainly sounds improbable. It is for Plaintiff to prove what amount he sent and his statement, which is unsupported in any way, is denied by Defendant who produces some proof to substantiate his story.

In regard to the counterclaim the Defendant admits that he took three sheets of iron from the hut which this Court has found did not belong to him. The hut was left unprotected and Defendant (Plaintiff in reconvention) says it was damaged by rain.

It was contended by Appellant's attorney that Plaintiff was a bona fide possessor and that he was therefore entitled to remove the materials belonging to him.

A bona fide possessor is one who at the time of his coming into possession of land is under the bona fide impression that the land belongs to him or that he is entitled to the possession of the same. Such a person retains his ownership in materials affixed by him to the land of another until he has given up possession of the land and may remove the materials again, if he can do so without any serious damage to the land (see Maasdorp Vol. 2., Fourth Edition, page 48).

The Plaintiff in this case cannot be regarded as a bona fide possessor in the sense set out above. He was never in possession of the land on which the hut was built nor did he build the hut. It was erected by the owner of the land, for the sole purpose of providing a place for the latter to live in. Plaintiff was merely the occupier of a house on another person's property towards the cost of erecting which he contributed. Now whatever claim he might have to a refund of the amount he had contributed he certainly had no right to take the law into his own hands and remove what he claimed to be his material thereby causing damage to Defendant.

This Court is not prepared to disturb the award made by the Native Commissioner.

The Native Commissioner has gone very carefully into the whole case and this Court is in agreement with his finding that the Plaintiff has failed to prove his various claims.

The appeal is dismissed with costs.

ABRAHAM NTEKISO vs. WALAZA and NGWETAFA VANQA.

KINGWILLIAMSTOWN: 13th December, 1938. Before H. G. Scott, Esq., President, and Messrs. M. L. C. Liefeldt and H. B. Myburgh, Members of the N.A.C.

Damages—Seduction and pregnancy—Documentary evidence—Case submitted for decision solely on handwriting contained in documents—Onus on Plaintiff to prove Defendant's signature where latter denies it.

(Appeal from Native Commissioner's Court, Lady Frere: Case No. 49/38.)

This was an action for five head of cattle or their value £25 damages for the seduction and pregnancy of Plaintiff's daughter, Median, by the first Defendant. Second Defendant was sued as Kraalhead of first Defendant.

In the plea first Defendant denied the seduction and second Defendant admitted that he was the kraalhead.

The Plaintiff gave evidence in the course of which he stated that in November, 1937, his wife made a certain report to him as a result of which he went to the Defendant's kraal. First Defendant was away and second Defendant asked him to wait until the first Defendant returned. He agreed to do so and went there again in September, 1938, where he found the two Defendants and three other men.

At this meeting first Defendant denied having caused the pregnancy of Plaintiff's daughter. Two letters were produced one of which he admitted having written, the other he denied being the author of. As he denied being the cause of the pregnancy no decision was come to and the present case was brought and the letters in question were put in marked "A" and "B" respectively. On Exhibit "A" is a postscript which will be referred to later.

At the close of Plaintiff's Examination in Chief, Mr. Hoole, Defendant's agent, admitted that his client wrote Exhibit "A" with the exception of the postscript and denied that he wrote Exhibit "B". He then proceeded to cross-examine Plaintiff very briefly and then the following note appears on the record:—

"At this stage Mr. Hoole admits all material facts and states that he desires that his client (Defendant) be placed in the witness box to admit or deny his signature in letter B."

"Mr. Kelly agrees. Also to admit or deny the postscript on letter 'A'."

First Defendant was then put in the witness-box and under oath denied having written the postscript on exhibt A. In regard to letter B he said: "I see letter 'B' before the Court. The signature on letter 'B', to say nothing of the face of the letter, is not mine."

He was cross-examined and asked to point out differences in the handwriting in the two letters which he did.

At the conclusion of his evidence the following note was made on the record:—

"Mr. Kelly and Mr. Hoole agree at this stage that this case depends on the handwriting in letters 'A' and 'B' and agree further that the Court decides whether the handwriting in these letters is the same. Both Mr. Kelly and Mr. Hoole further agree that this case be decided on the evidence in regard to the hand-writing alone and that any appeal will likewise be only on this point."

"At the request of the Court Walaza Vanqa wrote Exhibits E and F."

The Assistant Native Commissioner, after considering the letters and other exhibits came to the conclusion that neither the postscript on Exhibit A nor Exhibit B were written by first Defendant and entered judgment accordingly for Defendants. The appeal is against this judgment on the grounds that—

(1) the Assistant Native Commissioner committed an error of judgment and was wrong in fact in holding that the letter "B" had not been written by Defendant "Walaza" and that the signature "Wallacy Vanqa" was not the signature of the said Defendant Walaza;

(2) the judgment was against the weight of evidence.

The reason why the postscript to letter A and the letter B are so important is because they contain an admission by first Defendant, if they were written by him, of his responsibility for the pregnancy of Plaintiff's daughter. The following is a translation:—

Postscript to letter "A":—

"Here is another thing, if you have anything with you don't hide me my friend, tell me when you are being questioned, don't hide me, I am the person who did that thing."

Letter "B".

"Dear, in short words, while your heart is sore I don't know if you say you have been to my home and you say you were not given a word, I have however received letters from home. I don't know because I have admitted my guilt that I made you pregnant. Then I have heard that my elder brother is not at home, he is away at work. I do not know where he is. I have heard that he was not there when your people took you to my kraal. Please trust in God and so will I. I haven't much to say. I stop there."

If these letters were written by first Defendant there can be no question as to his liability and it is therefore necessary that they should be examined carefully.

It must be borne in mind that Exhibits A (with the exception of the postscript) D, E and F are admittedly in first Defendant's handwriting.

On a careful examination of the various exhibits we find the following:—

In Exhibits A, D, E and F the cross-stroke of the "t" in almost every instance passes right through the vertical stroke, thus "t", whereas in the postscript the Exhibit A it does not but the symbol is written thus "t", while in exhibit B there are examples of both methods of writing the symbol.

A very striking difference is found in the formation of the letter "z" in the various exhibits.

In A, D, E, F the formation is uniformly alike. The stroke of the loop not being carried through the down stroke or joined to the next succeeding letter. In the postscript to Exhibit A and in Exhibit B this letter is formed entirely differently, the stroke of the loop invariably being carried right through and joined to the succeeding letter.

The most marked difference is in the formation of the letter "K". In the Exhibits A, D, E and F it is written thus "*k*", whereas in the disputed letters it is thus "K".

Again the capital "K" in the word Kleinburg in Exhibit "B" is entirely different from that in all the other Exhibits. It is observed also that the spelling is not the same. In Exhibit "B" it is "Kleinburg" and in all the other Exhibits "Kleinberg".

These are only a few instances of the difference which exist between the two sets of exhibits. There are other differences which, with the documents before one, it is possible to observe but difficult to put on paper. But after all what chiefly weighs with this Court is the difference between the general appearance and character of the writing in the postscript to Exhibit A and that in Exhibit B to that in the other exhibits. It is significant too that the distinct peculiarities in certain letters in the postscript to Exhibit A are reproduced in Exhibit B but are entirely absent in all the other exhibits, a matter which gives rise to the grave suspicion as to the genuineness of the postscript and of Exhibit B.

It is contended that the signature " Wallacy Vanqa " on Exhibit " B " is clearly that of first Defendant. At first sight there is a distinct resemblance with his admitted signatures but he has, in his evidence, pointed out certain differences which are clearly noticeable, e.g. that the " V " in Exhibit A is more slanting than in " B ", that the " Y's " are different in that one has a short curve and the other is longer and more slanting; that the " q's " are very different in that in Exhibt A the loop closes up thus " q " and in Exhibit B it is open thus" q ". In addition to these differences pointed out by first Defendant it is to be observed that in Exhibits A, D, E and F the " V " in " Wallacy " has a small loop in the last up stroke but this is absent in Exhibit B. It is also significant that when Mr. Kelly exposed only the signatures of the three letters " A ", " B " and " D " and asked the first Defendant to state which signature he had written he was able, apparently without hesitation to point out the signature on the letter " B " as not being his own.

The Defendant has denied that the signature on Exhibit B is his and the onus was upon the Plaintiff to prove that it was. He has made no attempt to do so, and Defendant's denial stands uncontradicted.

It is observed that while the Assistant Native Commissioner's finding in regard to letter B is attacked on appeal his finding in regard to the postscript to letter A is not questioned. There can be little doubt that these were written by the same person. If the finding in regard to the postscript is correct it follows that that in regard to letter " B " is also correct.

While it is possible that the Plaintiff is in a position to produce further evidence in support of his claim, the parties through their attorneys have agreed that the case should be decided only on the handwriting and it would therefore appear that they do not desire to avail themselves of any additional evidence they may be able to produce.

This Court has accordingly not considered the question of an absolution judgment, and with the documentary evidence before it, it is satisfied that the findings of the Assistant Native Commissioner are correct.

The appeal is dismissed with costs.