UNION OF SOUTH AFRICA.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(TRANSVAAL AND NATAL.)

1934.

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CASE NO. 1

BAGANISE ZULU VS. MASINGHA ZULU.

DURBAN. 18th January, 1934. Before F.H. Brownlee, Esq., President, Messrs. E.N Braatvedt and F.F.C.Behrmann, Members of the Native Appeal Court (Transvaal and Natal Division).

Customary Union - Chief wife - Mqolisa ceremony - Public declaration.

An appeal from the Court of the Native Commissioner, Mahlabatini.

IN THE ABSENCE OF A PUBLIC DECLARATION MADE IN ACCORDANCE WITH ZULU CUSTOM THERE IS NO JUSTIFICATION FOR OUSTING THE FIRST MARRIED WIFE FROM HER POSITION AS THE INKOSIKAZI.

This is an appeal from the Court of Native Commissioner, Mahlabatini. The parties are half-brothers and each claims to be the general heir to the estate of their late father Timula who died about 1906.

The case was first tried by the Induna Nomzimane as representative of Chief Mhlolutini. The Appellant in this Court was Plaintiff in the Chief's Court and succeeded in his claim to be declared the heir. Respondent Masinsha appealed to the Native Commissioner's Court and was successful in having the Chief's judgment set aside and obtaining a judgment declaring him to be the rightful heir and not Baganise.

The late Timula had five wives, namely:-

1. Oka Hozana (mother of Respondent).

2. Oka-Zinto (mother of a boy named Mqedeni who died unmarried and of four daughters).

3. Oka Nyati (mother of a boy named Buqilikuvela and of four daughters).

4. Oka Faku (mother of a boy named Nyikeni who died recently).

5. Oka Dilikana (mother of Appellant).

There is a dispute as to whether Oka Hozana or Oka Zinto was the first married wife of Timula. After the war of 1879 the restrictions imposed on young men prohibiting them from marrying without the King's permission were relaxed and young men in many cases took possession of girls and married them without going through the customary formalities.

Timula at that time had four girls and when asked by his elders which of them he would like to take to be his wife he replied that Hlalukile (Ka Zinto) was his "best girl". According to her own evidence her people refused to consent to the marriage. Timula therefore abducted her and hid her for four years at his uncle's kraal at Enyanyeni. While Oka Zinto was in hiding Oka Hozana came to live with Timula at his kraal

and.....

and bore a child which died in infancy. Oka Zinto claims that she is the first married wife because she was the first to bear a child to Timula but later in her evidence she admits in cross-examination that she heard during her stay at Enyaneni that Oka Hozana had given birth to a child. The evidence shows that Timula married all his five wives without going through the usual ceremony or holding a marriage feast and the only formality that is mentioned is that of "mqoliso" (the anointing of the bride). The only witness who is at all definite about the "mqoliso" is Ndolombi who states that "Timula married Oka Zinto and Oka Hozana the same time but Oka Zinto was "qoliswaed" first and no marriage ceremony for either took place." This witness is called by Appellant and certainly does not appear to be impartial. He proves himself to be unreliable by stating that Oka Zinto was pregnant when Timula abducted her - a statement which is contradicted by Oka Zinto's own evidence. Ndolombi's evidence to the effect that Oka Zinto was "qoliswaed" first cannot be accepted therefore without corroboration.

Oka Zinto goes on to say: "When I returned to Timula's kraal from the place where he had hidden me for four years, I found Oka Hozana there as a newly wedded bride. She had no child there, nor had I." The evidence of Mbinantle who was at that time a young girl is to the effect that while Oka Zinto was in hiding she paid a visit to Timula's kraal and found Oka Hozana there as a newly wedded bride.

No Code of Native Law was in force at that time in Zululand, and in the absence of any registration of marriages and especially in view of the after-war conditions of confusion prevailing at that period it is not surprising to find a conflict of evidence regarding the priority of marriage of the two women. It seems clear, however, that during the period of four years that Oka Zinto was in hiding her father's consent to the proposed marriage could not have been obtained. As the father's consent is an essential of a native marriage it is clear that no marriage could have existed. Oka Hozana on the other hand was living with Timula at his kraal as his acknowledged bride. This could not have been the case if her father or guardian had not given his permission. It may therefore be safely assumed that a marriage did exist between Timula and Oka Hozana before one was entered into between him and Oka Zinto.

Oka Zinto admits that Timula had no cattle of his own to pay lobolo for her and that he did not wish to incur a debt by borrowing from his elders. It is usual for the elders to find the lobolo for the first wife and by inference it seems that this statement of Oka Zinto means that Timula had already been assisted to pay the lobolo of his first wife (Oka Hozana) and did not wish to incur a debt in respect of Oka Zinto. After some time he returned Oka Zinto to her people and then paid lobolo for her.

Having found in favour of Respondent on this point there remains the further question of whether Oka Zinto was not appointed as chief wife by a public declaration. It is undoubtedly correct that Timula did refer to Oka Zinto as his "best girl", and it seems that he wished to marry her first but was prevented from doing so for the reasons already stated. His statement did not amount to a declaration indicating Oka Zinto as his chief wife.

Respondent's witness Mbinantle states that when Chief Simoyi asked Timula who his chief wife was and suggested that it was Oka Zinto, Timula became angry and replied: "Am I a dog that my kraal should be allotted by some one, my chief wife is Oka Hozana!"

Yangabi states. "Timula made no declaration but Timula's mother made a declaration after his death. Timula died intestate." This witness is a very old man and lived near Timula. He also states that Oka Hozana married first and then Oka Zinto.

Oka Nyati states: "Timula died without making a declaration ..... Mqedeni died and then the mother of Timula declared Buqilikuvela as heir." This witness also said the declaration made by Timula's mother had caused confusion in the kraal.

Cakashana (Appellant's witness) states: "It is customary to appoint a chief wife before she is married and declare her before the elders of the family and subsequently make a public declaration."

Mahashini states. "I was present when Timula made a public declaration. He was not married when he made his chief wife".

Oka Dilikana states. "Oka Zinto is Timula's chief wife because she was appointed by Timula. He declared her before the elders as his chief girl"..... "Timula died when preparations (beer) were being made to hold a feast and for him to make a declaration."

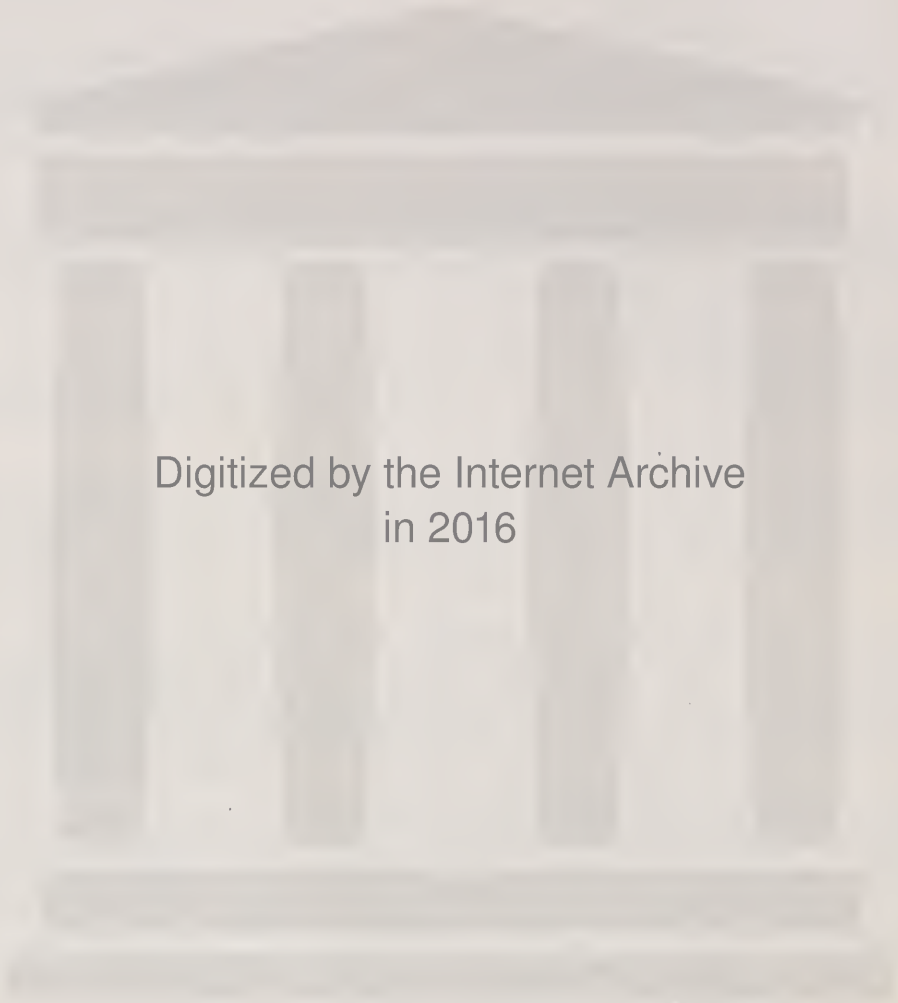
Buqilikuvela states: "My father did not make a declaration of my father's kraal. I do not know who was a chief wife. Oka Zinto was appointed by my grandmother after Timula's death ..... My grandmother arranged the status of the wives. Timula did not arrange his kraal affairs."

It seems abundantly clear from these quotations taken from witnesses on both sides that the only declaration ever made by Timula was when it was suggested to him that he should marry one of the four girls who loved him. In the absence of a public declaration made in accordance with Zulu custom there is no justification for ousting the first married wife from her position as the Inkosikazi.

Appellant would have no claim to the heirship in any case except through the affiliation of his mother to Oka Zinto's house. The Native Commissioner came to the conclusion that the affiliation did take place. There is however a considerable amount of evidence to show that Oka Dilikana was affiliated to Oka Hozana's house and not to Oka Zinto's. It is not in dispute that the cattle for Oka Dilikana were the cattle received as lobolo for Oka Zinto's eldest daughter Fihlwase.

Respondent states that Oka Dilikana was affiliated to Oka Hozana.

Appellant states: "My mother was affiliated to the chief house of Oka Zinto".



Yangabi said: "Baganise's mother was affiliated to Oka Zinto's house."

Oka Nyati says that Oka Dilikana was affiliated to Mashesha's mother's house i.e. Oka Nozana and that Mashesha was given two girls, Fihlwase and Lambile i.e. their lobolo rights.

Chief Maqiyana states that he asked Oka Zinto who the heir was and what houses were affiliated to her and she said she did not know.

In her evidence in the Native Commissioner's Court Oka Zinto states that both Oka Nyati's and Oka Dilikana's houses were affiliated to her.

Mahashini states: "After taking Oka Dilikana Timula told Cakashana that he was placing Oka Dilikana in the house of Oka Zinto".

Oka Dilikana states: "I was affiliated to Oka Zinto. Oka Nyati objected to be affiliated to the Indhlunkulu."

From these conflucting statements it was no easy matter for the Native Commissioner to come to a decision. He has given careful consideration to the evidence and it is not possible to say that he was wrong in holding that the affiliation did take place. It follows from his finding that he should have held that Appellant was the heir to the house of Oka Zinto.

The estate of the late Gunda is also involved in this dispute. Timula was an only son of his father Manyoni and Gunda is an ukungena brother of Timula. It is common cause that his estate belongs to the general heir of Timula and it follows as a matter of course that the judgment of this Court will decide whether Appellant or Respondent is entitled to it. The dispute over Gunda's estate appears to have started the litigation in this case and it contains also a probable explanation of the delay shown by both parties in bringing forward their claims to the heirship. Timula died about 1906. Oka Zinto states he owned no property. At that time soon after Rinderpest cattle were scarce and it is quite possible that there was no kraal property after his death although each of the houses had its own cattle. It was only when Gunda died that the occasion arose for the heir to assert himself.

The judgment of the Native Commissioner reversed that of the Induna and it may well be argued that the Court should not have disturbed the Induna's finding on a question of fact but on examination of the Induna's reasons for judgment it would seem that the Respondent's case was not properly represented in his Court. He states he gave judgment against Respondent because Respondent brought no witnesses. Chief Zombode also held that Appellant was the heir in an enquiry before him. This was not a judicial proceeding and it is not possible to ascertain whether the enquiry was exhaustive. In any case he appears to have based his decision on his own opinion and not on the evidence as he says that he knew before the enquiry who was the heir and merely held the meeting because others were disputing the heirship and he wished to satisfy the claimants.

A point has been made of the fact that Mqedeni is said

to have held the assegai at the burial of Timula. The evidence on this point is also contradictory. Mashesha was not present at the funeral and if Mqedeni did hold it he may have done so in a representative capacity only.

The evidence of Buqilikuvela who was called by the Court is interesting. He states that he was the first claimant to the heirship of Timula's estate and that he was induced by Oka Zinto to prefer a claim which he now admits was groundless. His evidence is now entirely in favour of Respondent.

After a careful consideration of the evidence the learned President and I have arrived at the following conclusions.-

1. That Oka Nozana was the first married wife of Timula and that her first born son Mashesha is Timula's general heir.

2. That the house of Oka Dilikana was affiliated to that of Oka Zinto and Appellant is therefore heir to the estate of the late Mqedeni i.e. the house heir.

3. That the general heir is also the heir to Gunda's estate.

The appeal is therefore upheld in part, and that portion of the Native Commissioner's judgment declaring Respondent heir to the estate of the late Mqedeni struck out. Baganise is declared to be the heir to Mqedeni's estate. Costs in this Court are awarded to the Appellant. The order as to costs in the Native Commissioner's Court is not disturbed.

Per Broatvedt (dissenting).

The parties to this action are sons of the late Timula by different mothers. Timula had five wives, namely:-

(1) Oka Zinto (mother of a boy named Mqedeni who died unmarried, and of four daughters).

(2) Oka Nozana (mother of Respondent).

(3) Oka Nyati (mother of a boy named Buqilikuvela and of four daughters).

(4) Oka Faku (mother of a boy named Mjikeni who has died).

(5) Oka Dilikana (mother of Appellant).

Timula died in about 1906. Gunda - an ukungena brother of Timula - died about four years ago, without male issue. Mqedeni (Timula's son by Oka Zinto) died in about 1918 or 1919.

The subject matter in dispute is the heirship to the Estates of Timula, Gunda and Mqedeni.

Appellant...

Appellant instituted proceedings in the Court of Nomzimana - the Chief's representative - and obtained judgment in his favour. Respondent appealed against the judgment to the Native Commissioner of Mahlabatini who reversed the decision given by the headman, and declared that Respondent was the general heir to the estates in question. Appellant now appeals against that judgment.

Appellant claims that Oka Zinto was Timula's first wife, and that Timula publicly declared that she was his chief wife. As her only son Mqedeni has died without male issue, he claims that he is the general heir by virtue of the fact that his mother (Oka Dilikana) was lobolaed with cattle received as lobolo on Oka Zinto's eldest daughter Fihlwase on her marriage, and because his mother was affiliated to Oka Zinto's house. He alleges that Respondent's mother was Timula's second wife; that she is of the ikohlwa house, and that Respondent cannot, therefore, lay claim to the indhlunkulu estate.

Respondent, on the other hand, claims that his mother (Oka Hozana) was lobolaed with cattle which Timula had received as lobolo on Fihlwase - his daughter by Oka Zinto.

Shortly after the Zulu war of 1879 Timula took Oka Zinto, without the consent of her father, and hid her in a friend's kraal for four years. During that time he often visited her. Eventually he took her back to her father, paid lobolo for her and took her to wife. It appears that while she was in hiding the Respondent's mother (Oka Hozana) came to live with Timula in his kraal. It is alleged by Respondent that Timula did not marry Oka Zinto because no proper marriage ceremony took place. Three witnesses, namely: Chief Zombode, Cakashana and Mahashini, state that there was no marriage ceremony in the case of any of Timula's wives, and there is no evidence to the contrary, so that the statement must be accepted. After the Zulu War the young men were told that they were free to marry. This new-found freedom resulted - as one witness says - in young men taking girls to live with them as their wives without having gone through any marriage ceremony. One old witness for Appellant, named Ndolombi, states that both Oka Zinto and Oka Hozana (Respondent's mother) were qolisad at the same time, but that Oka Zinto was qolisad first. It cannot, therefore, be said that Respondent's mother married first. Clearly Timula first eloped with Oka Zinto and kept her in hiding for some years before Respondent's mother came to him. Her stay in his kraal was no more a marriage than Oka Zinto's stay in the kraal where he kept her in hiding. We have evidence that both women were "qolisad" at the same time, and their marriage to Timula must be regarded as dating from that time.

Timula lived in what was then Zululand. When he married the women in question the country had not come under Government administration. No statute law was applicable to the country. The essentials of a Native wedding as laid down in the Native Code did not apply. In deciding whether there was a valid marriage or not we must consider the surrounding circumstances. At that period and up to the present time the ceremony of "qolisa" or annointing the bride is considered part of any marriage ceremony.

Timula died in about 1906. At that time Mqedeni -

the son of Oka Zinto - was a young man. Respondent did not dispute the heirship to Timula's estate with Mqedeni.

Both Oka Zinto and Appellant's mother state that it was Mqedeni who stood over Timula's grave carrying the assegais at his funeral.

Only one witness - namely Buqilikuvela who at that time (1906) must have been a small boy - states that Respondent stood over the grave. This statement is false for Respondent admits that he was absent when Timula died.

Before the Chief Maqiyana the Respondent admitted that a certain debt due by Timula to one Mabokeshiya had not been paid by him. His excuse is that he had no assets at the time. Had he been general heir he would have paid the debts.

Another important factor is Respondent's admission that he left Timula's kraal during the latter's lifetime and established a kraal of his own, whereas Mqedeni remained in Timula's kraal. It would be extraordinary for the general heir to establish a separate kraal during his father's lifetime.

On the evidence it appears clear that Mqedeni assumed the role of general heir from the time when Timula died in 1906 until his own death in 1918 or 1919. Respondent laid no claim to the heirship during that period. If he recognised Mqedeni as the general heir he is debarred from claiming now. It is clearly proved that Appellant's mother was affiliated to Oka Zinto's (Mqedeni's mother) house, and Appellant would become heir to that house on Mqedeni's death. If Mqedeni was the general heir, the Appellant would succeed him.

It is true that Buqilikuvela is a son of Timula's third wife whereas Appellant is the son of the fifth wife. His mother, however, was not lobolad with cattle from Oka Zinto's house, and it is not very clear what position she held in the kraal. He is the only other person who might claim the heirship, but he definitely repudiates any claim, and the issue is narrowed down to the parties to the action.

The Native Commissioner finds as a fact that Timula did declare while still a bachelor that Oka Zinto was his best girl and would, when married, be his chief wife, and there is ample evidence to justify that finding, but he does not accept such declaration as binding, being of opinion that it was contrary to custom. There is no evidence that Timula at any time changed his mind on the point. In fact Cakashana states that Timula told him that his general heir was Mqedeni, and Magobongo states that Timula also told Chief Nqodi - after the death of Mqedeni - that Oka Dilikana's son (Appellant) would be his heir. Respondent and his witnesses state that Timula did not at any time make a public declaration. Having expressed his wishes while still a bachelor, and having confirmed those wishes on at least two occasions after marriage, they must be accepted. Mqedeni acted as heir during his lifetime, and his mother states that she apportioned the meat of slaughtered animals to the other women in the kraal. Her statement is not contradicted. If we accept Mqedeni as having been the heir we must accept Appellant as his successor.

Timula was an important man and a meeting of his clan -

presided .....

presided over by Chief Zombode - investigated the position when the present dispute arose, and decided that Appellant was the heir. I should be slow to disturb such a finding. The facts outlined support it.

On the death of Gunda - Timula's ukungena brother - the stock in his estate was taken by Appellant, or rather his representative Mjikeni who was acting for him - to Cakashana with whom it was "sisad". No protest was made by Respondent at that time. Later Buqilikuvela interfered with the stock, and Appellant asked Respondent to take action against Buqilikuvela. He states he did so because Respondent was an older man - the eldest son of Timula. Respondent thereupon went to Chief Maqiyana. It was then that he first brought forward the claim that he was the general heir. Buqilikuvela did not attend before Maqiyana and the Chief declined to settle the question of heirship, but referred the parties to their kinsman Chief Zombode to decide that issue. It was the Appellant who sisad the cattle in Gunda's estate, and it was at his request that Respondent brought an action against Buqilikuvela when he interfered with the stock. If Respondent considered that he was the heir it is remarkable that he remained inactive for so long a time.

When Oka Zinto's youngest daughter married in 1929 it was the Appellant who provided her wedding outfit, and it was he who received her lobolo and "sisad" it with Cakashana. Respondent's story that Timula said that the lobolo on Fihlwase - Oka Zinto's eldest daughter - should be paid to him cannot be accepted and only indicates that his evidence is unreliable. When Fihlwase married we find that her lobolo was used to provide yet another wife for Timula - namely, Appellant's mother.

In my opinion it is clearly proved that the Appellant is Timula's general heir. As such he is also heir to the estates of Gunda and Mqedeni.

CASE NO. 2.

ISAAC KONANE VS. JOHN MACKENZIE MABELA.

PRETORIA. 12th March, 1934. Before F.H. Brownlee, Esq., President, Messrs. F.H. Ferreira and J.H. Steenkamp, Members of the Native Appeal Court (Transvaal and Natal Division).

Objection - Non-joinder - European and Native - Jurisdiction of Native Commissioner's Court - Acquiescence in civil judgment.

An appeal from the Court of the Assistant Native Commissioner, Johannesburg.

ALTHOUGH A NATIVE COMMISSIONER'S COURT HAS NO JURISDICTION TO TRY A CASE WHERE A EUROPEAN IS PERMITTED TO INTERVENE AS A CO-DEFENDANT, YET IT DOES NOT PREVENT THE COURT IN CONSIDERING WHETHER - IF SUCH AN APPLICATION SHOULD BE MADE IRRESPECTIVE OF THE FORUM - IT HAS A REASONABLE CHANCE OF BEING SUCCESSFUL.

NO THIRD PERSON WHO TAKES A BOND OVER PROPERTY WHICH HE KNOWS HAS A DEFECTIVE TITLE, CAN AFTERWARDS COME TO COURT AND APPLY TO INTERVENE AS A CO-DEFENDANT WHEN THE PERSON WRONGFULLY DEPRIVED OF THE PROPERTY SEEKS REDRESS.

In this case Plaintiff claims from Defendant:-

(I) The re-transfer to Plaintiff of Stand No. 1667, in Fifth Avenue, Alexandra Township, Johannesburg; for the reason that the property, having belonged to Plaintiff, was acquired by Defendant on certain invalid grounds.

(II) (a) £7 being the costs of the transfer claimed in Claim 1; and (b) £50 damages made up as follows.-

(1) £26.10.0 special damages, being:

(i) 10/- loss of earnings suffered as a result of attending to civil proceedings in the Magistrate's Court, Johannesburg, in connection with the said property;

(ii) £25 loss of wages suffered as a result of attending to a yet uncompleted action in this Court for Plaintiff's ejectment from the said property;

(iii) £1 travelling expenses incurred in connection with the said proceedings and action.

(2) £23.10.0 general damages, being.

(i) £10 for the unlawful attachment and sale of Plaintiff's property, the said Stand 1167, as a result of the aforementioned proceedings in the Magistrate's Court; and

(ii) £13.10.0 for the wrongful action for ejectment aforesaid.

There was an exception and two objections which were all dismissed in the Court below, judgment being entered as follows:-

ON CLAIM I: Judgment for Plaintiff for the transfer to him of Lot No. 1667, Alexandra Township, at Defendant's expense; subject, at Defendant's option, to the simultaneous registration against Plaintiff's title of a first mortgage bond in favour of Defendant for a sum at Defendant's option, not exceeding £33.11.0 and subject to the same conditions, mutatis mutandis, as Defendant's original bond for that amount.

ON CLAIM II: (damages) - Judgment for Defendant. Defendant to pay all costs except costs of the last hearing of the Action (on 16.8.33). Plaintiff is awarded the costs of the application for an interdict.

Against this judgment the following appeal has been noted:-

AD.....

AD OBJECTION I:

That the Acting Assistant Native Sub-Commissioner's judgment was bad in law in that the objection should not have been dismissed, and in that the said Acting Assistant Sub-Commissioner should have found that the Native Sub-Commissioner's Court had no jurisdiction to try the action.

AD OBJECTION II:

That the judgment of the Acting Assistant Native Sub-Commissioner dismissing the second objection was bad in law, as the Acting Assistant Native Sub-Commissioner should have found that the summons was bad for non-joinder.

AD EXCEPTION:

That the judgment of the Acting Assistant Native Sub-Commissioner dismissing the exception was bad in law in that he should have found that the summons disclosed no cause of action as the Stand was sold to defendant at a sale in Execution by the Messenger of the Magistrate's Court and that such sale conferred an indefeasible title.

AD FIRST PLEA:

That the judgment of the Acting Assistant Native Sub-Commissioner dismissing the first plea was bad in law in that he should have found that action was prematurely instituted, in that tender was not made before action of the various amounts in the said plea set out.

AD SECOND PLEA.

That the said Acting Assistant Native Sub-Commissioner erred in dismissing the second plea, in that he should have found that Plaintiff was estopped from claiming re-transfer of the subject matter of the suit or from claiming damages, by reason of the facts found.

AD THIRD PLEA.

That the judgment of the Acting Assistant Sub-Commissioner dismissing the third plea was bad in law by reason of the fact that he should have found that the plaintiff had waived his rights as appears from the facts found.

AD FOURTH PLEA.

That the Acting Assistant Sub-Commissioner erred in dismissing the fourth plea, in that he should have found that the plaintiff, by reason of his failure to take steps to prevent the cancellation of the bond on the property and the passing of a new bond, and in view of the fact that the property had been sold to a third party, was not entitled to claim restitutio in integrum, but at most damages.

AD CLAIM II.

Appellant appeals against the order made by the Acting Assistant Native Sub-Commissioner awarding costs against him

except .....

except the costs of the hearing on 16/8/33.

The appeal against the dismissal of the exception was withdrawn in this Court.

It is necessary to consider first the following objections before dealing with the pleadings.-

OBJECTION I:

The Native Commissioner's Court has no jurisdiction in respect of the suit; because the property claimed is mortgaged to Emanual Gluckmann, a European, for the sum of £100, the mortgage standing duly registered against the title-deed of the property; and the suit is therefore one between a Native (Plaintiff) on the one hand, and a Native (Defendant) and a European (Gluckmann) on the other.

OBJECTION II:

Claim I is bad for non-joinder; because Gluckmann, the registered mortgagee, must be joined as a defendant.

For the sake of convenience these two objections are dealt with at one and the same time.

It is admitted by the Appellant that the judgment obtained in his favour in the Magistrate's Court is void ab initio. Appellant's Attorney, Mr. Gluckmann, who is also a bond-holder in respect of a bond over the property in dispute passed in his favour subsequent to the void judgment in the Magistrate's Court, contends that he should have been joined as a co-defendant in the action now before the Court. In his evidence Mr. Gluckmann admits that he informed the Respondent that the judgment obtained in the Magistrate's Court was void ab initio but that the latter agreed to condone the irregularity. Notwithstanding such knowledge on the part of Mr. Gluckmann, after the property had been sold in execution on the void judgment he agreed to advance the purchaser - who was aware of the defective judgment - the sum of £100, and as security for this loan executed a bond over the property in question. Mr. Gluckmann now maintains that because he is the mortgagee he should have been joined as a co-defendant and in support of this contention he has quoted a number of cases which in the opinion of this Court are in essence authorities for the intervention of an interested party. Ordinarily there should have been no difficulty in Mr. Gluckmann applying to the Court for permission to intervene but unfortunately if such permission is granted then the case would be taken out of the jurisdiction of the Court of the Native Commissioner but this fact in itself does not preclude the Court from considering whether Mr. Gluckmann's interests are of such a nature as to justify intervention.

The underlying principle of non-joinder is that so long as the rights of the plaintiff are complete he can maintain his action without the joinder of the other parties interested, and if such parties contend that they have sufficient legal rights in the action they may apply to intervene if they so choose.

Two factors are essential to a claim to intervene, viz.

1. The party applying must show that he has an interest in the suit, or that his interests will probably be affected; and

2. That he has a common cause of action or common ground with the party with whom he wishes to join.

It cannot be argued that Plaintiff's rights are not complete. All he asks the Court to do is to restore him to the position he was in before the defective judgment was taken against him. This is very simple and if any third person with no knowledge of the defective judgment should be affected by the restoration, then such person should be given an opportunity to make application to intervene, but where the third person had full notice of the irregularity and notwithstanding this knowledge, takes a bond over the property in question, he than takes a personal risk and is estopped from coming to Court and making application to intervene.

Although the Native Commissioner's Court has no jurisdiction to try a case where a European is permitted to intervene as a co-defendant, yet it does not prevent the Court in considering whether - if such an application should be made irrespective of the forum - it has a reasonable chance of being successful. The Court is of opinion that no third person who takes a bond over property which he knows has a defective title, can afterwards come to Court and apply to intervene as a co-defendant when the person wrongfully deprived of the property seeks redress.

It is difficult to understand why Mr. Gluckmann, an Attorney of the Supreme Court, should have advanced the sum of £100 on property, the title of which he knew to be defective.

In view of all the circumstances the appeal against the dismissal of the two objections is disallowed and the finding of the Native Commissioner on the point is confirmed.

It now becomes necessary to deal with the pleas, which are as follows:-

Plea I is to the effect that Plaintiff's summons is premature and he has no cause of action, because he has failed either.-

(a) to tender defendant £2 paid by defendant in order to get a clearance certificate to enable him to obtain transfer; and

(b) to tender defendant payment of the debt of £100 in security for which the property is presently mortgaged to Gluckmann;

or, alternatively,

(c) to tender defendant payment of £30.17.9 being the balance still owing of the original bond debt of £33.11.0;

or, in the further alternative,

(d) to tender defendant a bond for the said sum of £30.17.9 over the property in dispute, on the same

terms.....

terms as the original bond for £33.11.0; and to tender therewith the cost of the cancellation of the present bond in favour of Gluckmann and also the costs of the new bond for £30.17.9d.

Plea II is to the effect that Plaintiff is estopped from claiming retransfer of the property and damages, on the ground that he was at all material times aware of the proceedings in and resulting from the action in the Magistrate's Court, more especially of the attachment, sale, transfer and bonding to Gluckmann of the property, and that he deliberately and wilfully stood by and allowed Defendant to act to his prejudice and to the prejudice of the others who derive title through or from the Defendant.

Plea III states that Plaintiff is debarred from claiming retransfer of the property by virtue of a verbal agreement between Plaintiff and Defendant; made after the commencement of the action in the Magistrate's Court and before the default judgment therein, to the effect that Plaintiff should at no time raise any objection to the fact that Defendant had instituted action in the Magistrate's Court instead of in the Native Commissioner's Court, and that should Plaintiff fail to extinguish his debt for capital and costs, Defendant would have the right to take judgment against him in the Magistrate's Court and, if necessary, levy execution against Plaintiff's property, the which is now claimed. It is further alleged that Plaintiff acquiesced in Defendant's action in terms of this agreement up to the time Plaintiff applied for the rescission of the default judgment against him in the Magistrate's Court.

Plea IV declares that as a result of Plaintiff's failure to take steps to prevent the sale in execution of the property, its transfer to Defendant, the cancellation of the original bond and the passing of the existing bond, the property has been sold by Defendant to one John Teffo, who has paid the purchase price; and that Plaintiff is therefore not entitled to claim restitutio in integrum and can at best claim damages only.

The original judgment in the Magistrate's Court being void all subsequent acts flowing from such judgment are therefore of no effect and the Court cannot uphold the contention that the Plaintiff could abandon his rights by agreeing not to raise any objection to the irregular procedure followed by the Appellant, or that he is estopped from taking timeous action in protecting his legal rights, and this Court knows of no time limit within which a party must intervene if the other side wishes to follow an illegal course. Moreover, when application was made in the Magistrate's Court for rescission of the judgment, the Appellant concurred, thus cancelling any agreement purporting to have existed between the parties that Respondent would not question the validity of the said judgment. This finding disposes of pleas II, III and IV.

With regard to plea I, the Court holds that the Plaintiff cannot obtain retransfer of the property unless he liquidates the debt still due in terms of the original bond and the amount of £2 disbursed by the Defendant on Plaintiff's behalf. If this plea had been taken in the form of an exception, the Court would have agreed with Defendant's contention that the action is premature but Defendant has joined issue

and therefore the Court must decide what will be a proper judgment to avoid Plaintiff being enriched at the expense of the Defendant.

Appellant admits having been paid an amount of £11.10.6. Any sum paid as costs must be set off against the amount of the original debt as Respondent could not be made to pay costs in an action void ab initio. This leaves a balance of £22.0.6 still due plus £2 disbursed by Defendant on Plaintiff's behalf.

The judgment of the Native Commissioner on Claim I is therefore modified to read. "Judgment for the Plaintiff for the transfer to him of Lot No. 1667, Alexandra Township, at Defendant's expense, subject to prior payment by Plaintiff to Defendant of the sum of £24.0.6d."

There is also an appeal against the award of costs in Claim II. This Court is not prepared to disturb the discretion exercised by the Court below in the award of costs on this claim and the Commissioner's award is confirmed.

As the Respondent has substantially succeeded in resisting the Appeal, he will be awarded costs at the maximum of the scale.

CASE NO. 3.

KOOS MANGALI VS. ALLIE NTLEMEZA.

PRETORIA. 13th March, 1934. Before F.H. Brownlee, Esq., President, Messrs. F.H. Ferreira and J.H. Steenkamp, Members of the Native Appeal Court (Transvaal and Natal Division).

Contract - Immoral consideration - Turpis causa.

An appeal from the Court of the Assistant Native Commissioner, Johannesburg.

WHERE PARTIES LIVING IN AN IMMORAL RELATIONSHIP PURCHASE GOODS WITH THE PROCEEDS OF HONEST EMPLOYMENT, IT CANNOT BE HELD THAT THE PURCHASE AMOUNTS TO AN IMMORAL CONSIDERATION.

The Plaintiff in the Court below sued the Defendant (a) for the return of certain household articles detailed in the summons, alleging that these articles, her property, had been removed by the Defendant. Plaintiff claimed alternatively £26.3.9 the value of the articles; (b) the return of one half of certain domestic articles which are detailed in the summons alleged to have been taken away by Defendant and which were alleged to have been purchased jointly by Plaintiff and Defendant or alternatively, payment of £15 the value of the half share of the articles.

Defendant excepted to the summons on the ground that Plaintiff being a woman had no locus standi in judicio and pleaded that Plaintiff was not the owner of the articles and

that.....

that he (Defendant) had not removed them.

In view of the exception Plaintiff gave notice that she intended to apply for the appointment of her brother Peter Nezant as curator ad litem "to assist her in the action." The Native Commissioner under the circumstances outlined granted permission for Plaintiff to appear in the terms of her application, that is, in terms of the rule for the appointment of a curator ad litem (her brother) "to assist her."

Meantime certain of the articles claimed had been returned by Defendant to Plaintiff who maintained her claim for the balance of the articles.

As the Plaintiff was proceeding with the evidence in her case, Counsel for the Defendant noted an objection on the grounds of non-jurisdiction in that the Plaintiff was a coloured person.

At the conclusion of the evidence for the Plaintiff, Counsel for Defendant asked that an alternative plea be filed viz. "If the Court finds that the articles were purchased by the Plaintiff they were for the purpose of an illicit union and consequently both the claims are irrecoverable as they are based on an illicit agreement", Defendant's Counsel arguing that the articles were purchased on an agreement "to set up a household in adultery" and for that reason the Plaintiff was not entitled to invoke the assistance of the Court, it being urged that the agreement was turpis causa in that the parties were living in adultery.

It is common cause that this action is brought under the common law and not under Native custom.

Normally the action would have been brought by Plaintiff assisted by her husband but it is clear that she has been deserted by him for a number of years, that his whereabouts are unknown and can not be ascertained, and that Plaintiff since the time of desertion has been in the position of a femme sole, during which time she has supported herself.

Dealing with the issue the Native Commissioner gave permission to Plaintiff to appear assisted by her brother. He might, under the circumstances disclosed, have granted her permission to appear unassisted and in the opinion of this Court this would have been the correct procedure. It is held, however, that the action of the Native Commissioner in appointing a curator to assist Plaintiff is in no way contrary to the spirit of the law, in its application in particular to Natives and a selection of terms where the intention was clear should not in effect have debarred Plaintiff from pursuing the action.

In regard to the plea of non-jurisdiction on the ground that Plaintiff is a coloured person, it is stated in evidence that her husband is a Xosa (an aboriginal native of South Africa) and this is uncontradicted. This Court accepts the evidence on the point, holding that the Plaintiff having married a Xosa husband becomes a Xosa and is thus within the jurisdiction of the Court of the Native Commissioner.

The Native Commissioner has found as a fact and in the opinion of this Court rightly, that the furniture and

effects.....

effects referred to in Claim B were acquired by the joint earnings of the parties during the period of their cohabitation.

It is argued that the articles were acquired in the furtherance of and directly connected to an immoral association, and that for this reason they, *turpis causa*, cannot in law be claimed by Plaintiff. Counsel for Defendant cited various decisions, in particular the case of Richards vs. The Guardian Assurance Co. (1907 H.C. 24). None of these decisions appeared to the Court to have a direct bearing on the particular point now at issue. In the opinion of the Court the circumstances under which the furniture and effects were acquired by the parties were not directly associated with or in furtherance of the idea of immoral relations. The Court is satisfied that the property was acquired by the parties for ordinary purposes of utility and no other, and further, that the circumstances under which the furniture and effects were acquired are entirely distinct and separate from the immoral act of cohabitation.

While placing full value upon the arguments of Counsel for the Appellant whose reasonings have been fully considered and carefully weighed, this Court is of opinion that.-

1. The action of the Native Commissioner in appointing a curator "to represent" Respondent is not out of order.

2. In this case the ground of *turpis causa* does not apply; and

3. Though the Appellant may not actually have removed or taken the articles claimed he had done so constructively by retaining them in his possession to the exclusion of the Respondent.

The judgment of the Native Commissioner is upheld and the appeal is dismissed with costs. Fee for conducting the appeal to be £3.3.0 (three guineas).

1940 (T. N) 100.

CASE NO. 4.

AFRICAN BROTHERHOOD ASSOCIATION VS. ISAAC GANGA.

PRETORIA. 14th March, 1934. Before F.H. Brownlee, Esq., President, Messrs. F.J. Forrester and J.I. Incampe, Members of the Native Appeal Court (Transvaal and Natal Division).

Universitas - Locus standi in judicio - Objection.

An appeal from the Court of the Additional Native Commissioner, Pretoria.

THE ASSOCIATION CALLED IS NOT A UNIVERSITAS OR CORPORATE BODY CAPABLE OF SUING AND BEING SUED AS SUCH.

The Plaintiff Association (now Appellants) sued the Defendant (now Respondent) in the Court below in his capacity

as.....

as Treasurer of the Association for £34.5.0 and £57.12.3, the property of the Association, which, it is alleged, Respondent had withdrawn from the funds of the Association and for which he had not accounted.

The Respondent's Counsel objected to the summons on the grounds that the Appellant Association had no locus standi in judicio to sue in its own name in that it is not an incorporated association.

The Native Commissioner, upholding the objection dismissed the summons with costs. An appeal was noted against the decision and this Court is called upon to decide the point as to whether or not the African Brotherhood Association is a body capable of suing and being sued, in its own name.

Appellant's Attorney quoted the case of Standard Building Society vs. Morrison, 1932 A.D. 229 in support of his contention that the Appellant Association is a universitas and as such is entitled to sue and be sued.

The case quoted is authority for the statement that "an association of individuals does not always require the special sanction of the State in order to enable it to hold property and to sue in its corporate name in South Africa. Whether it can or cannot depends upon the nature of the association, its constitution, its objects, and its activities."

As far as the record shows, the African Brotherhood Association consists of a society of fifteen Natives, its present membership, of whom one is presumably Chairman and another Secretary and Treasurer. There is no Board of Directors or other executive authority although the society appears to have been established in May, 1924. The constitution consists of nine rules. The objects of the society are to render financial assistance to its members. Membership fees of 7/6 for the first month and thereafter 5/- per mensem are charged. A member may borrow a sum not exceeding £1 for which he must pay interest. If the amount borrowed is not repaid within a month, he is liable to a fine of 2/- and if he neglects to repay the loan within two months, he must leave the society.

There is also provision for the imposition of a fine of 2/- on a member who fails to attend a meeting of the society when called upon to do so.

The General Treasurer has control of the funds.

Rule No. 7 mentions members of the Committee but it does not indicate how this Committee comes into being.

There being at present only fifteen members, the activities of the association are naturally very restricted.

There is no provision in the so-called rules whereby the association may hold property apart from its members, nor is there any mention of the manner in which it may dissolve itself.

In view of the facts outlined, this Court comes to the conclusion that the African Brotherhood Association is not

a.....

a university or corporate body capable of suing and being sued as such, and the appeal is therefore dismissed with costs.

CASE NO. 5. 1944 (T+N)49.

MLANJA NDLELA Vs. TUKILE NTIYANE.

DURBAN. 11th April 1944. Before F.H. Brownlee, Esq., President, Messrs. E.A. Lowe and C.I. Nicholson, Members of the Native Appeal Court (Transvaal and Natal Division).

Customary union - Essentials - Widow or divorced woman - Section 4, Zululand Code of 1875 - Illicit association.

An appeal from the Court of the Native Commissioner, Mtunzini.

ALTHOUGH FEW FORMALITIES ARE OBSERVED AT THE RE-MARRIAGE OF A WIDOW OR DIVORCED WOMAN, CERTAIN PROVISIONS IN THE ZULULAND CODE OF 1875 MUST BE COMPLIED WITH BEFORE ANY MARRIAGE CAN BE HELD TO BE VALID.

This case comes on appeal from the Court of Native Commissioner, Mtunzini.

It appears from the record that in the year 1921 Chief Sinayi successfully sued his wife for divorce on the grounds of her adultery with the present Appellant. The woman subsequently proceeded to the latter's kraal where it is alleged by Respondent, her guardian, that she has remained practically ever since. In 1931 a writ was issued by Chief Sinayi in pursuance of the judgment in the original divorce case and Respondent was mulcted in eight head of cattle (return of lobolo). The issue of this writ would seem to have been a highly irregular proceeding for which no explanation is forthcoming in the record. Respondent then instituted an action in the Chief's Court for recovery of an equivalent number of cattle from Appellant. The Chief dismissed the summons, but on appeal to the Native Commissioner Respondent was awarded the cattle claimed, the presiding officer finding that a marriage had taken place between Appellant and Nogwenela, the divorced wife of the Chief. Against this judgment appeal is brought. For Appellant it is contended that although he may have cohabited with Nogwenela no marriage has ever taken place, nor has payment of lobolo been arranged and therefore he has not incurred any liability for the payment of lobolo.

After a careful perusal of the record this Court comes to the conclusion that on the evidence adduced, it cannot support the Acting Native Commissioner's finding that a marriage subsists between Appellant and the woman Nogwenela.

What the Court was asked to recognise as a marriage, or customary union, to use the terminology of Act 38 of 1927, was an irregular relationship which started in the adultery of the parties, and which led to the woman's divorce from her husband Sinayi; this relationship appears to have continued

spasmodically .....

specifically - possibly over the whole period of twelve years from the time of the divorce until commencement of the action for payment of lobolo. The only evidence that may be regarded as unbiassed is contradictory. Mzamane bases on common report his statement that the parties were married. The witness Mpende, who is the Appellant's Chief, says quite definitely that the parties were not married to each other. He goes further and says the woman lived anywhere, which may also be considered as common report. The Native Commissioner says that he could not accept this witness' evidence, because the witness was unaware of the fact that the woman had been divorced twelve years previously. But this in our opinion is no ground for disbelieving Mpendeme when he says the parties were not married; the deduction which can be fairly drawn from his ignorance is not that the parties were not married to each other, but that the woman was in the habit of living anywhere - it indicates a certain looseness of life on her part.

The fact too that the Respondent waited ten years or more after the relationship between his sister and Appellant came into being, before taking action, tends to indicate that such relationship was of a very loose nature, where the circumstances do not justify this Court in saying that the parties were united in a customary union, as defined in the Act, that is, the association of a man and a woman in a conjugal relationship according to native law and custom, where neither the man nor the woman is party to a subsisting marriage.

While it is common cause that few formalities are observed at the re-marriage of a widow or divorced woman, certain provisions in the Code of Native Law must be complied with before any marriage can be held to be valid. None of these are shewn to have been observed, nor have the requirements of Zulu custom in such cases been met. Another significant point is that Appellant, in evidence which was not contradicted, said he had never paid tax in respect of this woman although paying for the others whom he had married. To hold that - when continued for a number of years - such an association, without any attempt to legalise the position having been made by any of the parties, constitutes a customary union, would be contrary to Native law and custom and subversive of the Zulu moral code as well as being, contra bonos mores.

The appeal will be allowed with costs and the judgment of the lower court altered to read "For Defendant with costs."

CASE NO. 6.

NDUNA MTETWA VS. MQUNDANE MTETWA.

DURBAN. 12th April, 1934. Before F.H. Brownlee, Esq., President, Messrs. E.W. Lowe and C.H. Nicholson, Members of the Native Appeal Court (Transvaal and Natal Division).

Lobolo - Heirless house - Allocation by Kraalhead.

An appeal from the Court of the Native Commissioner, Pinetown.

A KRAALHEAD IS THE ABSOLUTE OWNER OF ALL KRAAL PROPERTY AND HE MAY ALIENATE IT IN ANY WAY HE PLEASES WITHOUT CAUSING ANY OBLIGATION BETWEEN ONE HOUSE AND ANOTHER.

The.....

The Appellant in this case sued the Respondent in the court of Chief Ngijima and obtained judgment for six head of cattle. The Respondent appealed to the Court of the Native Commissioner, Pinetown, where the judgment of the Chief was set aside with costs on the higher scale. The Appellant now brings appeal against the judgment of the Court of the Native Commissioner.

The facts of the case are as follows:-

Respondent is the eldest son and general heir of the late Mxakaza (hereinafter referred to as the deceased), he is the eldest son of the Indhlunkulu house. The Appellant is the eldest son and heir of the Iqadi house of the same kraal. In the Court below the Appellant claimed six head of cattle paid as lobolo for his half sister Makaza, daughter of the father of the parties by his second (Ikohlo) wife.

The grounds on which Appellant's claim was based are:-

(a) That the lobolo paid for his only full sister (Kayeda) went to the Indhlunkulu because the lobolo for his (Appellant's) mother came from that house.

(b) That when the cattle derived from the lobolo of Kayeda accrued to the Indhlunkulu his father undertook that he should receive the balance of the lobolo (six head of cattle) still payable in respect of the girl Makaza.

The Respondent denied the alleged allocation and in his grounds of appeal to the Court of the Native Commissioner he maintained that even if such allocation had been made, it was not binding on the Indhlunkulu and further that there can be no "Ukwetula" in favour of the Iqadi house from the Ikohlo house.

The Native Commissioner in his judgment held, inter alia, that as the house to which the girl Makaza belonged was heirless, the heir of the Indhlunkulu house (Respondent) became automatically heir of such house and that the kraalhead could not have taken property from such house for the benefit of Appellant's house without creating an obligation for the return of such property to the Indhlunkulu house i.e., that he could not make the property over to Appellant as a gift.

Appellant's grounds of appeal to this Court are that the Native Commissioner erred in his application of the Law.

In arguing the case before this Court Counsel for Appellant quoted among other cases that of Bhekizita Mapumulo vs. Jabulani Mapumulo, 1913 N.H.C. Part II (3) in which it is clearly laid down that the property of an heirless house becomes kraal property unless such house had been affiliated to another.

It is clear from both the new and the old codes of Native Law that a kraalhead is the absolute owner of all kraal property and that he may alienate it in any way he pleases without creating any obligation between one house and another.

For.....

For the Respondent, Counsel has endeavoured to show that the house to which the girl Makaza belonged has not definitely been proved to be heirless as their is no irrefutable evidence that the wife (Ngabisile) of this house is dead and that she might still bear an heir. This Court is unable to accept this view as throughout the proceedings not the slightest suggestion was made by any witness that the house was not heirless.

As, therefore, the lobolo paid - or to be paid - for the girl Makaza [illegible] to a kraal property belonging as it did to an [illegible], the only question to be decided is whether the [illegible] the balance of lobolo payable for [illegible] by Appellant.

It is not disputed that the lobolo of Appellant's full sister went to the Indlunkulu. It would therefore only be natural that he should ask his father where he was to get lobolo for a wife; further, it is to be expected that his father would desire to deal fairly with his son with whom he was living and whose earnings, or part thereof, were regularly handed over to him. (Respondent had at that time established his own kraal).

This Court comes to the conclusion that the allocation was in fact made as a gift and that the Appellant is entitled to succeed in his appeal.

The appeal is therefore allowed with costs, the Native Commissioner's judgment set aside, and the judgment of the Chief for Appellant for six head of cattle is restored with costs.

1937 (T.N) 1. 1946 (T.N) 11
1938 (- -) 145, 153, 155, 188. 1947 (-) 78.
1940 (- -) 85. CASE NO. 7. 1944 (C.O) 85.
1945 (- -) 54 MBONGWE DHLAMINI VS. SILWANA DHLAMINI.

DURBAN. 17th April, 1934. Before F.H. Brownlee, Esq., President, Messrs. E.W. Love and C.H. Nicholson, Members of the Native Appeal Court (Transvaal and Natal Division).

Obligations of kraalhead - Earnings of kraal inmates; claim in respect thereof - Section 35(1) Natal Native Code.

An appeal from the Court of the Native Commissioner, Mahlabatini.

A KRAALHEAD IS ENTITLED TO A REASONABLE SHARE OF THE EARNINGS OF THE INMATES OF HIS KRAAL.

This action arises from a claim made by Respondent for wages for services rendered during the South African War (1899-1902) wherein it is alleged that he was in charge of a wagon and span of oxen owned by Appellant's [illegible] (since dead). He alleges that he was [illegible] wages, together with other moneys, were to be retained for the purchase of a family farm. The farm has not been purchased and for that reason he now brings the action claiming that the delay has arisen from the fact that he believed the farm would be purchased.

The.....

The suit was originally brought before the Court of Chief Matole who gave judgment in favour of Respondent for £32, that is for sixteen months' service at £2 a month. From this judgment an appeal was lodged with the Native Commissioner, Mahlabatini, who upheld the judgment of the Chief.

An appeal has now been lodged against the finding of the Native Commissioner on the grounds:-

1. That the judgment is against the weight of evidence.

2. That the judgment is contrary to law and Native custom.

3. That the claim is prescribed.

4. That the evidence of witnesses Maxaga and Langalibalele is hearsay or irrelevant.

5. That Appellant is sued in his personal capacity.

6. That proper procedure has not been followed.

7. That the Native Commissioner gave judgment as "Magistrate".

Certain facts emerge from the evidence, of which the significance of some appear to have been overlooked by the Native Commissioner.

In any claim where the subject matter upon which it is based arose many years prior to action being taken the Court will require the clearest proof that the action is well grounded, that it is supported by good and sufficient reasons for the delay in the issue of process, and that it is clear that the delay has caused no prejudice to the other party.

The subject matter of this action arose some thirty years ago; this being so the Plaintiff in the Court below would be expected to comply in the first instance with the three requirements indicated.

This Court is of opinion that the evidence adduced for the Plaintiff under the circumstances outlined (some of which is hearsay) is inconclusive, that Plaintiff's reason for delaying action, viz. that his earnings were to be devoted to the purchase of a farm, do not appeal to this Court as being sound and sufficient, especially in view of the fact that Jubane, who is said to have had the custody of Respondent's earnings, and who must have had a full knowledge of the matters at issue, died in 1910, at which juncture it might reasonably and normally be expected that the claimant would take action, if at all, and finally, in this connection the fact of Jubane's death is undoubtedly prejudicial to Appellant's interests in that his evidence would have been in favour of Appellant.

The Native Commissioner has found as a fact, and this Court sees no reason to disagree with his finding, that the Respondent was an inmate of the kraal of which the late Jubane was head, but in coming to this conclusion he seems to have overlooked (as did the Chief) the old and well established custom embodied in section 26(1) of the present Code, which reads as follows: "A kraalhead is entitled to the earnings of his minor children and to a reasonable share of the earnings of the other

members ....

members of his family and of any other kraal inmates....."

Assuming that the late Jubane had received and retained the earnings of the Respondent, there is on the other hand the fact that he presented him with a heifer on his return from active service and at the time of his marriage handed over three head of cattle to him to assist with lobolo and it is only reasonable to assume that the Respondent being an inmate of the kraal was provided by Jubane with the necessities of life.

In our opinion, bearing in mind all the circumstances of this case, the liabilities of the kraalhead, such as they may have been, were discharged with reasonable liberality and that no further claim in the matter rests upon the heir of the kraalhead.

The appeal is allowed and judgment is entered for Appellant with costs in all Courts.

Per Lowe

I have come to the same conclusion that the Appellant has been prejudiced in the proceedings in the lower Court, but on somewhat different grounds.

This case is one which was heard by the Assistant Native Commissioner in the lower Court as an appeal from the judgment of a Chief. Before dealing with the cause at issue between the parties, it is necessary to make some remarks upon the procedure adopted by the Assistant Native Commissioner in hearing and determining the issue, as he is required to do under rule 8 of Chiefs' Civil Courts, published under Government Notice No. 2255 of the 21st December, 1928.

When an appeal from a Native Chief's judgment is lodged, the Native Commissioner is required by rule 6, among other things, to fix a day for the hearing of the appeal. Having fixed a day, the Native Commissioner is then required under rule 8, to hear and determine the case as "if it were a case of first instance" in his Court. The words of rule 6, viz. for the hearing of the appeal, may have led to confusion and may explain why the provisions of rule 8 have not been carried out in this case.

The procedure to be adopted in hearing the appeal as laid down in rule 8 clearly means, among other things, that the person who institute the original action is under the onus of proving his case in the Native Commissioner's Court before the Defendant can be called upon for his defence notwithstanding that the latter may be the appellant from the Chief's judgment.

Again, my view of the meaning of this rule, reading it in conjunction with section 12(4) of the Act is that in determining the case, the Native Commissioner in addition to confirming, setting aside or altering the Chief's judgment, as he is entitled to do under the relative section of the Act, is required to give his own judgment on the merits of the case between the parties, the evidence in which he has heard and recorded.

Now in the case before us, the Assistant Native Commissioner, after hearing the evidence and recording the

evidence...

evidence of the Chief who tried the case, which I take it he did to conform with rule 7, proceeded to call the Appellant who was Defendant in the Chief's Court, to give his evidence, presumably to show why the Chief's judgment should be upset, seeing that he was the party against whom the Chief gave judgment, and who lodged the Appeal with the Native Commissioner.

This procedure was clearly irregular, in that it threw, as the present Appellant in his grounds for appeal rightly says, a burden on him - adding to his prejudice - to deny a claim which had not yet been brought against him.

The Assistant Native Commissioner records his judgment as "Appeal dismissed with costs." This is in keeping with section 72(4) of the Act but does not comply with rule 8, in that he has not determined the matter as a case on first instance in his Court. In this respect there are grounds for supporting the Appellant's contention in his grounds of appeal that the judgment is against the law and that proper procedure has not been followed. No doubt what the Commissioner means by this judgment is that he sustains or confirms the Chief's judgment and enters judgment for the Plaintiff for the amount of £32 with costs.

Against this judgment the appeal is brought on various grounds, none of which, other than those considered above, seem to be very important.

The Respondent worked for sixteen months during the Anglo Boer War as a voorloper with a wagon and team provided by Jubane, the Appellant's father. Respondent, son of Nongwalendi, was a minor at the time he left with the wagon. With his father he was an inmate of the kraal of Jubane who was the recognised kraalhead. Payment for the transport in question was made direct by the authorities to Jubane.

On Respondent's return Jubane presented him with a heifer, and later on when he desired to marry, gave the young man three head of cattle towards the lobolo he needed. Jubane died in 1910.

The Respondent sues now for the return to him of the amounts received by Jubane in connection with his - Respondent's - services.

The Chief gave judgment for the Respondent, which was affirmed and repeated by the Assistant Native Commissioner.

It is clear from the facts that the Respondent Sulwana was an inmate of the kraal of Jubane, the kraalhead, who was entitled to a reasonable share of Respondent's earnings, and the facts of this case do no more than fit the custom.

CASE NO. 8.

MUNYAMADUSHWA MADUSHI VS. MALAMANI VILEGASI.

DURBAN. 19th April, 1934. Before T.R. Prowtlee, Esq., President, Messrs. E.J. Lowe and C.H. Nicholson, Members of the Native Appeal Court (Transvaal and Natal Division).

Sisa custom - Section 150(3) Natal Native Code - Account of cattle.

An.....

An appeal from the Court of the Native Commissioner, Stanger.

A NATIVE, TO WHOM CATTLE HAVE BEEN "SISAED", COMPLIES WITH THE REQUIREMENTS OF SECTION 150 OF THE NATAL NATIVE CODE IF HE ACTS IN ACCORDANCE WITH INSTRUCTIONS FROM A PERSON WHOM HE KNEW TO BE NOT ONLY PRIVY TO THE ARRANGEMENTS FOR THE PURCHASE OF THE CATTLE BUT ALSO THE ELDER BROTHER AND KRAALHEAD OF THE PARTY WHO "SISAED" THE CATTLE.

In the Court below Plaintiff sued Defendant for £30 the value of two cattle and their increase alleged to have been sisaed to Defendant about 1925. The Native Commissioner gave judgment for the Defendant with costs. Against the judgment an appeal has been lodged with this Court on the grounds that the judgment is against the weight of evidence and contrary to law. There was another ground of appeal but this has been abandoned.

From the evidence it appears that Plaintiff (present Appellant) was engaged to work for an Indian, Palwan Maharaj, at a wage of £1 10.0 a month, until he had earned £10, as value for which he had received a bull and cow; these were the cattle sisaed with Defendant.

Plaintiff worked for some time with Palwan and then deserted his service. The length of time he worked is in dispute but it is clear that he had not earned the amount due in respect of the cattle before the desertion took place.

One Sibusiso, who was Palwan's manager, together with Boshwayo, who was Plaintiff's elder brother and kraalhead, and both of whom were privy to the cattle transaction, went to Defendant and stated that Boshwayo was removing the cattle. Upon their representations Defendant duly handed over the cattle.

In the particular circumstances of this case we are satisfied that Defendant acted in a bona fide manner and was justified in handing over the cattle to Boshwayo. He acted in accordance with instructions from the latter whom he knew to be not only privy to the arrangements for the purchase of the cattle, but also the elder brother and kraalhead of Plaintiff. This is the explanation of the matter which Defendant subsequently gave to Plaintiff and in our view it covers such account of the cattle as is required to be given by section 150 of the Code.

The judgment of the Native Commissioner has been based mainly upon questions of fact. In the opinion of this Court he has found correctly on the evidence, and his judgment is in accordance with law. The appeal is dismissed with costs and the judgment of the lower Court confirmed.

1934. (T. N.) 36.
1936 (") 36, 76.
CASE NO. 9. 1939 (") 55, 82.

YUBEIE MKIZE VS. BONIFASE MKIZE.

PIETERMARITZBURG. 23rd April, 1934. Before F.H. Brownlee, Esq., President, Messrs. E.V. Love and C.H. Nicholson, Members of the Native Appeal Court (Transvaal and Natal Division).

Appeal.....

Appeal from Chief's Court - Award of Costs - Rules 5, 6 and 8, Government Notice No. 2255 of 1928.

An appeal from the Court of the Native Commissioner, Greytown.

AN APPEAL FROM A CHIEF'S COURT SHOULD BE DEALT WITH FIRST AND FOREMOST AS AN APPEAL. RULE 8 MERELY LAYS DOWN THE MANNER IN WHICH THE APPEAL SHALL BE HEARD.

This is an appeal from the Court of the Native Commissioner, Greytown. The case came before that Court by way of appeal from the judgment of Chief Kululа.

The main facts are that Respondent sued Appellant before the Chief for £13 made up as follows.-

(a) £4 advanced to Appellant's father.

(b) £7 advanced as lobolo in connection with the marriage of Appellant's brother.

(c) £2 advanced to Defendant personally.

The Chief gave judgment for Respondent for £13 and Appellant appealed to the Native Commissioner.

The Native Commissioner after hearing the appeal in the manner provided for in the rules gave judgment for Respondent for £2 (item (c) above) and the Chief's judgment was amended accordingly, but the Appellant was ordered to pay costs. He has now brought the matter on appeal to this Court against (a) the Native Commissioner's judgment in favour of Respondent for £2; and (b) the order of the Native Commissioner that he (Appellant) should pay the costs in the Native Commissioner's Court.

This Court after perusing the record and hearing argument by Counsel for both parties has come to the following conclusions:-

(a) That the appeal in regard to the £2 should be dismissed; and

(b) That the Native Commissioner took an incorrect view of the position in regard to appeals from Courts of Native Chiefs as laid down in section 12 of Act 38/1927 and in rules 5, 6 and 8 of the rules for Native Chiefs' Courts. We are

We are of opinion that an appeal from a Chief's Court should, under the section and rules referred to, be dealt with first and foremost as an appeal. Rule 8 merely lays down the manner in which the appeal shall be heard. This rule reads, inter alia, "The Native Commissioner shall hear and determine the case as if it were a case of first instance."

This view of the position is borne out by the decision of this Court in the case of Charlie Nxele vs. Lamfete Nxele, 1930 N.A.C. (N. and T.) P -H.R. 80.

Therefore in such an appeal, if the Appellant succeeds

to....

to a substantial degree he is entitled to his costs.

In the present case Appellant before the Native Commissioner succeeded in having the judgment against him reduced from £13 to £2, and there would seem to be no reason why he should be deprived of his costs.

The appeal will be (a) dismissed in regard to the £2 and (b) upheld in regard to the costs, Appellant being awarded costs in the lower Court, and the judgment of the Native Commissioner altered accordingly.

As Appellant has succeeded to a substantial degree in his appeal, the Respondent is ordered to pay costs of this Court.

Per Lowe (dissenting).

I have not been able to arrive at the same conclusion regarding the appeal as to costs. I am not satisfied that rule 8 was framed to obviate a plea of res judicata and to provide for a written record, and no more. Had that been all the rule was intended to do, there would scarcely have been the need for the words used, "hear and determine the case as if it were a case of first instance", nor for the last clause of the rule.

In incorporating Courts of Native Chiefs with our judicial system, a practice and procedure which are at variance with our own in some very important aspects have been given a degree of recognition. Under our system there is a continuity of practice running through all our Courts, from the lowest to the highest, so that no party may suffer prejudice in the passing of an action from one Court to a higher by any break or variation in judicial practice. The highest Court lays down the practice which becomes the practice of all Courts.

Courts of Native Chiefs are however sui generis. In the first place their judicial practice is not based upon the decisions of the higher Courts. In the important question of onus, their practice varies from our own. The onus is not on the party who makes the charge or claim to prove it. The onus is on the party suffering the charge or claim to rebut it. Again hearsay evidence, however remote, is acceptable evidence. It becomes manifest, then, that under these circumstances, there is danger of prejudicing the parties, when a case passes from the lower Court, where Native judicial practice is in vogue, to the higher where a different, that is, our own, practice obtains. It is significant also that although as Courts of first instance, Courts of Chiefs stand on the same footing as those of Native Commissioners, appeals from Chiefs' Courts, as we know, lie to the Native Commissioner and not to this Court.

There is not possible the continuity of practice and procedure, which our system of jurisprudence provides for and demands, for Native Commissioners' Courts are bound by our own practice and procedure under which the onus is placed on the party who makes the charge, and the acceptance of hearsay evidence is bound by strict rules.

To provide for the switch over from one practice to

another.....

another, some machinery was required. This machinery of necessity had to provide for a definite limit to the Native practice and procedure, after which our own practice and procedure must come into use. There was in my view no other way, but a clear break from the practice which varies from our own in so many important aspects.

This to my mind is the real significance of rule 8, and explains the words "hear and determine" in the rule, and gives meaning to the last clause of the rule.

In this case the Commissioner in my judgment was right in his decision on the question of costs. Under our practice and procedure, the Respondent became the Plaintiff and was entitled to costs. To say that the Appellant, having succeeded in the appeal from the Chief's Court to the Native Commissioner's Court, becomes entitled to costs appears to me to establish a link between our practice and that of the Chief's Court, to limit and confine which to such Courts was in my mind the particular intention of rule 8.

In my view the appeal on the question of costs should be dismissed with costs.

CASE NO. 10.

MTANYANA NDHLOVU VS. DHLOTOVU NDHLOVU.

PIETERMARITZBURG. 24th April, 1934. Before F.H. Brownlee, Esq., President, Messrs. E.V. Love and C.H. Nicholson, Members of the Native Appeal Court (Transvaal and Natal Division).

Native Estate - Enquiry under Government Notice No. 1664/1929, Section 3(3) - Irregular examination of witnesses - Parties entitled to be present.

An appeal against the finding given in an enquiry held by the Native Commissioner, Dundee.

AN ENQUIRY UNDER SECTION 3(3) OF GOVERNMENT NOTICE NO. 1664 OF 1929, BEING OF A SEMI-JUDICIAL NATURE, SHOULD BE CONDUCTED AS FAR AS POSSIBLE IN THE SAME MANNER AS JUDICIAL PROCEEDINGS.

The appeal in this case is from the finding of the Native Commissioner, Dundee, in an enquiry held under Section 3, sub-section (3) of Government Notice No. 1664 of 1929, into the administration and distribution of property in a native estate.

The proceedings were conducted mainly by way of affidavit the which were put in by the attorneys for the parties. There was also viva voce evidence adduced.

It appears that after the former evidence had been tendered and placed on record the Native Commissioner, as he was entitled to do, called two witnesses, Norman Dhlamini and Mabeduzana Ndhlovu whose testimony was heard and recorded in the

absence....

absence and without the knowledge of either party or his representative, whereafter the Native Commissioner gave a finding on the facts.

It is not proposed nor does it appear necessary at this juncture to discuss the merits of the Commissioner's finding as in our opinion the admission of evidence in the absence of the parties neither of whom has had the opportunity of examining or traversing it is irregular and inconsistent with what we believe to be the intent of the section of the Government Notice quoted which states, inter alia, "the Native Commissioner shall summon before him all the parties concerned and such witnesses as he may consider necessary."

Although the enquiry was held by the Native Commissioner in his administrative capacity, it was of a semi-judicial nature, and we feel that no part of it should have been conducted in the absence of the parties, both of whom were represented by attorneys.

The finding of the Native Commissioner is set aside and the proceedings are referred back to him in order that Appellant may be given the opportunity of traversing the evidence of the witnesses Norman Dhlamini and Mabeduzana Ndhlovu either by way of affidavit or otherwise; either party to be entitled to call such further evidence as he may desire and thereafter the Native Commissioner to give a finding in the light of the evidence as a whole.

The costs of this appeal to abide the issue.

Rider by Nicholson (Member of Court).

The rule under which the enquiry was held lays down that the Native Commissioner shall summon all the parties before him and such witnesses as he may consider necessary.

While it cannot be held that the filing of affidavits is irregular, I feel that enquiries of this nature which amount more or less to civil actions between the disputants should as far as possible be conducted in much the same manner as judicial proceedings i.e., that witnesses should give their evidence viva voce before the Native Commissioner and in the presence of the parties and that an opportunity should be given of cross-examination and re-examination. Such enquiries may be administrative but they are at the same time partly judicial in that the Native Commissioner must give his finding and such finding is subject to the right of appeal to this Court.

1936 (T.N) 52.
1943 (") 38.

CASE NO. 11.

NTETSHANA JAPA D/A VS. NOMATSHENI SINDANI D/A AND NLAHLENI SINDANI (jointly and severally).

PIETERMARITZBURG. 3rd July, 1934. Before Howard Rogers, Esq., Acting President, Messrs. H.G.W. Arbuthnot and R.W. Hancock, Members of the Native Appeal Court (Transvaal and Natal Division).

Defamation .....

Defamation - Privilege - Express malice - Sections 132 and 141, Revised Code of Native Law - Liability of guardian for delicts of ward.

An appeal from the Court of the Native Commissioner, Richmond.

A KRAALHEAD HOLDS A POSITION OF AUTHORITY UNDER THE NATAL CODE OF NATIVE LAW IN RELATION TO THE INMATES OF HIS KRAAL AND DEFAMATORY WORDS, ADDRESSED TO THE KRAALHEAD HIMSELF OR TO SOME OTHER PERSON OF AUTHORITY IN THE KRAAL INVESTIGATING A MATTER UNDER THE KRAALHEAD'S INSTRUCTIONS, ARE UTTERED ON A PRIVILEGED OCCASION. THE PRIVILEGE, HOWEVER, CONFERRED BY THE PROVISO TO SUB-SECTION (2) OF SECTION 132 OF THE CODE IS NOT ABSOLUTE BUT QUALIFIED AND IT OBTAINS ONLY IN SO FAR AS THE DEFAMATORY WORDS ARE UTTERED IN GOOD FAITH AND NOT WITH EXPRESS MALICE.

In September, 1933, the present Appellant instituted in the Court of Chief Ndunge of the Richmond District, an action against Nomatsheni Sindani duly assisted by her father Mlahleni in which he claimed the sum of £10 as and for damages by reason of the Defendant having falsely accused him of having seduced and caused her pregnancy.

The Chief entered the following judgment in the matter: "Judgment for Plaintiff for £10, with costs, if it should be proved, when the child was born, that Plaintiff was not the father."

The Chief's judgment was taken on appeal before the Court of the Native Commissioner, Richmond, which, in terms of section eight of the regulations framed under section twelve of the Native Administration Act, No. 38 of 1927, and published under Government Notice No. 2255 of 1928, proceeded to hear and determine the case as if it were one of first instance in that Court. After hearing and recording the evidence, the Native Commissioner upheld the appeal and altered the Chief's judgment to one of absolution from the instance with costs.

On the 22nd March, 1934, the present Appellant, having regard to the provisions of section one hundred and forty-one of the Revised Natal Code of Native Law promulgated under Proclamation No. 168 of 1932, issued in the Court of the Native Commissioner, Richmond, a fresh summons against "Nomatsheni Sindani, duly assisted by her father Mlahleni Sindani, and the said Mlahleni Sindani, jointly and severally", claiming the same amount on what was the same cause of action, though somewhat differently expressed in the summons.

The first Defendant, Nomatsheni, filed a plea admitting that she had used the words complained of but averring that she had done so without malice and in a genuine belief that what she said was true. She pleaded further that the amount claimed as damages was excessive. The second Defendant pleaded that he was not liable in respect of any defamatory words which may have been uttered by his daughter the first Defendant.

At the hearing, the evidence taken in the previous proceedings before the Native Commissioner was put in by consent and no further evidence was led by either side.

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The Native Commissioner gave judgment for the Defendants and awarded costs against Makubeni, the Plaintiff's guardian.

The Native Commissioner's reasons for judgment read as follows.

"(1) Having regard to the circumstances of the case, and in view of section 132 (2) of the Natal Code of Native Law, the Court found that the words used were privileged, having been addressed to Plaintiff's relatives and the authorities.

"(2) In view of section 51 of the said Native Code Defendant was granted costs against Plaintiff's father or guardian for instituting proceedings on behalf of his ward without the permission of the Native Commissioner first had and obtained."

Against the Native Commissioner's judgment an appeal was noted by Plaintiff's Attorney on the following grounds:-

"1. That the words used were not privileged, as found by the Native Commissioner, nor was privilege pleaded, or even raised during the progress of the case.

"2. That on the facts, the onus of proving the truth of the words (admittedly used) was not discharged by the Defendant.

"3. That the Native Commissioner's award of costs against the Plaintiff's guardian under section 51 of the Native Code, was not justified, in view of the fact that such guardian did not institute the action, but such was instituted by the Plaintiff himself - a full grown man - merely with the assistance of his kraal head as guardian, which assistance was merely superfluous."

At the hearing of the appeal, Mr. Thrash appeared for the Appellant and Mr. Becker for the Respondents. During the course of the argument Mr. Thrash abandoned the third ground of appeal.

In reference to the first ground of appeal it is obvious that the first Defendant's plea though not so expressed was in effect that of privilege relying as she clearly did on the proviso to sub-section (2) of section one hundred and forty-two of the Revised Code of Native Law which lays down that no action for defamation will lie if the words used were addressed to any person in authority, with reference to the Plaintiff or Complainant in good faith and not with express malice.

Mr. Thrash in effect admitted that the defence raised was that of privilege but contended in the first place that the defamatory words were not uttered on a privileged occasion in that they were not addressed to any person in authority.

In his contention the Court is unable to concur. From the evidence, it is clear that the words complained of were addressed in the first instance by the first Defendant to her mother when the latter on instructions from the kraalhead, Nomatsheni's father and guardian, Mlahleni, questioned her as to

her....

her condition; that they were repeated when the kraalhead questioned her himself; and that they were again repeated in the presence of the inmates of Plaintiff's kraal, when on instructions from Mlahleni, the first defendant, her mother and another woman proceeded further to deal with the matter under Native custom. A kraalhead certainly holds a position of authority under the Natal Code of Native Law in relation to the inmates of his kraal and the defamatory words were on each occasion addressed to the kraalhead himself or to some other person of authority in the kraal who was investigating the matter under the kraalhead's instructions.

The Court accordingly comes to the conclusion that each of the occasions on which the defamatory words were uttered was privileged.

The privilege, however, conferred by the proviso to sub-section (2) of section one hundred and thirty-two of the Code is not absolute but qualified and it obtains only in so far as the defamatory words are uttered in good faith and not with express malice.

Here it should be mentioned that in the opinion of this Court the terms "express malice" used in the sub-section referred to means something more than the ordinary "animus injuriandi"of our law. It is in fact an English law term meaning actual ill-feeling or malice in the popular and general sense (vide Reynolds vs. Ainsley 1904 T.S. 870). Under the common law, if a defamatory statement is made the existence of "animus injuriandi" is presumed but if the occasion be privileged this presumption as to "animus injuriandi" is rebutted and the existence of such "animus" must be affirmatively established by the Plaintiff. The sub-section of the Code which we are considering in the present case should be interpreted in accordance with this principle of the common law and it therefore follows that once the defendant establishes the privileged occasion the plaintiff must affirmatively prove that the defamatory words were uttered either "mala fide", or if uttered "bona fide", were actuated by express malice, that is with actual ill-will towards himself. If the plaintiff can show that the defendant published the defamatory statement not in good faith but "mala fide", it follows that the defendant has abused or exceeded the limit of the privilege, and cannot claim the benefit thereof.

If the Plaintiff's story is to be believed in the present case, he ceased having any relations whatsoever with the first Defendant some six months before she conceived and her statement that he had seduced and rendered her pregnant could not possibly have been made "bona fide".

If on the other hand the first Defendant's story is to be believed, the Plaintiff did actually seduce and render her pregnant and she was quite entitled under the circumstances to make the statement she did about him.

The matter accordingly resolves itself into a question of credibility of evidence as between the Plaintiff and the first Defendant and careful consideration of the record leads this Court without hesitation to accept the testimony of the Plaintiff in preference to that of Nomatsheni.

The.....

The Plaintiff frankly admitted that he formerly courted Nomatsheni and as her lover in accordance with Native custom had "thlobonga" relations with her over a period of some months. He states that when taxed by the woman with responsibility for her seduction and pregnancy he denied the allegation and in this he is borne out by the second Defendant.

Nomatsheni, while asserting that Plaintiff had seduced and rendered her pregnant, admitted having confessed before the Magistrate to incestuous relations with her uncle Mguquka about the time when she became pregnant, in consequence of which they were both convicted of incest. She stated, however, that in point of fact she had never cohabited with her uncle but that she had been forced by the Induna to make a false confession. She stated further that when she taxed the Plaintiff with responsibility for her condition he said he would not pay the "ngqutu" and "mvimba" beasts until the child was born.

The second Defendant on the other hand not only confirmed the Plaintiff's statement that he entirely denied responsibility for Nomatsheni's seduction and pregnancy but stated definitely that both his daughter and her uncle admitted their guilt to him and at the Court House. If further proof of the falseness of Nomatsheni's evidence is required it is furnished by Mahleni's statement that when confessing his guilt to him Mguquka offered to pay him as damages the "ngqutu", "mqezo" and "mvimba" beasts, an offer which he would under no circumstances have made if he had not actually seduced Nomatsheni.

Under the circumstances the Court is of the opinion that the Plaintiff discharged the onus of proving that the defamatory words admitted to have been uttered by the first Defendant were not "bona fide" and that he is accordingly entitled to damages. In so far as the second Defendant is concerned, his plea must fail having regard to the provisions of section one hundred and forty-one of the Code.

The Court does not consider the amount of £10 damages claimed by the Plaintiff excessive, having regard to the fact that, as the direct result of the defamation, he was charged with the crime of seduction, was brought before the Court on three occasions before being discharged, paid an attorney £3 to defend him in the criminal proceedings and was kept out of his employment for a period of one month.

The appeal is accordingly allowed with costs and the judgment of the Court below is altered to read as follows: "Judgment for Plaintiff for the sum of £10 with costs against the first and second Defendants, jointly and severally, the one paying the other to be absolved."

CASE NO. 12.

MKUKWANA MOLIFE VS. JHLUPEKI MOLIFE

PIETERMARITZBURG. 4th July, 1934. Before Howard Rogers, Esq., Acting President, Messrs. H.G.V. Arbuthnot and R.V. Hancock, Members of the Native Appeal Court (Transvaal and Natal Division).

Succession....

Succession - Affiliation of Wives - Basuto custom - Section 162, Natal Code of Native Law, 1891.

An appeal from the Court of the Native Commissioner, Polela, at Bulwer.

ENTRIES IN A MARRIAGE REGISTER MUST BE REGARDED AS CORRECT IN VIEW OF THE PROVISIONS OF SECTION 162 OF THE NATAL CODE OF NATIVE LAW OF 1891.

In this matter the Appellant instituted an action in the Court of the Native Commissioner, Bulwer, in which he claimed as against the Respondent, Defendant in the Court below, an order declaring him to be the general heir to the late Tshayilana Nolife and as such entitled to the general kraal property of the deceased and more particularly a certain piece of land, 200 acres in extent, being Lot C of S.5 Stoffelton, in the District of Polela.

It is common cause that the late Tshayilana was thrice married according to Native custom. His first wife was Mankitsi, who bore him only one child, a daughter named Nkitsi. His second wife was Nakakani (alias Matibana) who had one son, Nhlupeki Nolife, the Respondent, and five daughters. The third wife Puleni had at least three sons, namely Mkukwana Nolife the Appellant, Ncamango Nolife and Mapiciza Nolife.

It is common cause too that the Natives concerned in this case belong to a community of Basutos from Basutoland who many years ago settled in the Polela District. They have in a large degree retained their Basuto customs, but, being domiciled in Natal, are subject to the Natal Code of Native Law and the Court can accordingly take cognisance of their adherence to Basuto custom only in so far as it is not in conflict with the provisions of the Natal Code.

The Appellant's claim that he is the general heir to his late father is based upon the contention that Puleni, the third wife in point of time, did not rank third in that a separate independent house was not established for her, but she was affiliated to the house of Mankitsi, the "indhlunkulu". If she were so affiliated, her eldest son would, in the absence of an heir in the "indhlunkulu", be the general heir to the late Tshayilana, but, if she were not so affiliated, Nhlupeki the heir of the second house, that of Nakakani, would succeed as general heir in the absence of an "indhlunkulu" heir.

The vital issue then in this case is whether Puleni was affiliated to the indhlunkulu or not. This was rightly emphasised by the Native Commissioner in his reasons for judgment and was accepted without reserve by both Mr. Thrash and Mr. Howes, who at the hearing of the appeal appeared for the Appellant and Respondent respectively.

It was stated by several of the witnesses in evidence and was admitted by all concerned that according to Basuto custom the invariable rule is that (apart from the Ngqutu beast) only five head of cattle are paid as lobolo in respect of a wife who is to be affiliated to an existing house and that the payment of ten head as lobolo would be a clear indication that there is no affiliation of the wife concerned.

The.....

The Court from its own knowledge sees no reason to quarrel with this statement of Basuto custom.

Puleni's marriage to Tshayilana was registered on the 31st August, 1894, before the Acting Administrator of Native Law for the Bulwer District under the provisions of section one hundred and fifty-one of the Code of Native Law then in force.

The original Native marriage register was produced by the Clerk of the Court at the hearing and an extract therefrom is attached to the record.

This reflects "inter alia" the following particulars in respect of the marriage.-

"Wife's name and rank: Uvuleni - 3rd.
"Lobolo delivered, Number of: 10 head.
".....
"The lobolo agreed upon was delivered."

As stated by the Native Commissioner in his reasons for judgment, the antecedent circumstances as disclosed by the evidence were such as to indicate a probability that Tshayilana would have desired to affiliate Puleni to the "indhlunkulu" e.g. there was no son in Mankitsi's house, Puleni was taken from the same kraal as that from which Mankitsi hailed and further it was stated that the lobolo cattle received by Tshayilana for Mankitsi's daughter, Mkitsi, were used to lobola Puleni. By virtue of these circumstances and of the evidence of Mankitsi and Lufasa, said to be the only survivors of those who attended Puleni's marriage, Mr. Thrash for the Appellant strongly urged that the particulars reflected in the marriage register must be regarded as inaccurate and asked the Court to pronounce accordingly.

The Native Commissioner, who had the witnesses before him, states on grounds specified in his reasons for judgment that he came to the conclusion that Lufasa's testimony was entirely unreliable and must be rejected "in toto" and that no great weight could be attached to Mankitsi's evidence.

Quite apart from this aspect of the matter, however, it is clear that the entries in the Marriage register must prevail against the evidence of these two or any other witnesses who may have testified to the contrary, for it was definitely laid down by section one hundred and sixty-two of the Code of 1891 then in force that:

"Marriage registers or copies of entries therein,
"certified by the Administrator of Native Law or by the
"Secretary for Native Affairs, shall be received as
"conclusive evidence in all Courts of Law under this
"Code, of the matters or things therein recorded."

It is true that the 1891 Code has been repealed and superseded by the revised Code of Native Law, promulgated under Proclamation No. 168 of 1932 issued in terms of section twenty-four of the Native Administration Act No. 38 of 1927, but it is clear from sub-section (2) of section thirteen of the Interpretation of Laws Act, No. 5 of 1910, that the special protection afforded in section one hundred and sixty-two of the Old Code still applies in respect of entries made in Marriage registers

under.....

under that Code, and moreover, an analogous provision is contained in the Revised Code. The entries in the Marriage register regarding the union between Tshayilana and Puleni cannot therefore be challenged and must be accepted as conclusive and accurate.

These entries indicate that Puleni's rank was that of third wife, no mention being made of affiliation and that ten head of cattle were paid as lobolo in respect of her, a payment which, having regard to the Basuto custom previously referred to, clearly indicates that there was no affiliation in so far as she was concerned.

The appeal is accordingly dismissed with costs.

CASE NO. 13.

BHANOYI DHLADHLA D/A VS. MJIBA DHLADHLA.

PIETERMARITZBURG. 5th July, 1934. Before Howard Rogers, Esq., Acting President, Messrs. H.G.W. Arbuthnot and R.W. Hancock, Members of the Native Appeal Court (Transvaal and Natal Division).

Res Judicata - Chief's Court - Registration of judgment.

An appeal from the Court of the Native Commissioner, Kranskop.

AN EXCEPTION NOT TAKEN IN A CHIEF'S COURT MAY BE RAISED IN THE NATIVE COMMISSIONER'S COURT WHEN THE CASE HAS BEEN TAKEN THERE ON APPEAL. THE REQUIREMENT OF THE REGULATIONS REGARDING THE REGISTRATION OF CHIEFS' JUDGMENTS WITHIN FOURTEEN DAYS IS DIRECTORY AND NOT IMPERATIVE.

This matter came before the Court of the Native Commissioner, Kranskop, by way of an appeal from the Court of the Native Chief, Maqinga, in an action by Mjiba against Appellant claiming eight head of cattle in which the Chief on the 30th November, 1933, had given judgment for the Plaintiff with costs.

At the hearing in the Court below, Mr. Attorney Bestall, who appeared for the Appellant, raised a special plea taking the exception that the matter was "res judicata."

Certain evidence was led in regard to the exception which was eventually dismissed by the Court, which then in terms of section eight of the regulations framed under section twelve of the Native Administration Act, No. 38 of 1927, and published under Government Notice No. 2255 of 1928, proceeded to hear and determine the case if it were one of first instance in that Court. After hearing and recording the evidence on the merits the Native Commissioner found in favour of Mjiba and entered the following judgment:-

"Appeal dismissed. Judgment for Respondent with costs."

Against.....

Against this judgment an appeal was noted by Mr. Bestall on behalf of the Appellant on, very briefly, the grounds, firstly that the Native Commissioner had been wrong in dismissing the exception and secondly, that his finding on the merits was against the weight of evidence and contrary to law.

At the hearing of the appeal, Mr. Bestall appeared for the Appellant and Mr. Buss for the Respondent. It was agreed that the Court would in the first instance hear Counsel on the first ground of appeal, it being clear that if the Native Commissioner's finding on the exception were overruled, there would be no necessity to consider the merits.

The exception that the matter was "res judicata" was based on the contention that, prior to the institution in his Court of the proceedings which formed the subject of appeal to the Native Commissioner's Court in the present case, Chief Maqinga had in 1932 given judgment in a suit between the same parties on the same cause of action.

In this connection an extract from the register of judgments of Chiefs' Courts kept by the Clerk of the Native Commissioner's Court in terms of paragraph (i) of section nine of the regulations for Chiefs' Civil Courts published under Government Notice No. 2255 of 1928, was handed in.

The record of the judgment in question disclosed, "inter alia", the following particulars.-

"No. 63/1932.
"Date of Report: 31/10/32.
"Date of Trial 1/9/32.
"Parties. Mjipa Dhladhla vs. Nqasha Dhladhla.
"Claim: Eight head of cattle being cattle advanced to Defendant's late brother, Msiswa Dhladhla by the Plaintiff as lobolo on Msiswa's marriage to Nozindunge Gitole, the Defendant being Msiswa's heir's guardian.
"Judgment. For Plaintiff for eight head of cattle and costs.
"Name of Chief by whom tried: Maqinga."

The Native Commissioner's reasons for dismissing the exception of "res judicata" read as follows:-

"On appeal to this Court the appellant for the first "time sets up the decision in the first case tried by "the Chief as res judicata in the second action. The "Attorney for the appellant argued at length that all the "essential requirements of the exceptio rei judicatae were "present. The evidence as to whether the parties to the "two actions were the same is, in my opinion, not conclu-"sive. The point, however, is not material in view of the "fact that the plea of res judicata was not raised by "appellant in the Chief's Court. The omission to do so "must be taken as a waiver of any rights appellant may "have had to that defence and it is now not open to him in "this Court."

The point to decide then is whether the Native Commissioner's view that the Appellant was barred from raising the exception of "Res judicata" in his Court by reason of the

fact.....

fact that the point had not been taken in the Chief's Court is correct.

In considering this aspect of the matter, it must be borne in mind that Chiefs' Courts have been established for the purpose of determining Native claims arising out of Native law and custom only; that they are not Courts of record; that they do not take cognisance of the ordinary rules of evidence; that the proceedings in such Courts are governed by Native custom and are not marked by any rigidity of procedure or formalism of pleadings such as is demanded in European Courts; and that litigants in Chiefs' Court appear in person and have not the benefit of professional advice. Under these circumstances, it would be unreasonable to lay down that because a litigant before a Chief's Court has not raised in that forum any special plea, defence, exception or counter-claim based on the same (but not on a separate) cause of action which would be open to him in a Native Commissioner's Court he is to be barred from advancing such when the matter is brought on appeal to the Native Commissioner's Court and, in accordance with the regulations, heard by that Court as a case of the first instance.

This view is strengthened by the consideration that many of the special pleas, exceptions and defences which are allowable in Native Commissioners' Courts would not be understood or appreciated by Chiefs if advanced before them.

It seems quite clear that as Chiefs' Courts are not Courts of record when an appeal from such Court is heard as a matter of the first instance by a Native Commissioner in terms of the regulations the parties would not be confined to exactly the same evidence as was led before the Chief, and, for that matter, would not be debarred from producing evidence which was not led before the Chief at all. To hold otherwise would lead to interminable questions and arguments as to exactly what did take place before the Chief's Court and would stultify the entire proceedings. This latitude must be allowed as regards the evidence and a similar concession must be made in regard to pleadings.

Mr. Buss for the Respondent cited in this connection the case "Yubete Mkize vs. Bonifase Mkize" (1934 P.-H.R. 33) heard before this Court in April last in which it was laid down that section twelve of Act No. 38 of 1927 and the rules contemplate that an appeal from a Chief's Court to that of a Native Commissioner would be dealt with primarily as an appeal, in order to obviate a plea of "res judicata" and, secondly, as if it were a case of first instance for the purpose of recording evidence. It must be borne in mind, however, that in that case the Court was concerned with one aspect and one aspect only, that of the award of costs, and did not have occasion to consider the question of pleadings.

Apart from the aspects already discussed, and regarding the matter from another angle, there is nothing in the record to show that the plea of "res judicata" was not raised in the Chief's Court. Indeed from the Chief's own evidence it seems clear that this question was at any rate given due consideration by the Court and that he decided to try the case again because he was of opinion that the previous judgment was defective owing to the absence of Bhanoyi. In other words, he may be regarded as having taken the point "suo motu" and his decision

thereon could accordingly be challenged on appeal.

This Court accordingly comes to the conclusion that the Native Commissioner erred in dismissing the exception on the grounds indicated by him in his reasons for judgment.

It remains now to consider whether the requisites of a plea of "res judicata" were present in this case.

To establish a plea of "res judicata":

(a) the previous judgment must have been given in an action between the same parties or their privies;

(b) the previous judgment must have been given in respect of the same cause of action; and

(c) the previous judgment must have been a competent one, that is, given by a Court of competent jurisdiction and capable of being carried into effect.

As regards the first of these essentials, it cannot seriously be disputed that the parties in an action in which a plaintiff sues a guardian in his capacity as the legal representative of his ward and in an action in which such plaintiff sues such ward duly assisted by his guardian are in law the same. Mr. Buss in argument cited certain cases in an endeavour to establish that such is not the case. These cases have been consulted by the Court but are not in point.

The question arises in the present case whether in the first instance before the Chief's Court Nqasha was sued in his personal capacity or in his capacity as guardian of Bhanoyi. The particulars recorded in the register show that the parties were "Mjipa Dhladhla vs. Nqasha Dhladhla" but a disclosure of the representative capacity of Nqasha in the proceedings is contained under the heading "claim" where the following words occur: "the Defendant being Msizwa's heir's guardian". The entries in the register must be considered not only under one particular heading but as a whole. Moreover, it is not the record in the register alone to which the Court must look in deciding this matter as the regulations themselves, under paragraph (iii) of the additional section applying to Natal appearing in section two of Government Notice No. 1312 of 1931, clearly recognise that entries in these registers based on reports submitted by Chiefs or their indunas may be faulty or incomplete. The Native Commissioner rightly recognised this and decided to hear evidence upon the point. That evidence, in the opinion of this Court, establishes that in the initial proceedings Nqasha was sued in his representative capacity as guardian of Msizwa's heir Bhanoyi.

The Clerk of the Court's evidence is quite clear upon the point. He says.

"It was reported to me when the judgment was regis-
"tered that Defendant was sued in his capacity of guardian
"of Msizwa's heir.
"....
"It was not until the nature of the claim was made
"known to me that I had any idea that Ngqasha Dhladhla was
"being sued in any other than his personal capacity."

The Chief in his evidence says:

In.....

"In the first case heard by me in 1932 the Plaintiff "appellant sued Ngqasha Dhladhla as the guardian of "Bhanoyi Dhladhla who was a minor at the time".

".....

"I did not intend the judgment to be against Ngqasha "personally. The judgment should in the first case have "been registered against Ngqasha in his capacity as the "guardian of Bhanoyi."

It is true that in other parts of his evidence the Chief made statements which apparently contradict those quoted above but these were, it seems clear, due to confusion in his mind as to the legal position as regards the possibility of executing against the property of Bhanoyi.

This Court finds that in the original proceedings Ngasha was sued in his representative capacity as guardian of Isizwa's heir, Bhanoyi, and that accordingly the parties to both actions were the same.

In this connection, it may be mentioned that Mr. Bestall, who apparently at one stage objected to the amendment of the record in the register so as clearly to indicate the true position, assured the Court that his reason for so doing was that he had no instructions from his client in the matter and that he would now be prepared to agree to the alteration.

As regards the second essential of "res judicata", it is common cause that the cause of action in the two cases before the Chief was the same.

It remains to consider whether the initial judgment was competent as having been given by a Court of competent jurisdiction and as having been capable of being carried into effect. It was not disputed and may be accepted that Chief Maqinga has jurisdiction under section twelve of the Native Administration Act - in other words, that his Court was a competent one. The question whether his judgment in the matter was effective must be considered in relation to the provisions of paragraph (i) of the special Natal regulations published under Government Notice No. 1312 of 1931 previously referred to. That paragraph reads as follows.-

"(i) All judgments of a Chief's Court shall be "entered, together with the names of the parties and "particulars of claim, in a register to be kept by the "Clerk of the Native Commissioner's Court for the purpose. "Such entries shall be made as soon as possible but in "any case not later than fourteen days after judgment is "given, and no judgment shall be enforced unless and until "it is so registered."

It is clear that the Chief's judgment in the original action between the parties, though given on the 1st of September, 1932, was not reported and registered until the 31st October, following, that is to say, a longer period than that prescribed by the regulation had elapsed between the date of judgment and that of registration.

The question then is. did this delay - due apparently

to .....

to the negligence of the induna responsible - have the effect of rendering the Chief's judgment nugatory, so that it could not be enforced? In other words, is the requirement that Chiefs' judgments be registered within a period of fourteen days imperative or merely directory and designed to ensure in so far as possible the prompt registration of these matters?

Chiefs are given jurisdiction under section twelve of the Native Administration Act and, such being the case, any litigant who obtains a judgment in a Chief's Court established under the section has a common law right to have that judgment carried into execution.

The Minister is empowered under sub-section (5) of section twelve of the Act to make regulations for the effective carrying out of the provisions of the section but this regulatory power does not include the power by regulation to deprive a litigant of his right to execute his judgment. In other words, he may by regulation prescribe the formalities and procedure to be observed as regards the execution of a Chief's judgment but in doing so cannot prohibit such execution altogether.

As was laid down by the Appellate Division of the Supreme Court in the case "Rex vs. Williams" (1914 A.D. 460), the power to regulate does not include the power to prohibit.

In view of these considerations the Court comes to the conclusion that the requirement of the regulations regarding the registration of Chiefs' judgments within fourteen days is directory and not imperative.

The Chief's original judgment was registered, though not timeously, and when registered became of full force and effect and can be carried into execution.

The Court accordingly finds that all the requisites of "res judicata" were present in the case under consideration and that the exception should have been upheld by the Court below.

The appeal is allowed with costs. The Native Commissioner's judgment is struck out and his ruling on the exception is altered to read: "Exception allowed. Appeal upheld. Chief's judgment set aside with costs."

1940(T+N) 147.
1941(") 40.

CASE NO. 14.

PHILEMON P.Z. LUTULI VS. MARIA NYOKANA.

DURBAN. 9th July 1934. Before Howard Rogers, Esq., Acting President, Messrs. H.G.W. Arbuthnot and J. Addison, Members of the Native Appeal Court (Transvaal and Natal Division).

Amendment of record - Procedure - Law 41/1908 (Natal) - Applies to loans between exempted Natives - Previous decision of Native Appeal Court overruled - Appellate Division judgments binding.

An.....

An appeal from the Court of the Additional Native Commissioner, Durban.

JUDGMENTS OF THE APPELLATE DIVISION OF THE SUPREME COURT ARE BINDING ON THE NATIVE APPEAL COURT.

This is an appeal from the judgment given by the Additional Native Commissioner, Durban, for Plaintiff as prayed with costs, in an action instituted by Respondent, as Plaintiff, against Appellant as Defendant, for the refund of the sum of £26 alleged to have been advanced to the Defendant in January, 1932. It was averred in the summons that the amount was handed to Defendant's daughter, Dorothy, at Defendant's special instance and request.

It is on record that both parties to the action are Natives who have been exempted from the operation of Native Law. They accordingly do not fall under the provisions of the Natal Code of Native Law. The respondent is a widow.

The grounds of appeal were that the evidence showed:-

"1. That the loan was not made by Plaintiff but by her daughter to Defendant's daughter.

"2. That when the loan was made whether by Plaintiff or her daughter the Defendant was not mentioned as a party to the transaction thereby disproving the averment in the Summons "that the amount was handed to Defendant's daughter at the Defendant's special request and instance."

"3. That Plaintiff's daughter unsuccessfully instituted action in another Court against Defendant for recovery of the amount now claimed by Plaintiff and that such action was to the knowledge of and with the connivance of Plaintiff.

"4. That even if Defendant did borrow from Plaintiff, which he denies, the Native Commissioner in the absence of any document signed as provided in Act 41 of 1908, Natal, was wrong in entering judgment for Plaintiff against Defendant."

The Appellant conducted his case in person in the Lower Court but was represented by Mr. Burne at the hearing of the appeal. Mr. Pullin represented Respondent both in the Court of the Additional Native Commissioner and in this Court.

When the matter came before the Court, a preliminary application was made by Mr. Burne, relying on an affidavit which he had filed on behalf of the Appellant, for the amendment of the record in certain respects. In view, however, of the replying affidavits of the Additional Native Commissioner and of the Court Interpreter, this application was subsequently withdrawn.

It is not necessary to deal at any length with the first three grounds upon which the Appellant bases his appeal.

It is clear from the evidence that the money, which forms the subject of the claim, was handed to Appellant's

daughter.....

daughter, Dorothy, by Respondent's daughter, Leah, at an interview at which Respondent, Leah and Dorothy were present.

Both the Respondent and Leah were, however, emphatic that Respondent insturcted the latter to hand over the money to Dorothy and in actual fact was the lender.

In attempting to disprove this, the Appellant did not, as might have been expected, call Dorothy but relied solely on the fact that proceedings had previously been instituted against him in the Magistrate's Court by the daughter Leah on the same cause of action.

It is clear from the Additional Native Commissioner's reasons for judgment that he accepted the evidence of Respondent and Leah on this point, concluding as he did that the Appellant was endeavouring to play off the one party against the other and this Court is not prepared to disturb his finding in this connection.

Appellant's contention that he was not a party to the transaction cannot hold in view of the following statements made by him in a letter which he admitted he had addressed to the Respondent on the 23rd October, 1933.-

> "When I made arrangements with you I put it quite "clear to you that Dorothy in obtaining the loan from you "was acting on my instructions and that that being so I am "the person responsible for repayment of the money.
>
> "As a matter of fact I still assure you to look to "me for the settlement of this matter and not my daughter "Dorothy. Surely you wouldn't have advanced that consider- "able sum of money to Dorothy had she not assured you that "she was sent by me to obtain the loan."

The first three grounds of appeal must accordingly fail.

As regards the fourth ground of appeal, it was admitted in argument, that this point was not raised in the Court below and, while there is no direct evidence on the matter in the record, it is a necessary inference from the testimony of the Plaintiff and her daughter on the one hand and of the Defendant on the other that the loan transaction upon which the claim was absed was not reduced to writing in terms of Natal Act No. 41 of 1908, and, indeed, the entire arguments of Counsel proceeded on this basis.

Section two of Natal Act No. 41 of 1908 reads as follows:-

> "No judgment shall be given in any Court of law "against a Native for the recovery of a loan made after the "commencement of this Act, or for interest on such loan "unless the contract has been reduced to wirting as provid- "ed by this Act."

Section one relating to the application of the Act lays down that its provisions shall apply to any transaction which, whatever its form may be, is substantially one of money lending; that the word "interest" as used in the Act (except

in.....

in section 3) includes any charges made in respect of a loan; that advances of money by an employer to be re-paid by the labour of the Native to whom advances are made shall not be deemed to be a loan under the provisions of the Act; and that "any reference in this Act to a loan or the like means money lent without any additions whatever."

In the matter of "Kumalo vs. Ncwana" a case heard before the Natal Provincial Division in 1929 in which a Native exempted from the operation of Native law sued an unexempted Native for £100 on a promissory note admittedly given for money lent, it was contended on behalf of the Defendant that the transaction did not fall within the prohibition imposed by section two of Act No. 41 of 1908; that the Act was not intended to apply to loans between Native and Native, and that the words "substantially one of money lending" in the first paragraph of section one showed that the Legislature intended to regulate only those transactions in which money was lent at interest or for remuneration.

It was ruled by the Court that the terms "loan" and "money lending" used in the Act are not restricted to the transactions of persons engaged in the business of money lending or to transactions in which sums of money are lent for interest or other consideration; that the provisions of the Act apply to loans as between Native and Native; and that accordingly the particular transaction under consideration did fall within the purview of section two of the Act.

Application was made to the Appellate Division of the Supreme Court for leave to appeal "in forma pauperis" against this judgment of the Natal Provincial Division. The application was heard before the full bench of the Appellate Court, which, after having heard the various contentions advanced by Applicant's Counsel in regard to the interpretation of Act No. 41 of 1908 and having reserved judgment, refused the application for leave on the ground that an appeal would be bound to fail. The judgment of the Court was pronounced by Roos, J.A. (1930 A.D. 362) and it laid down that section two of the Act applies to all loans and not merely interest bearing loans; that the title of the Act, upon which a measure of reliance had been placed, is not sufficiently widely expressed; and that the term "moneylending" in section one does not imply the loan of money at interest but is intended to convey the same meaning which the term "lending money" would convey.

In the case "Daniel Ndimande vs. Jeremiah Ndimande (1930 N.A.C. 114)", the question of the interpretation of Act No. 41 of 1908 was considered by this Court. That was a case brought on appeal from the Court of the Native Commissioner, New Hanover, and the facts were briefly that the Appellant at the request of the Respondent had discharged a money liability due by the Respondent to a third party; that to meet that liability the Appellant had borrowed the amount at 8 per cent. interest; and that Appellant then sued Respondent for the amount, principal and interest, which he had paid on his behalf. In the Native Commissioner's Court, the Respondent (Defendant) pleaded, inter alia, that the transaction was substantially one of money lending in terms of Act No. 41 of 1908 and that as the formalities prescribed by that Act had not been observed, no action lay for the recovery of the amount claimed. The Native Commissioner upheld the plea stating in his reasons for judgment

that....

that he had been guided in his decision by the case "Kumalo vs. Ncwana" previously referred to.

At the hearing of the appeal before this Court, Respondent's Counsel relied upon the decision of the Natal Provincial Division in "Kumalo vs. Ncwana", emphasised its confirmation by the Appellate Division and referred also to "Hosea Yeni vs. Francis" (1930 N.P.D.) in which the decision in "Kumalo vs. Ncwana" had been followed.

This Court allowed the appeal, the then President, in a lengthy judgment, which was concurred in by the Members of the Court, traversing, criticising and dissenting from the pronouncements of the learned judges of the Natal Provincial Division and of the Appellate Division and holding:-

(a) that the contract under consideration was one of mandate and not "substantially one of money-lending";

(b) that "money-lending" as used in section one of Act No. 41 of 1908 must be interpreted to mean the lending of money for profit or at interest.

(c) that the word "loan" in section two of the Act must be regarded as having a corresponding meaning in that it must refer to a transaction falling under the purview of section one, that is, a transaction which is substantially money lending;

(d) that the Natal Provincial Division and Appellate Division had not appreciated the necessity for restrictive interpretation of the terms appearing in the Act.

In the present appeal, Mr. Burne on behalf of the Appellant relied upon the decision of the Appellate Division in the case of "Kumalo vs. Ncwana", while Mr. Pullin, for the Respondent, relied upon the case of "Alfred Mtembu vs. Philip Mtembu" (1915 N.H.C. 129) and more particularly upon the decision of this Court in the case of "Daniel Ndimande vs. Jeremiah Ndimande", contending that this Court is bound by its own decisions.

Before proceeding further, it would be as well to dispose of this contention. It is quite clear from section fourteen of the Native Administration Act, No. 38 of 1927, that a Native Appeal Court is not bound by its own decisions, for that section makes special provision for the settlement of conflicting decisions given by such a Court within its area of jurisdiction. It lays down that under such circumstances the Minister may cause a special case to be prepared and to be argued before the Appellate Division of the Supreme Court of South Africa, in order to obtain its ruling on the issue and that such ruling shall thereafter be deemed to be the correct decision in the matter.

This Court then is not bound by its previous decisions and would be entirely justified in overruling such a decision if satisfied that it was incorrect.

It is perhaps unnecessary to say that if in the present case the Court applies the Appellate Division judgment

in .....

in "Kumalo vs. Ncwana" the appeal must succeed whereas if the interpretation of Act No. 41 of 1908 pronounced by this Court in the Ndimande case is accepted the appeal must fail.

In the Ndimande case the Court seems to have entirely ignored the essential consideration whether this Court is bound by any pronouncement of the Appellate Division on a question of law or the interpretation of a statute. In fact, the learned President and Members seem to have assumed without question that this Court is not so bound - truly a startling proposition.

The Appellate Division of the Supreme Court is the supreme judicial body in South Africa and it must be accepted as axiomatic and elementary that its decisions are binding upon all subordinate and inferior Courts.

The question is therefore whether a Native Appeal Court is a subordinate or inferior Court in relation to the Appellate Division of the Supreme Court or whether it is something separate and apart, standing, so to speak, outside the recognised judicial system in South Africa.

Provision was made in section thirteen of the Native Administration Act, No. 38 of 1927, for the establishment of Native Appeal Courts for the hearing of appeals in any proceedings from Courts of Native Commissioner. What then is the nature of Native Commissioner's Courts from which appeals lie to a Native Appeal Court?

Section ten of the Act, as amended by section five of Act No. 9 of 1929, provides for the establishment of Native Commissioners' Courts (with unlimited jurisdiction as to cause of action) for the hearing of all civil cases and matters between Native and Native only, except for certain five specially reserved topics, which need not be considered here.

Sub-section (2) of section ten provides that every such Court shall be a Court of law, which can only mean that they must administer the ordinary law of the land, while section eleven gives them discretion, subject to certain safeguards, in all suits or proceedings between Natives involving questions of customs followed by Natives, to decide such questions according to the Native law applying to such customs except in so far as it may have been repealed or modified.

Native Commissioners' Courts are therefore tribunals, with unlimited jurisdiction as to cause of action (save for the five specially reserved topics previously referred to) administering the ordinary law of the land as between Native and Native, with a discretionary right to apply Native law in proceedings involving questions of customs followed by Natives.

It would be absurd to lay down that in administering the ordinary law the Native Commissioner's Court is not bound by and can ignore the decision upon any particular point at issue of the Appellate Division, the supreme tribunal established by the Legislature in South Africa for the determination and elucidation of our law.

At the same time it must be accepted, and has in fact been repeatedly laid down by this Court, that the decisions of the Native Appeal Court are binding upon Native

Commissioner's....

Commissioners' Courts.

It will be appreciated, therefore, that an intolerable position of doubt, uncertainty and confusion would arise if the Native Appeal Court could, as in the case which we have been considering, regard itself as free to overrule decisions of the Appellate Division on questions of law and on the interpretation of a statute.

The absurdity of the position which has arisen is further amphasised by the fact that in the majority of outlying districts the same judicial officer presides in a Magistrate's Court in suits between European and Native and in a Native Commissioner's Court in proceedings between Native and Native.

He might conceivably have to interpret the provisions of Act No. 41 of 1908 in both tribunals. In the Magistrate's Court he would unquestionably have to follow the pronouncements of the Appellate Division, whereas in the Native Commissioner's Court he would be expected to follow the decision of the Native Appeal Court and so adopt an entirely different interpretation.

Such a position would be anomalous in the extreme and could never have been intended by the Legislature.

What was the intention of the Legislature? This question admits of only one answer, viz. that the Legislature clearly intended that the decisions of the Appellate Division should be accepted by and binding on Native Appeal Courts.

This is clearly to be inferred not only from the provision already discussed, whereby in the case of conflicting decisions of a Native Appeal Court the ruling of the Appellate Division may be sought and, when obtained, must be accepted as correct, but even more strongly from section eighteen of the Native Administration Act, which reads as follows:-

> "18(1) Notwithstanding anything in any law contained, no appeal shall lie from the judgment of a court of native commissioner in respect of an action or proceeding except to a native appeal court constituted under section thirteen, unless the native appeal court itself consents to an application for leave to appeal (upon any point stated by the said court) being made to the Appellate Division of the Supreme Court, subject in any event to the rules of the said Appellate Division.
>
> " (2) Save as is provided in section fourteen and in this section, the decision of a native appeal court shall be final and conclusive."

The Appellate Division of the Supreme Court is accordingly constituted as a forum of appeal from Native Appeal Courts and the latter must accordingly be regarded as subordinate to and bound by the decisions of the former. It is true that the right of appeal from a Native Appeal Court to the Appellate Division is a limited and circumscribed one, but so for that matter is the right of appeal from the Appellate Division to the Privy Council and yet the Appellate Division

does .....

does not hesitate to say that it is bound by Privy Council decisions, when they apply, even if pronounced not on appeal from South Africa but in purely English cases (vide De Waal N.C. vs. North Day Canning Co., Ltd. 1921 A.D. at page 524 and Surmon vs. Surmon, 1926 A.D. 47).

I accordingly come to the conclusion that judgments of the Appellate Division of the Supreme Court are binding upon Native Appeal Courts, that this Court in the case of Daniel Ndimande vs. Jeremiah Ndimande exceeded its province in purporting to overrule the pronouncements of the Appellate Division as regards the interpretation of Natal Act No. 41 of 1908; and that in the present case this Court is bound by those pronouncements as set forth in the judgment in the case "Kumalo vs. Ncwana."

The appeal must accordingly be allowed and the judgment of the Native Commissioner is altered to one of "Absolution from the instance with costs."

Having regard to all the circumstances of the case and more particularly to the fact that the point on which this appeal succeeds was not taken in the Court below, there will be no order as to the costs of the appeal.

CASE NO. 15.

BAGANISE ZULU VS. MASHESHA ZULU.

DURBAN. 12th July, 1934. Before Howard Rogers, Esq., Acting President, Messrs. H.G.W. Arbuthnot and J. Addison, Members of the Native Appeal Court (Transvaal and Natal Division).

Taxation of Bill of Costs - Review on appeal - Allowable items in Native Commissioner's Courts.

An application for review of a bill of costs taxed in the Court of the Assistant Native Commissioner, Mahlabatini.

THE CORRECT PROCEDURE FOR BRINGING THE TAXATION OF A BILL OF COSTS IN A NATIVE COMMISSIONER'S COURT BEFORE THE NATIVE APPEAL COURT IS BY WAY OF APPLICATION FOR REVIEW THEREOF.

This is an application for this Court to review the taxation of the bill of costs in the case of Mashesha Zulu vs. Baganise Zulu heard in the Court of the Native Commissioner, Mahlabatini, the position being that the bill as taxed by the Clerk of the Court was on the 5th March, 1934, brought in review before the Assistant Native Commissioner, who allowed certain charges which the Applicant contends should not have been allowed.

It appears that there is no attorney practising at Mahlabatini and that the Respondent accordingly employed an attorney from Vryheid to represent him in the proceedings. The attorney in question made two journeys from Vryheid to attend Court at Mahlabatini in connection with the case and brought

up .....

up in the bill of costs a charge of £4.1.8d. for motor hire in respect of each of these journeys.

These charges, despite the objections of Applicant's Attorney, were allowed by the Assistant Native Commissioner when reviewing the bill as taxed by the Clerk of Court and these are the particular items which it is desired to bring in review before this Court.

At the hearing Mr. Holmes, who appeared for the Respondent, raised the preliminary objection that the matter should have been dealt with by way of appeal and not review.

In support of his contention Mr. Holmes relied upon the pronouncement of this Court in the case "Ntswelaboya Mbanjwa vs. Mgidi Tshezi (21 P.-H. R.20)" in which application was made twelve months after the date of judgment to set aside by way of review certain proceedings before the Native Commissioner, Bulwer. It was then held that this Court would only exercise its powers of review where there has been a gross irregularity of procedure and not where a Native Commissioner has arrived at a wrong decision on the law or the facts. That judgment related to the review of the actual proceedings in a Native Commissioner's Court, and was in no way concerned with the question of taxation of costs. It certainly cannot be relied upon as authority for the proposition that the taxation of costs must be brought before this Court by way of appeal and not in review.

Sub-section (2) of section forty-three of the regulations for Native Commissioners' Courts provides that taxation by the Clerk of the Court shall be subject to review free of charge by the Native Commissioner. The rules are silent as to the procedure to be followed by a litigant who is dissatisfied with the Native Commissioner's review of costs awarded against him. He, however, must - as was admitted by Mr. Holmes - have some remedy and that remedy must be in recourse to this Court under the provisions of Section fifteen of the Native Administration Act, No. 38 of 1927, which lays down that a Native Appeal Court shall have full power to review, set aside, amend or correct any order, judgment or proceeding of a Native Commissioner's Court within the area of its jurisdiction.

Now review is the recognised method of bringing disputed bills of costs before a higher authority or tribunal. It is not only the procedure prescribed under the regulations for questioning the decisions of the Clerk of a Native Commissioner's Court but is also the procedure laid down under the Magistrates' Courts Act No. 32 of 1917, section seventy-eight of which reads as follows -

> "Taxation by the Clerk of the Court shall be subject "to review free of charge by a judicial officer of the "district, and the decision of such judicial officer may "at any time within one month thereafter be brought in "review before a judge of the Court of appeal."

This Court accordingly comes to the conclusion that the correct procedure for bringing the taxation of a bill of costs in a Native Commissioner's Court before it is by way of application for review thereof.

Mr.....

Mr. Holmes contended secondly that this Court should refuse to entertain the application in the present case by reason of the delay in bringing the matter under review.

This Court is not concerned with what took place prior to the review of the Clerk of the Court's taxation of the bill by the Assistant Native Commissioner. The Assistant Native Commissioner reviewed the bill on the 5th March, 1934, and the affidavit in support of the present application is dated the 12th April, 1934. There was thus an interval of thirty-eight days.

Now no period is prescribed in the regulations within which a matter may be brought in review before this Court, and, under these circumstances, the Court can do no more than lay down in general terms that there must be no unreasonable delay in doing so. What constitutes "unreasonable delay" must be decided according to the circumstances of each particular case with due regard, of course, to the desirability on the grounds of public policy for achieving finality in litigation.

The Court is of the opinion that a reasonable explanation of the delay in the present case is furnished in paragraph 6 of the affidavit submitted in support of the application and cannot sustain Mr. Holmes' contention in this connection.

As regards the merits of the application, it was strongly urged by Mr. Holmes that litigants are entitled to professional representation in legal proceedings and that accordingly if no practitioner is is available at the centre where a case is to be heard, a party is entitled to procure the services of an attorney from neighbouring centres and in the event of his being awarded costs, to include the reasonable travelling expenses of his attorney in the bill of costs.

This contention, however, disregards the essential considerations that special courts have been established for the hearing of cases between Native and Native by the Native Administration Act; that the procedure prescribed for such courts under the regulatory powers vested in the Governor-General by sub-section (4) of section ten of the Act is specially designed to facilitate the conducting by Natives of their cases in person; that the main object in the establishment of these courts and in prescribing their procedure was economy in litigation in so far as Natives are concerned; and that to this end an inclusive tariff of costs and charges for legal practitioners has been prescribed by the Governor-General in terms of paragraph (e) of sub-section (4) of section ten.

That tariff appears as Table "D" in the Second Annexure to the regulations for Native Commissioners' Courts published under Government Notice No. 2253 of 1928, as amended by Government Notices Nos. 1313 of 1931, 1078 of 1932 and 305 of 1934, and the fact that it is inclusive is clear from sub-section (1) of section forty-three of the regulations which reads as follows.-

> "43(1). The stamps, fees, costs and charges in connection "with any proceedings in a court, including all fees or "charges of court or of the clerk of court, the messenger, "or of legal practitioners, shall be payable in accordance "with the scales prescribed in the second annexure hereto."

Table "D" contains no provision for the payment of charges in connection with the travelling of legal practitioners

and.....

and the items to which objection was taken by the Applicant should accordingly have been disallowed by the Assistant Native Commissioner.

His review of the bill of costs will therefore be amended accordingly.

The Respondent to pay the costs of these proceedings.

1937 (T+N) 22.
1945 (") 46.

CASE NO. 16.

MARAULA SIKOSANA VS. MOLIBILE NDHLOVU.

DURBAN. 12th July, 1934. Before Howard Rogers, Esq., Acting President, Messrs. H.G.W. Arbuthnot and J. Addison, Members of the Native Appeal Court (Transvaal and Natal Division).

Default judgment - Not effective against uncited guardian - Service of summons - Section 141(2)(a) Natal Code of Native Law.

An appeal from the Court of the Native Commissioner, Nqutu.

WHERE A SUMMONS ISSUED ON THE 7th DECEMBER, 1933, CALLED UPON THE DEFENDANT TO APPEAR ON THE 19th JANUARY, 1933, AND DEFENDANT WAS IN DEFAULT ON THE DAY WHEN JUDGMENT WAS GIVEN, THE IRREGULARITY VITIATED THE PROCEEDINGS.

This matter comes in appeal from the Court of the Native Commissioner, Nqutu, where Respondent, Plaintiff in the Court below, sued the Appellant, Maraula Sikosana, for ten head of cattle as lobolo or alternatively, £10 damages by reason of Appellant having seduced Plaintiff's sister.

The following judgment was given by the Native Commissioner, on the 6th March, 1934:-

"Judgment is entered by default against the Defendant, "Maraula Sikosana, as prayed for £10 damages. Defendant to "pay costs. As Defendant was at the home of his father at "the time of the delict, the father Sikosana is liable in "respect therefor."

Against this judgment an appeal was noted on the 2nd April, 1934, on behalf of both the Defendant and his father Sikosana, on the following grounds:-

"1. That evidence of service of summons as required by Rule 26(b) of the Rules of the Native Commissioner's Court, was not led, nor was evidence led that Defendant was resident at the address given in the summons, on the contrary the father's statement shows that Defendant left that address in 1931.

"2. In so far as the judgment is against William Sikosana, the Plaintiff having made his election and having decided to sue Maraula Sikosana, judgment should not have been recorded as it purports to have been recorded against Defendant's father, and generally the judgment is bad in law.

3. .....

"3. The judgment is in any event wrong in that according to Native Custom no provision is made for payment of damages of this nature in terms of money, alternatively the amount awarded as damages is excessive.

"4. There is no evidence that the Defendant lived in his father's kraal at the time of the seduction, so that in any event the evidence does not support the judgment as against William Sikosana.

"5. There is no evidence that Plaintiff is the right party to claim damages for the seduction of his sister as he purports to do.

"6. Generally the judgment is against the weight of evidence and contrary to law."

In view of the fact that the appeal was not noted within twenty-one days from the date upon which judgment was delivered as prescribed by Rule 6 of this Court's rules, Mr. Darby, representing the Appellants, made an application to the Court for an extension of time within which to appeal, as provided by the rule in question. He requested further that in the event of the application being granted, the appeal be heard forthwith.

Indulgence in respect of the tardy noting of the appeal was granted by the Court as the papers disclose that there was a definite intention throughout on the part of the Appellants to take the matter on appeal; that to this end they without undue delay consulted an attorney; that the Clerk of the Court was advised of this on 21st March, 1934, and actually arranged for the issue of a writ of execution on the Native Commissioner's judgment to be stayed in view of the probability of appeal; and that the appeal was formally noted only a few days after the expiry of the prescribed period. The Court was, moreover, influenced in large measure by the fact that a perusal of the record indicated that there was a reasonable probability of the Appellants succeeding in an appeal against the judgment. The Court also consented to the appeal being heard forthwith.

As regards the first ground of appeal, paragraph (b) of section twenty-six of the regulations for Native Commissioners' Courts framed under sub-section (4) of section ten of the Native Administration Act, No. 38 of 1927, and published under Government Notice No. 2253 of 1928 as amended by Government Notice No. 1313 of 1931, laid down that the Court, if it were satisfied from evidence on oath that the summons had duly been served on the Defendant or the Respondent personally or upon some adult member of the kraal or dwelling at which defendant or respondent resided might enter judgment or make an order in favour of the claimant consistent with such evidence as might be adduced, etc. The definite requirement of the regulation then was that in such a case the Court must be satisfied by evidence on oath as to the service of summons before it would give a default judgment against a defendant. This special provision as regards proof of service in the case of defaulting defendants or respondents must prevail against any general provision, such as that relating to the service of process by the Messenger, contained in the concluding sentence of paragraph (e) of sub-section (3) of section twenty-five of the regulations.

The record in the present case discloses that no

evidence....

evidence was taken regarding the service of the summons upon the Defendant. The summons was entrusted to the Messenger of his return, which cannot be accepted as evidence on oath for the purposes of paragraph (b) of section twenty-six previously referred to, is as follows:-

> "I, this 8th day of Jan. 1934, proceeded to the kraal "of the within named Maraula Sikosana, and as Maraula "was out at work, a copy of this summons was handed to "Maraula's brother who was advised to find Maraula and "give him the summons."

It will be noted that the Messenger's return does not disclose that the person to whom the copy of summons was handed was an adult or that the nature and the exigency of the summons was explained to him.

Further reference to the original summons, which was issued by the Clerk of the Court on the 7th December, 1933, shows that it purported to call upon the Defendant to appear before the Court of the Native Commissioner at Nqutu on the 19th January, 1933. Thus, even had a copy of the summons been served personally on the Defendant he would under the circumstances have been quite justified in ignoring it. This irregularity, having regard to the fact that the Defendant was in default on the day of hearing, must of necessity vitiate the proceedings and there is accordingly no need for this Court to consider the other point urged on behalf of the Appellant, Maraula, as regards the service of the summons, viz that at the time of service he was not residing at the kraal where the process was served.

The Court considers it advisable to deal with the second ground of appeal having regard to the second sentence of the Native Commissioner's judgment. It would seem from his reasons for judgment that he did not intend this to operate as a judgment against Defendant's father, Sikosana, but merely wished to make it clear that Sikosana, as the kraal head, was, having regard to paragraph (a) of sub-section (2) of section one hundred and forty-one of the Code of Native Law, affected by the judgment though not a party to the action, and could accordingly within seven days make application, under sub-section (5) of section thirty of the regulations, for the judgment to be rescinded or varied by the Court. If this was the Native Commissioner's intention there was no necessity to incorporate the statement in question in his judgment and it is unfortunate that he did so.

If on the other hand it was intended that this should operate as a judgment against Sikosana, it was obviously irregular and incompetent to enter a judgment against a party not cited in the proceedings. There is certainly nothing in section one hundred and forty-one of the Code to authorise this.

It may be remarked, too, that there is no evidence on the record that at the time when the alleged seduction took place the Defendant, Maraula, was in fact an inmate of his father's kraal. Nor for that matter is there any evidence that the Plaintiff (Respondent), Nolibile Ndhlovu, was the kraalhead and guardian of his sister Boniso, and as such entitled to sue in respect of the alleged seduction.

The appeal is accordingly sustained with costs, and the judgment of the lower Court altered to read: "Summons dismissed with costs."

CASE NO. 17.

MGEDHLELENI MPUNGOSE VS. SIPOSO MPUNGOSE.

ESHOWE. 24th July, 1934. Before Howard Rogers, Esq., Acting President, Messrs. H.G.W. Arbuthnot and J. Addison, Members of the Native Appeal Court (Transvaal and Natal Division).

Inheritance - Ikohlo house - Etula custom.

An appeal from the Court of the Native Commissioner, Eshowe.

THE DESCRIPTION OF APPELLANT AS "OF THE OBEDWINI KRAAL" IS NOT TANTAMOUNT TO SAYING THAT THE KRAAL BELONGS TO HIM.

On the 22nd June, 1933, the Appellant, as Plaintiff, instituted an action in the Court of the Native Commissioner, Eshowe, in respect of two separate claims advanced by him against the Respondent as Defendant.

The case was heard by the Acting Assistant Native Commissioner, who on the 1st March, 1934, gave judgment for the Defendant with costs in respect of both claims.

An appeal was noted on the 21st March against the judgment on the first claim, which was thus expressed in the summons:-

"1. Plaintiff is the Ikohlo heir of the late Chief Mbango "and claims sixteen head of cattle being the lobolo "of the daughter of Sofayi Zikokile. The said Sofayi "is Plaintiff's uncle. Plaintiff says that the said "Zikokile was "etulad" to the Ikohlo house of the late "Chief Mbango and Plaintiff is therefore entitled to "her lobolo".

The Respondent (Defendant) resisted this claim in the Court below but in his plea admitted that the Plaintiff was "ikohlo" heir to the late Mbango. Incidentally it may be mentioned that the Appellant and Respondent are half-brothers, both being sons of the late Mbango.

It was common cause.-

(a) that the late Mbango during his lifetime succeeded to the "indhlunkulu" of his deceased father Chief Gawozi, comprising the Nomaqoni, Cyengweni, Ecukwaneni and Obedwini kraals;

(b) that the late Mbango advanced to one Sofayi, a kraal inmate at Obedwini, eleven head of cattle, wherewith to lobola a wife, Danzule, and that it was then stipulated that the lobolo received for the first daughter who might be born of the marriage should be appropriated in re-payment of the loan;

(c) that the first born daughter of Sofayi was Zikokile, who was married in 1922, some years after Mbango's death; and

(d) that the lobolo cattle paid to Sofayi for Zikokile had been demanded from him and received by the Respondent (Defendant) who at that time claimed to be and was regarded as the general heir of the late Mbango.

These.....

Th These are the cattle which form the subject of the claim, the Appellant (Plaintiff) alleging that they were sixteen in number, that they belonged to the "ikohlo" kraal of the late Mbango and that he is entitled to them as the "ikohlo" heir of Mbango.

Plaintiff's claim to be the "ikohlo" heir is based upon a certain disposition made by his late father, Mbango, when on the point of death. This disposition was reduced to writing and embodied in a document, a copy of which was put in by agreement and figures as annexure "A" to the record.

The document reads as follows.-

"APPEAR NDABAYAKE MPUNGOSE KA MASOMPO AND MAKOSANA NGEMA.

"State.-

"Yesterday, March 5th, the Chief Mbango, in the presence "of the "ibandhla", made the following declaration.-

"I know that my death is imminent and desire to acquaint "you with my disposition.-

"Siposo is Gaozi, and is to be head of the Mpungose with "Vumbe of Eculwaneni kraal as an "umnawe".

"As regards my personal establishment I declare that "Nqumile, the daughter of Dabulamanzi is my chief wife and her "son Zulumpungose is my heir.

"I bequeath to my son Mkuluzi, the two daughters I "have by Oka Ntshingwayo, Mkuluzi's own sister will be "etulaed" "to Zulumponguse.

"In the position of 'uyise', i.e. 'Father of the kraal' "I appoint Makuzela alias Mehlayabuka, his mother being the "daughter of Soshangana Biyela ka Menziwa.

"IKOHLO.

"Mgedhleleni of the Obedwini kraal is the heir of the "Ikohlo; he will receive the lobolo for his sister.

"Note: Mbango established a kraal of his own and named "it: Felandawonye. In this kraal he placed Oka Dabulamanzi with "three other wives. These three died and the kraal became extinct. "Oka Dabulamanzi was accommodated with a hut, outside, but close "to the Nomaqoni. She, however, elected to join her brother "Bangani at Nkonjeni."

The Acting Assistant Native Commissioner stated, inter alia, in his reasons for judgment that this Court in the case "Mkuluzi Mpungose vs. Siposo Mpungose (1933 Prentice-Hall R.19) had pronounced this death bed disposition of the late Chief Mbango to be invalid; that he was bound by that decision and that accordingly he could not recognise the Plaintiff as the "Ikohlo" heir of the late Mbango.

The....

The grounds of appeal are as follows:-

"1. That the judgment is against the weight of evidence and is bad in law.

"2. That the Defendant, now respondent, having admitted as a fact that Appellant was Ikohlo heir it was not competent nor was the Acting Assistant Commissioner called upon to find that Appellant was not such heir. Moreover as it was no part of Respondent's defence that Appellant did not adduce full evidence that he was in fact the late Mbango's Ikohlo heir, alternatively,

"3. That the judgment of the Native Appeal Court relied upon by the Acting Assistant Native Commissioner, viz. Mkuluzi versus Siposo decided the question of the validity of the Indhlunkulu heirship only in the disposition made by the late Mbango and there is nothing in that judgment to show that the late Mbango's disposition was not merely confirmatory of some previous arrangement in so far as the Ikohlo House is concerned."

In reference to the second and third grounds of appeal, it may be stated that the Native Commissioner in his reasons for judgment did not confine himself to the record. He is certainly bound by the decisions of this Court on questions of law but he apparently overlooked the fact that, quite apart from the question of its relevancy, the previous judgment referred to by him had not been proved in the present case.

The parties to this action are not the same as in the previous case referred to by the Acting Assistant Native Commissioner nor is the cause of action the same.

An important issue unquestionably does arise in reference to the admission by the Defendant (Respondent) in his plea that the Plaintiff was the "ikohlo" heir to the late Mbango. Mr. Rutherfoord, who represented the Respondent both in the Court below and in this Court, stated that he had made it abundantly clear during the proceedings in the inferior Court that this admission had reference only to the fact that the late Mbango had in his death bed disposition pronounced the Appellant to be his "ikohlo" heir but was not an admission of the fact that the Obedwini kraal had been established by Mbango as his "ikohlo" house. He added that his cross-examination of the Plaintiff's witnesses throughout was in large measure directed to establish the fact that the Obedwini kraal was not the "ikohlo" house. A perusal of the record serves to confirm this statement.

Mr. Kent, however, for the Appellant, contended that the admission in the plea that Appellant was the "ikohlo" heir involved a corresponding admission of the fact that the Obedwini kraal had been established as the "ikohlo" house. He stated that had he understood otherwise he would have endeavoured to bring evidence to prove that the Obedwini kraal had previously been recognised by Mbango as his "ikohlo" house and that his dying disposition in this connection was merely confirmatory of the previous arrangement.

Now the only ground upon which Mr. Kent's contention that Respondent's admission that Appellant is Mbango's "ikohlo"

heir.....

heir involves recognition of Obedwini as the "ikohlo" house can rest is the wording of the relative portion of Mbango's death bed disposition, which is as follows:-

"IKOHLO.

"Mgedhleleni of the Obedwini kraal is the heir of the ikohlo; he will receive the lobolo for his sister."

It by no means follows that these words appointing Mgedhleleni the "ikohlo" heir involve the establishment of the Obedwini kraal as the "ikohlo" house.

The Court below came to the conclusion that the expression "of the Obedwini kraal" appearing in this disposition were merely descriptive of Mgedhleleni and nothing more. There is authority for this view in the case "Ntukwini vs. Hiso (1918 N.H.C. 216), in which a somewhat similar position arose.

In that case Jackson, J. said.-

"Nor do I think that the statement that Ntukwini belongs to the Esindumeni kraal is tantamount to saying that that kraal belongs to him. It is a form of reference often made in assigning the status of a Native."

Further support for the view that the words "of the Obedwini kraal" were merely descriptive of Mgedhleleni emerges from a consideration of Mbango's disposition as a whole. He first purported to deal with the position of the Respondent. Here his disposition is both simple and comprehensive as follows.-

"Siposo is Gaozi. He is to be head of the Mpungose with "Vumbe of Ecukwaneni kraal as 'umnawe'".

This identification of Siposo with Gaozi must surely imply that what came from Gaozi must go to Siposo. If so it necessarily follows that the words "of the Obedwini kraal" in the "ikohlo" portion of the disposition must merely be descriptive.

Mbango next purported to deal with his personal establishment and here it will be observed that though he specially nominated the woman Nqumile as his chief wife with her son Zulumpungose as his heir, he did not appoint any woman as "ikohlo" wife which he normally would do if establishing an "ikohlo" house.

This Court then cannot accept the contention that the death bed disposition had the effect of establishing the Obedwini kraal as the "ikohlo" house.

Further, it is difficult to see what evidence could possibly have been brought by Mr. Kent to show that Obedwini had previously been established by Mbango as his "ikohlo" house. His own witnesses were very definite on the point that no previous pronouncement had been made. Thus Gubaza Mpungose, a cousin of Mbango who was present at Sofayi's marriage to Danzule and who was Plaintiff's principal witness, testified as follows in this connection:-

"On his death bed Mbango made the Obedwini kraal his

ikohlo .....

"ikohlo and Plaintiff the heir thereto."

".....

"The Obedwini had been one of Gawozi's kraals - one of the "Indhlunkulu kraals. The cattle taken by Mbango to pay for "Danzule were kraal property - inherited by Mbango from Gawozi, "with the kraal. They were Indhlunkulu property then and at the "time of Sofayi's marriage and up to the time of Mbango's death. "On his death bed he made his disposition and made the Obedwini "the Ikohlo."

Again another important witness for the Plaintiff, Ngqina a half-brother of the late Mbango, made the following statements in his evidence.-

"The Obedwini was then (i.e. when Mbango inherited it) "part of Gawozi's 'indhlunkulu'".

".....

"The Obedwini was made the 'ikohlo' of Mbango by "Mbango on his death bed."

The evidence of these Plaintiff's own witnesses makes it clear that there was no recognition of the Obedwini kraal as Mbango's "ikohlo" house prior to his death bed pronouncement.

The cattle lent to Sofayi by Mbango to lobola Danzule were admittedly portion of the property which had belonged to Gawozi's "indhlunkulu" and which when it devolved upon him became Mbango's general kraal property. It is a recognised canon of Native Law that in a case of "etula" the lobolo received for the "etulaed" woman must go to the source from which the debt arose - in this case the general kraal property of Mbango no matter whether Danzule's lobolo cattle were taken from Obedwini or from other kraals (a point on which the record is not altogether clear though the preponderance of evidence and the balance of probability seem to indicate that they were taken from Obedwini).

It was doubtless in recognition of this principle of Native Law that Sofayi, some years after Appellant's appointment as "ikohlo" heir handed over Zikokile's lobolo cattle without demur to the Respondent on demand. In this connection it should be stated that the Court accepts the evidence of Siposo and Mxosheni in preference to that of Amos - an obviously unreliable witness.

Lastly, it must be pointed out that if, as contended by Mr. Kent, the appointment of an "ikohlo" heir must necessarily imply the establishment of an "ikohlo" house, the new house so established would receive only such of the general kraal property as is specially assigned to it by the kraal head. It would even be compelled to restore the same to the "indhlunkulu" if the kraal head made a pronouncement to that effect (case Bhekizita vs. Jabulani 8 N.H.C. 1913).

The only property specially assigned by Mbango to the Appellant as his "ikohlo" heir was the lobolo of his sister and in the opinion of this Court he is entitled to nothing more than that.

Under the circumstances it is unnecessary to consider the further point raised by Mr. Rutherfoord as to whether the

disposition.....

disposition of Mbango was invalid having regard to the provisions of section thirty-eight of the 1878 Code of Native Law which was then in operation.

The judgment of the Court below is sustained and the appeal is dismissed with costs.

CASE NO. 18.

KLAAS MATHE VS. FLIP KEKANA.

PRETORIA. 30th August, 1934. Before Howard Rogers, Esq., Acting President, Messrs. R.W. Norden and F.H. Ferreira, Members of the Native Appeal Court (Transvaal and Natal Division).

Native custom - Ndebele tribe - "Seantlo" - "Bohadi" cattle.

An appeal from the Court of the Native Commissioner, Benoni.

A WIDOWER ENTITLED TO "SEANTLO" MAY NOT DEMAND THE IMMEDIATE HANDING OVER OF A GIRL NOT YET OF MARRIAGEABLE AGE.

This is an appeal from a decision of the Native Commissioner, Benoni, who gave judgment for the Defendant with costs in an action instituted by the Appellant, as Plaintiff, against the Respondent, as Defendant, in which he claimed an order entitling him to marry another daughter of the Defendant in substitution for his deceased wife, who was likewise a daughter of the Defendant, or, alternatively, a refund of the "bohadi" paid by him to the Defendant in respect of his deceased wife.

The facts as they emerge from the record are briefly as follows:-

In November, 1930, the Plaintiff contracted a customary union with Wilhelmina Kekana, a daughter of the Defendant, and paid "bohadi" to the Defendant in respect of the union.

Wilhelmina died in June, 1932, without leaving any living issue. She had, however, during the period of her union with the Plaintiff two miscarriages. She had been previously married according to Native custom to one Lotta Letsula by whom she had two children who were either stillborn or died shortly after birth. The Defendant was aware of the circumstances of Wilhelmina's union with Lotta and was in point of fact actually responsible for the dissolution of that union. He himself made the following statement in this connection in his evidence:-

"I heard that Defendant had to refund Lotta's dowry. "Wilhelmina told me this. Defendant also told me this in 1928. "The reason of the refund was that Wilhelmina and Letsula could "not agree as she was barren. I knew in 1928 that Wilhelmina "was barren. I thought that Wilhelmina would have children by "me. I had heard that she had given birth to two children but "that they had died the day after birth. I do not know whether "they were premature born children."

The .....

The whole question at issue then is whether under the circumstances indicated the Plaintiff was entitled under Native custom to the relief he sought from the Court.

The Plaintiff is a Shangaan and the Defendant belongs to the Ndebele tribe. They reside in an area where different customs are in operation and the matter accordingly falls to be decided according to the customs of the Defendant's tribe.

In view of the dearth of authority as to the customs of the Ndebele tribe upon the point at issue, the Court summoned to its assistance, as assessors, two elders of this tribe.

A series of questions was put to them and from their replies it clearly emerged that the custom of providing a substitute for a wife, who is barren or dies without leaving surviving issue, is recognised to its fullest extent among the Ndebele. They stated very definitely, however, that when a man marries a woman knowing that she is barren or is laible to miscarriages, he cannot upon her death claim any relief from the father either by way of "seantlo" (substitute) or in the shape of the return of the "bohadi" or any portion thereof.

Apart from this aspect of the matter, it appears from the record that when the Plaintiff approached the Defendant for a substitute, the latter did not refuse to recognise the former's claim but referred to the fact that he had only two other daughters, both of whom were of tender age, saying that the Plaintiff might make love to one of these. The Plaintiff then claimed that he should immediately be given one of these daughters to take to his kraal and the Defendant refused this. In the opinion of this Court, it was this demand on the part of the Plaintiff, which under Native law and custom he was not entitled to make, that led to the break down of the negotiations and not any refusal on the part of the Defendant to recognise his claim. Plaintiff's action was accordingly prematurely instituted even had he been entitled under the circumstances to "seantlo".

The judgment of the Native Commissioner is upheld and the appeal is dismissed with costs.

CASE NO.19.

SALATIEL MABE VS. PHATSOANE KGASOE.

PRETORIA. 30th August, 1934. Before Howard Rogers, Esq., Acting President, Messrs. R.W. Norden and F.H. Ferreira, Members of the Native Appeal Court (Transvaal and Natal Division).

Cause of action - Contract or tort - Exceptions.

An appeal from the Court of the Additional Native Commissioner, Rustenburg.

PROCEEDINGS IN TORT MAY BE INSTITUTED BY ANY INDIVIDUAL MEMBER OF AN UNINCORPORATED ASSOCIATION IN RESPECT OF ANY INFRINGEMENT OF HIS RIGHTS WITHOUT IT BEING NECESSARY TO JOIN IN THE ACTION ALL THE MEMBERS OF THE ASSOCIATION.

This....

This is an appeal from a judgment delivered by the Additional Native Commissioner, Rustenburg, on the 26th April, 1934, in which he awarded the sum of 10/- with costs of suit to the Plaintiff in an action instituted by the Respondent, as Plaintiff, against the Appellant as Defendant.

The Plaintiff's allegations as set out in his summons were as follows:-

"1. Plaintiff is a member of the Batlako Tribe of Natives residing at Rabieskraal in this District.

"2. During September, 1922, a dispute arose between sections of the said Tribe and a fund was inaugurated by various members of the Tribe.

"3. Plaintiff then subscribed the sum of £1 towards the said fund and in all there was contributed by the Plaintiff and other members of the tribe a sum of approximately £183.0.0.

"4. With the knowledge and consent of Plaintiff and the other Contributors to the said fund an amount of £70 being portion of the aforesaid fund was paid on the 4th September, 1922 to Messrs. Weavind and Weavind, Solicitors, Pretoria, by way of deposit in respect of certain contemplated litigation.

"5. The said contemplated litigation did not arise and the aforesaid sum of £70 remained in the custody of Messrs. Weavind and Weavind until 6th April, 1932.

"6. On the 6th April, 1932, Defendant wrongfully and unlawfully without the knowledge and consent of Plaintiff and other Contributors to the said fund obtained payment of the said sum of £70 from Messrs. Weavind and Weavind."

At the hearing in the Court below the following exceptions and plea were filed on behalf of the Defendant:-

"1. Defendant excepts to the summons in that it discloses no cause of action.

"2. Defendant excepts to the summons on account of non-joinder in that if the action of the Plaintiff is based on Contract, express or implied, between him and other contributors to the Fund referred to in the Summons, it is the duty of the Plaintiff to join in the action all other contributors to the Fund.

"In the event of the Exceptions being overruled, but not otherwise, the Defendant pleads to Defendant's Summons as follows.-

"Defendant admits Paragraph 1 of the Summons.

"Ad Paragraph 2 of the Summons: The Defendant says that certain nine headmen of the tribe inaugurated a fund for the purpose of obtaining contributions from members of the Tribe towards the expenses of any action to be taken by the Headmen of the Tribe, that the said fund was controlled by the said nine

headmen.....

headmen, that members of the Tribe were invited to contribute, that any contributions made by members were donations given by them and on payment of such contributions the members contributing had no further interest in the monies contributed by them or by any other members of the Tribe. Save for the above Defendant denies Paragraph 2 of the Summons.

"Ad Paragraph 3: Defendant has no knowledge of any subscription made by the Plaintiff and puts Plaintiff to the proof thereof. Defendant denies that contributions amounting to £183 were made.

"Ad Paragraph 4: Defendant admits that £70 was paid by the nine Headmen of the Tribe to Messrs. Weavind and Weavind but says that such payment was made at the instance and by the authority of the said nine headmen and that no knowledge or consent of the Contributors was required.

"Defendant admits Paragraph 5.

"Defendant denies paragraph 6 and says further that on the 6th day of April, 1932, the Defendant and certain native, a member of the Tribe, named Abednego Sebokoane, were authorised and instructed by a majority of the aforesaid nine Headmen of the Tribe and/or their lawful successors in office to obtain from Messrs. Weavind and Weavind the said amount of £70. In accordance with the instructions received by the said Defendant and the said Sebokoane, they duly collected the £70 from Messrs. Weavind and Weavind and in accordance with the instructions given them by the Headmen aforesaid and/or their successors in office, they delivered the amount collected to a certain Headman named Magape Moatloli, who duly received the same.

"Defendant denies that he is in possession of the whole or any portion of the said amount of £70, and denies that he has ever been in possession of the said amount, save and except as custodian of the said amount on behalf of the nine Headmen as aforesaid until delivery of the amount in accordance with the instructions of the Headmen.

"Defendant denies that Plaintiff is entitled to sue, that he has any interest or ownership whatsoever in any portion of the amounts contributed to the fund and he prays that the Plaintiff's summons may be dismissed with costs."

The case first came on for hearing on the 2nd February, 1934, both parties being represented by attorneys. After argument the Native Commissioner reserved his ruling on the exceptions and by agreement proceeded to hear the evidence on the main issue. After the evidence of the Plaintiff and his witnesses had been taken, the case was adjourned. When the hearing was resumed on the 21st March the Native Commissioner overruled the exceptions. Plaintiff's Attorney then closed his case, whereupon Defendant's Attorney applied for absolution from the instance. This was refused and the evidence for the defence was then led, judgment ultimately being entered on the 26th April, by the Additional Native Commissioner for Plaintiff "for 10/- being the Plaintiff's approximate share as contributor to the £70 with costs of suit."

The grounds of appeal are as follows:-

1. .....

"1. That the judgment of the Native Commissioner dismissing the exceptions filed by the Defendant is bad in law in that:-

(a) The summons disclosed no cause of action.
(b) The summons is framed on contract express or implied between the Plaintiff and other contributories to the Fund referred to in the Summons, and it was therefore the duty of the Plaintiff to join in the action all the other contributories to the Fund and the Summons is therefore bad in law for non-joinder.

"2. The judgment is bad in law in that at the close of the Plaintiff's case no case was made out for the Defendant to answer and the Commissioner should have granted the Application of the Defendant for absolution from the instance.

"3. The judgment is bad in law in that the evidence led on behalf of the Plaintiff did not support the allegations in the summons and further that no proof was adduced by Plaintiff that the ownership of any portion of the Fund remained vested in him.

"4. The judgment is bad in law in that evidence was adduced by the Plaintiff to show that the Fund in question could only be dealt with by consent of all the contributories and no proof was adduced by the Plaintiff that he was authorised by the contributories to institute his action.

"5. The judgment is against the evidence and against the weight of evidence."

The facts as they appear from the record are briefly as follows:-

In or about the year 1921, there was an agitation among the members of the Batlako tribe, to which the parties belong, against the lease of a trading site in their location to Messrs. Gluck and Cohen and a fund was inaugurated by certain nine headmen belonging to the tribe to contest the action of the Chief and his lekgotla in granting this lease. Contributions were collected for the purpose in view from individual tribesmen both in the location itself and in Johannesburg, where a number of them were employed. One of the prime movers in the matter was the Defendant, Exhibit "A" showing that he was actually appointed "chairman" for the purpose of the collection of funds in Johannesburg.

A meeting of the tribesmen at work in Johannesburg was convened in 1922 for the purpose of collecting funds. It was attended by the nine headmen and, according to the Defendant, was presided over by himself. The Plaintiff was present and alleges, and the Native Commissioner finds as a fact, that he then and there contributed £1 to the fund handing it to one of the headmen. An amount of £9.15.0 which had previously been collected in Johannesburg was produced at that meeting and apparently a further sum of £70 was contributed at the gathering. In pursuance of a decision of the contributors at the meeting, £70 of the £79.15.0 was then entrusted to the nine headmen to be

taken.....

taken by them to Pretoria and handed over to Messrs. Weavind & Weavind for the purpose of contesting the lease. The money was duly taken to Pretoria by the nine headmen and was deposited by them with Messrs. Weavind & Weavind in the name of one of their number, Mabi Molotsi.

After the meeting further contributions were apparently made from time to time, a total amount of £113 being collected apart from the sum of £70 deposited with Messrs. Weavind & Weavind.

This sum of £113 was deposited in a bank at Johannesburg but was subsequently withdrawn and paid to tribal funds.

At the meeting held in Johannesburg no arrangement was made as to what was to happen if the £70 which it was agreed should be handed over to Messrs. Weavind & Weavind for the purpose of contesting the trading lease were not utilised for that purpose. The contributors apparently contemplated no such possibility and the money was entrusted to the headmen for the purpose in view; the position admittedly being that they accepted it for that purpose and could not dispose of it or appropriate it to any other purpose without the consent of all the contributors.

The sum of £70 remained on deposit with Messrs. Weavind & Weavind until 1932, by which time the project of contesting the trading lease had definitely been abandoned. In that year a dispute arose concerning the appointment of certain members of the tribal lekgotla and a meeting was held in the location presided over by one of the original nine headmen, Mogape Moatloli, and attended by the Defendant and certain of the contributors, but not by the Plaintiff. It was then decided to withdraw the £70 from Messrs. Weavind & Weavind and to utilise it for the purpose of employing an attorney to make representations to the Government regarding the "lekgotla".

In pursuance of this decision, the Defendant and one Abednego Sebokoane were sent to Pretoria armed with a letter addressed to Messrs. Weavind & Weavind asking for the return of the amount of £70 which had been deposited with them. This letter was dated the 2nd April, 1932, and purported to be signed by six persons including three of the original nine headmen (five of whom were by this time dead), one other headman and two contributors who were not headmen. Incidentally it may be remarked that it appears from the record that one of the signatures to this letter, that of Mogotsi Magodielo, one of the original nine headmen, was forged.

The Defendant and Abednego proceeded to Pretoria via Johannesburg and at the latter centre held a further meeting, which was attended by some of the contributors. This meeting is alleged to have sanctioned the withdrawal of the £70 from Messrs. Weavind & Weavind and its being utilised for the purpose of ousting the lekgotla members. According to Plaintiff's evidence he was not present at this meeting and Defendant does not contradict this. On arriving at Pretoria and presenting the letter to Messrs. Weavind & Weavind, Defendant obtained from them a cheque in his own name for £70, cashed it and took the money to the location when he handed it over to Mogape Moatloli one of the original nine headmen. The money was subsequently expended according to Defendant's own evidence for the following purposes.

(1)....

"(1) Lekgotla; (2) Case of Ramisa Kumalo - to pay his attorney "his fees; (3) The appointment of a secretary; and (4) Expens- "es of the committee."

As regards the first ground of appeal, Mr. McCarthy in his contentions that the summons disclosed no cause of action and was bad on account of non-joinder urged that the Plaintiff's claim was in effect one for a refund of his contribution or portion thereof; that his right to such a refund was governed by the terms of the contract express or implied entered into between the various contributors to the fund; that the contributors were associated for a common purpose and that no individual member of the association, having regard to the contractual relationship existing between the members, had the right to sue any person in control of the funds of the association for any portion thereof without joining in the action all of the members of the association. In support of these contentions he relied strongly upon the following remarks of Solomon, J. in the case "Ho ling and Others vs. Leung Quinn" (1909 T.H. 64):-

"But the action is brought not only for an interdict, "but also, in the alternative, for payment of the sums of £50 "and £241.17.3d., subscribed respectively by the plaintiff and "thirty-three other members of the association, and so far as "the action is one for the recovery of these sums of money I am "of the opinion that the exception that it discloses no cause "of action is a good one. For I do not think that the mere fact "that persons, who are in control of a fund which has been sub- "scribed for certain purposes, have formed the intention of "using that fund for some other purpose is in itself sufficient "to entitle a subscriber to reclaim the money which he has con- "tributed.

"Whether in any circumstances such an action would be "maintainable, or whether it might not be necessary to apply for "a liquidation of the affairs of the association, is a question "upon which I desire to express no opinion. For even if such an "action were maintainable, I am satisfied that the facts set out "in the declaration would not support the claim.

"What further allegations may be necessary to support "such an action I am not concerned to inquire; but I may point "out that there is not even a statement to the effect that "under the constitution of the association, and in the circum- "stances set forth in the declaration, the plaintiff is entitled "to reclaim his subscription, nor is it alleged that the defend- "ants have fraudulently misappropriated the money, or that they "are attempting so to do. Whether any such allegations would "make the declaration good I do not feel called upon to say; it "is sufficient, for the purpose of deciding the matter before me, "to hold that the declaration as it stands is quite insufficient. "No authority has been quoted to me in support of such a claim, "and in the absence of authority I must decline to accede to the "contention that the declaration discloses a good cause of action. "In so far, therefore, as the exception is one to the action for "the recovery of money it must be upheld."

This Court is unable to appreciate the contention that the claim in the present action was based on contract. In point of fact the whole basis of the claim is the alleged tortuous act of the Defendant in removing "wrongfully and unlawfully without the knowledge and consent of Plaintiff and other contributors" an

amount .....

amount of money which had been contributed for an express purpose and by consent of the contributors had been deposited with a firm of attorneys to be utilised for that purpose.

The delict is clearly and emphatically alleged in the summons and the Plaintiff's action is for redress from the Defendant in respect of the latter's wrongful act. Though not so stated in express terms, paragraphs (a), (b) and (c) of Plaintiff's claim are in essence a demand that steps be taken to ascertain the patrimonial loss suffered by Plaintiff by reason of Defendant's wrongful and unlawful act and that such amount when ascertained be paid by the Defendant to him. Furhter, under paragraph (d) of his claim the Plaintiff asks for alternative relief.

Here it may be remarked that under the rules for Native Commissioners' Courts, the same precision of pleadings is not demanded in such Courts as in Magistrates' Courts or in the Supreme Court. The proviso to section fifteen of the Native Administration Act No. 38 of 1927, expressly lays down that no judgment or proceeding of a Native Commissioner's Court shall, by reason of any irregularity or defect in the record or proceedings, be reversed or set aside unless it appears to the Court of appeal that substantial prejudice has resulted therefrom.

In Ho Ling's case the learned judge was careful to refrain from expressing an opinion on what would have been the position had the Plaintiff in that case alleged fraudulent misappropriation on the part of the Defendants, but it has definitely been laid down in subsequent cases that proceedings in tort may be instituted by any individual member of an unincorporated association in respect of any infringement of his rights without it being necessary to join in the action all the members of the association - vide Louvis and Others vs. Ciconomos and Others (1917 T.P.D. 474.)

In the opinion of this Court, therefore, the Plaintiff's summons discloses a good cause of action and he was entitled to institute that action, based as it was on delict, without joining therein the other contributors to the fund.

The exceptions to the summons were accordingly rightly overruled by the Additional Native Commissioner.

Mr. McCarthy's argument on his second ground of appeal was based on practically the same contentions as he had advanced in respect of the exceptions. It is quite clear from the record that the evidence of the Plaintiff and his witnesses established a prima facie case for the Defendant to meet and it has been definitely laid down by the Supreme Court that absolution should be refused where there is evidence on which a reasonable man might (not "ought to") find for the Plaintiff (Gascoigne vs. Paul and Hunter, 1917 T.P.D. 170). The Native Commissioner accordingly acted rightly in refusing to grant absolution at the close of the Plaintiff's case.

The third ground of appeal must be rejected for the reason that the evidence substantiates the essential allegations put forward by the Plaintiff in his summons, to wit, that he contributed £1 towards a fund inaugurated for a specific purpose, that £70 of the amount so contributed was deposited by consent of the contributors with Messrs. Weavind & Weavind, that this sum was withdrawn by the Defendant without adequate authority and

subsequently .....

subsequently utilised for other purposes without Plaintiff's knowledge and consent. Moreover, it is quite clear from the Plaintiff's evidence that the collections made were contributions for a specific purpose and not donations and this is confirmed by the evidence of the witnesses for the defence. The Native Commissioner found as a fact that the Plaintiff had contributed £1 for the express purpose of contesting the lease of a trading site in the tribal location and this Court after careful consideration of the evidence on the record accepts that finding.

The fourth ground of appeal is in essence merely a reiteration in another form of the exception of non-joinder.

The Plaintiff's case was not for a refund of the contributions from those who were lawfully in possession of the fund but for redress from the Defendant in respect of patrimonial loss suffered by him by reasons of Defendant's delict.

This ground of appeal must therefore likewise fail.

The fifth ground of appeal is couched in general terms, viz. that the judgment is against the evidence and against the weight of evidence. The Additional Native Commissioner in his reasons for judgment has given his findings as to the facts and after carefully considering the evidence this Court sees no reason whatsoever to differ from those findings.

The amount of £70 deposited with Messrs. Weavind & Weavind was undoubtedly trust money ear-marked for a specific purpose and in so far as that money was withdrawn and utilised for other purposes without the knowledge and consent of any contributor, there was a breach of trust in relation to such contributor. The Defendant had an intimate knowledge of and played a prominent part in the entire transaction. According to his own evidence he knew the purpose for which the money had been set aside, and that it could not be diverted or used by the headmen for any other purpose without the consent of the contributors. He was present at the meetings at which it was decided to withdraw the money from Messrs. Weavind & Weavind and he acknowledges that not all of the contributors attended those meetings. Acting upon insufficient authority and being cognisant of all the circumstances he actually withdrew the money from the custody of Messrs. Weavind & Weavind and handed it over to the headman by whom it was expended. He was accordingly privy to the breach of trust and thus, as was laid down in the case Yorkshire Insurance Company, Limited, vs. Barclay's Bank (1929 W.L.D. 199), became personally responsible in respect thereof.

The judgment of the Court below is upheld and the appeal is dismissed with costs.

CASE NO. 20.

LEO PALANE VS. FRANS MABANGA.

PRETORIA. 31st August, 1934. Before Howard Rogers, Esq., Acting President, Messrs. R.W. Norden and F.H. Ferreira, Members of the Native Appeal Court (Transvaal and Natal Division).

Interpleader.....

Interpleader - Cattle of guardian - "Bohadi" - Ownership.

An appeal from the Court of the Additional Native Commissioner, Pietersburg.

A JUDGMENT OBTAINED AGAINST A WARD IN AN ACTION IN WHICH THE GUARDIAN WAS NOT CITED CANNOT BE ENFORCED AGAINST THE LATTER'S PROPERTY. WHEN "BOHADI" OR "LOBOLO" CATTLE ARE DELIVERED TO A WOMAN'S FATHER OR GUARDIAN IN ANTICIPATION OF A CUSTOMARY UNION BETWEEN HER AND THE PERSON BY OR ON WHOSE BEHLAF THEY ARE DELIVERED, THE OWNERSHIP IN THE CATTLE DOES NOT PASS UNTIL THE UNION HAS ACTUALLY BEEN CELEBRATED AND THE WOMAN HANDED OVER.

On the 26th March, 1934, the Respondent, as Plaintiff, obtained a default judgment against one Longone Palane, as Defendant, for £10 damages sustained by him by reason of the said Defendant having wrongfully struck a horse belonging to the Plaintiff and having thereby caused its death.

In pursuance of this judgment a warrant of execution was issued on the 26th March, 1934, under which certain ten head of cattle were attached by the Messenger of the Court on the 28th. Two of these ten cattle were attached at the Appellant's kraal and the remaining eight at the kraal of one Ramonya.

On the following day an interpleader summons was issued by the Appellant, Leo Palane, against the Respondent in which the former laid claim to the stock which had been attached. The interpleader proceedings were heard on the 13th April, when the following judgment was entered by the Additional Native Commissioner:-

"The Court is satisfied from the evidence before it "that the stock seized by the Messenger of the Court is the "property of the claimant Leo Palane and further that the said "claimant is the guardian of Longone Palane, who is an unmarried "native male, according to Native Law and Custom and is in his "capacity as guardian responsible for debts and liable for damages "for the torts of Longone Palane. Further that the stock seized "by the Messenger of the Court are executable."

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

"(1) That the judgment is bad in law.

"(2) That it only transpired in the interpleader suit that the original action by Frans Labanga against Longone Palane was prosecuted against a minor without the legal assistance of his Guardian, the Claimant; in view of which the Commissioner should have rescinded the default judgment against the minor Longone Palane. The appellant Leo Palane craves permission to raise that point now and that the default judgment be rescinded and the writ be set aside, in as much as the Appellant had no knowledge of the Judgment till the 26th March, 1934, when the Writ was presented to him."

The Native Commissioner's reasons for judgment are as follows:-

The.....

"The claimant Leo Palane having in evidence been "shown to be the guardian of Longone Palane, the court decided "that as such under Native Law and custom he is responsible for "damages sustained for the torts of his ward and that his "cattle are therefore executable."

Prior to the hearing of the appeal the Respondent abandoned the judgment in so far as the two head of cattle attached at the Appellant's kraal were concerned.

When the matter came before this Court, Mr. Levy, on behalf of the Respondent, took a preliminary objection to the notice of appeal on the ground that it did not comply with the requirements of section ten of the Native Appeal Courts' rules published under Government Notice No. 2254 of 1928, in that it did not specify whether the whole or part only of the judgment was appealed against and did not set out clearly and specifically the grounds of appeal it being merely stated under the first ground that the judgment was bad in law without any indication as to why this was the case.

This objection was upheld by the Court which, however, granted an application by Mr. Krause, who appeared for the Appellant, to amend the grounds of appeal to read as follows.-

"The appeal is against the whole judgment as being bad in law in that.-

"(a) The interpleader was instituted under the common law and the Native Commissioner decided it according to Native Law without previously stating that Native Law would be applied.

"(b) The Appellant came into Court to claim cattle attached in a default case in which he was not cited and which he had no opportunity to defend, and the Native Commissioner in his judgment wrongly converted the interpleader case into a case against the Appellant in relation to his responsibility as guardian under Native Law for the torts of his minor ward - which was not the matter submitted for his decision in the interpleader action."

There was no evidence in the original case as to the age or status of the Defendant, Longone Palane, nor is there anything on the record to indicate that those proceedings were either brought or decided under Native law. On the contrary the action was based on an alleged delict in respect of which, if substantiated, the Defendant would have been liable under the ordinary or common law and the case was therefore not one which fell, in terms of section eleven of the Native Administration Act, No. 38 of 1927, to be decided according to Native law and custom.

In so far as the former judgment is concerned, therefore, the position is simply that the Plaintiff, Frans Mabuga the present Respondent, obtained a default judgment against the Defendant, Longone Palane, for £10 damages and that this judgment was based on the common law.

Turning now to the interpleader proceedings, it is clear from the Appellant's own evidence that Longone is under Native law his ward and the Appellant admitted that under Native

custom.....

custom he would be liable in respect of Longone's delicts. There is nothing in the evidence, however, to indicate that Longone is under twenty-one years of age, that is to say, a minor under the common law. On the contrary the evidence would seem to indicate that he is a grown man in that he is on the point of getting married. There is, therefore, nothing on record to show that the original proceedings were wrongly instituted against Longone in his own name and that the judgment should accordingly have been rescinded by the Native Commissioner.

As regards the point actually at issue in the present appeal, it is quite clear that the Native Commissioner erred in holding that the cattle, which he found belonged to the Appellant, were attachable in respect of a judgment given in proceedings instituted against a third party and to which the Appellant was not himself a party. The initial action for damages must, as has already been pointed out, be regarded as having been decided under the common law and under Roman Dutch Law a guardian is not, save under exceptional circumstances, which are not alleged in the present case, liable for the delicts of his ward. But even if the guardian were legally liable in respect of the delict of his ward in the present case, a judgment obtained against the ward in an action in which the guardian was not cited cannot, as laid down by this Court in a recent case, "Maraula Sikosana vs. Molibile Ndhlovu" heard in July, 1934, not yet reported, be enforced against the latter's property. To render him liable he must be cited as a party to the proceedings and be given the opportunity of being heard in his own defence.

Mr. Levy, however, for the Respondent urged that the Native Commissioner's finding as to the ownership of the cattle was wrong in respect of the eight head which were attached at Ramonya's kraal.

From the evidence on the record, this Court is satisfied that the eight head in question were cattle belonging to the Appellant which had been handed over to Ramonya as "bohadi" in contemplation of a customary union between Appellant's younger brother, Longone, and Ramonya's daughter and that this customary union had not at the time of the attachment been celebrated.

Now it is universal Native law that when "bohadi" or "lobolo" cattle are delivered to a woman's father or guardian in anticipation of a customary union between her and the person by or on whose behalf they are delivered, the ownership in the cattle does not pass until the union has actually been celebrated and the woman handed over.

Such being the case, the ownership in the eight head of cattle still vested in the Appellant at the date of attachment and he was, in view of what has already been said, entitled to an order declaring them non-executable.

The appeal is accordingly allowed with costs and the judgment of the Native Commissioner altered to one declaring the stock in question not to be executable.

CASE NO. 21.

PRISCILLA MOTOTSI VS. CHIEF ATHLONE M. MAMABOLO.

PRETORIA. 31st August, 1934. Before Howard Rogers, Esq.,Acting President, Messrs. R.W. Norden and F.H. Ferreira, Members of the Native Appeal Court (Transvaal and Natal Division).

Married woman - Venia agendi - Powers of Native Commissioner's Court.

An appeal from the Court of the Native Commissioner, Pietersburg.

A NATIVE COMMISSIONER'S COURT HAS JURISDICTION TO GRANT "VENIA AGENDI" TO A NATIVE WOMAN MARRIED IN COMMUNITY OF PROPERTY TO HER HUSBAND, SHOULD THE CIRCUMSTANCES JUSTIFY IT.

On the 7th March, 1934, the Appellant made application to the Court of the Native Commissioner for the Pietersburg District for permission to institute, in her own name and without the assistance of her husband, Ruben Hafani, an action for damages against the Respondent, Chief A.M. Mamabolo, for illegal assault.

In support of her application, she submitted an affidavit wherein it was alleged, "inter alia", that she had married the said Ruben Hafani according to Christian rites and in community of property in November, 1917; that her husband had repeatedly assaulted her and that she had therefore found it impossible to live with him and was residing with her mother; that she had reported this state of affairs to the Police who had referred her to the Respondent; that the Respondent had then had her handcuffed and thrashed; and that it was impossible for her to secure the assistance of her husband in instituting an action for damages against the Respondent as she was not on friendly terms with her husband who had in point of fact been instrumental in getting the Respondent to thrash her.

The application came before the Court on the 9th March, 1934, and it was ordered that a copy of the petition be served upon the Applicant's husband and that he should show cause on the 16th idem why the peititon should not be granted as prayed.

On the return day the husband appeared and stated that he had no intention of assisting his wife in her contemplated action against the Chief and that he was unable to show cause why his wife's petition should not be granted.

The Court thereupon made the following order:-

"The Petition as prayed is granted."

The Appellant thereupon, as Plaintiff, issued summons in her own name and unassisted against the Respondent, as Defendant, claiming from him the sum of £100 damages by reason of her having been publicly flogged and deprived of the custody of her children on the order of the Defendant.

At.....

At the hearing the following preliminary objection was filed by Mr. Attorney Blabbert on behalf of the Defendant:-

"DEFENDANT'S OBJECTION.

"Defendant objects to Plaintiff's summons on the ground "that Plaintiff is a native woman and as she is not assisted by "a male relative she has no legal standing in court."

After hearing argument and reserving judgment on the preliminary objection, the Native Commissioner on the 20th April, 1934, gave the following ruling:-

"The Court upholds exception and dismisses the summons."

Against this ruling an appeal was noted on the 24th idem.

The Native Commissioner's reasons for judgment are as follows:-

"Defendant's Attorney took exception to the summons "on the grounds that as the Plaintiff was a native woman and "as she was not assisted by a male relative she had no legal "standing in Court.

"As Plaintiff was not assisted by her guardian or "male relative and as the Court considered that the previous "Court had no jurisdiction to grant her locus standi to appear "on her own behalf, the exception was upheld on account of "Plaintiff having no locus standi in judicio and summons "dismissed."

The whole question at issue then is whether it is competent for a Native Commissioner's Court to grant Venia agendi" to a Native woman married in community to bring an action, for the institution of which she is unable to obtain the assistance of her husband.

That the Supreme Court can and does recognise that under such circumstances a woman married in community of property is under the common law entitled to relief from the operation of the ordinary rule that she has no locus standi in judicio and can only sue through her husband, admits of no doubt, and the Court comes to the assistance of such woman - particularly in a case of injury - either by appointing a "curator ad litem" or by granting to the woman herself "venia agendi"; vide McCullough vs. Ross (1918 C.P.D. 389), in which Buchanan, J. discussed at length the common law upon the subject and laid down that, though no specific provision to that end was made in the Magistrates Courts Act No. 32 of 1917, a magistrate under the common law can, if the circumstances justify it, grant a married woman, whose husband is absent, leave to sue in her own name.

In McGregor vs. South African Breweries, Limited (1919 W.L.D. 22), where a wife wished to bring an action for damages for personal injury and her husband was absent and could not readily be communicated with and it was alleged that there was a danger of losing evidence then available, the Court granted leave to her to sue without her husband's assistance.

In.....

In "ex parte Meyer (1920 E.D.L. 300)", the Applicant applied for leave without the assistance of her husband to sue her brother-in-law for damages for defamation and assault, her husband having declined to assist her as he considered the publication of a family quarrel unwise. The Court, though appreciating the force of the husband's contention, nevertheless granted the application.

It remains to be considered, therefore, whether in so far as Native women are concerned a Native Commissioner's Court has the same jurisdiction to grant "venia agendi" as the Supreme Court.

Section ten of the Native Administration Act, No. 38 of 1927, as amended by section five of Act No. 9 of 1929, provides for the establishment of Native Commissioners' Courts for the hearing of all civil causes and matters between Native and Native only, save and except matters in which:-

(a) the status of a person in respect of mental capacity is sought to be affected;

(b) is sought a decree of perpetual silence;

(c) namptissement is sought;

(d) the validity or interpretation of a will or other testamentary document is in question; or

(e) a decree of nullity, divorce or separation in respect of a marriage is sought.

Subsection (2) of section ten of the Act provides that every such Court shall be a court of law, which can only mean that these courts must administer the ordinary law of the land, while section eleven gives them discretion, subject to certain safe-guards, in all suits or proceedings between Natives involving questions of customs followed by Natives, to decide such questions according to the Native law applying to such customs except in so far as it may have been repealed or modified.

Native Commissioners' Courts are therefore tribunals, with unlimited jurisdiction as to cause of action (save for the five specially reserved topics mentioned above), administering the common and statutory law of the land as between Native and Native, with a discretionary right to apply Native law in proceedings involving questions of customs followed by Natives.

In other words, in so far as Natives are concerned, a Native Commissioner's Court has in respect of cause of action, save for the five specially reserved topics, the same jurisdiction as the Supreme Court.

It follows, therefore, that a Native Commissioner's Court has jurisdiction to grant "venia agendi" to a Native woman married in community of property to her husband, should the circumstances justify it. It was accordingly quite competent for the Native Commissioner's Court to make the order which it did on the 16th March and for the Appellant to sue the Respondent in her own name in pursuance of that order.

The Native Commissioner therefore erred in upholding the preliminary objection raised on behalf of the Respondent in

the Court below and his ruling thereon is altered to read as follows:- "The exception is overruled with costs."

The appeal is accordingly allowed with costs and the case is remitted to the Native Commissioner for trial on the merits.

CASE NO. 22. 1945 (T&N) 117.

WILSON RAMOTHATA VS. JESSE MAKHOTHE.

PRETORIA. 3rd September, 1934. Before Howard Rogers, Esq., Acting President, Messrs. R.W. Norden and F.H. Ferreira, Members of the Native Appeal Court (Transvaal and Natal Division).

Seduction - Common law or Native Custom - Maintenance.

An appeal from the Court of the Assistant Native Commissioner, Johannesburg.

SEDUCTION IS AN ACTIONABLE WRONG UNDER BOTH ROMAN DUTCH LAW AND NATIVE CUSTOM AND THE ASSISTANT NATIVE COMMISSIONER RIGHTLY EXERCISED HIS DISCRETION IN DECIDING THE ACTION ACCORDING TO THE COMMON LAW.

On the 2nd December, 1933, the Respondent Jesse Makhothe, in his capacity as father and natural guardian of Motselisi Makhothe, as Plaintiff issued summons against the Appellant, Wilson Ramothata, as Defendant, in the Court of the Assistant Native Commissioner, Johannesburg, in an action in which he claimed payment of the sum of £200 damages in respect of the seduction by the Defendant of the said Motselisi Makhothe.

The case was set down for hearing on the 20th December, and on the 19th idem Defendant's Attorney put forward a request for further particulars, viz. as to the date and place of the alleged seduction and as to how the sum of £200 claimed was made up.

When the parties appeared before the Court on the 20th idem, Plaintiff's Attorney notified the Court that the request for further particulars had only been served upon him that morning and he furnished the following information in open Court before the commencement of the hearing:-

"Date of seduction is December, 1931. At Defendant's "house in Alexandra Township. The parties lived together "as man and wife until October, 1933. In April 1933 a child "was conceived. The child is not yet born. The damages "claimed are made up as £50 for the seduction and £150 as an "estimate of the lying-in expenses and maintenance of the child."

The Court thereupon directed that Defendant's plea be filed within three days and that the case be set down for hearing on the 2nd February, 1934.

On the 21st December, 1933, the following plea was filed on behalf of the Defendant:-

1. .....

1. Defendant never seduced Plaintiff's daughter, as alleged, or at all.

2. Plaintiff's mother agreed with Defendant that Plaintiff's said daughter should cohabit with him and such cohabitation took place, although the said mother knew that Defendant was married and cohabiting with his legal wife.

3. Defendant admits paternity of the child in question and says that the customary damages are two beasts and one goat, the value of which he has already tendered to Plaintiff, but which tender Plaintiff has refused.

4. Defendant consents to judgment for two beasts and a goat or their equivalent and again tenders payment of same.

On the 28th idem Plaintiff's Attorney called for the following further particulars in respect of Defendant's plea:-

1. Ad paragraph (2), defendant is required to state when, where and under what circumstances the alleged agreement took place.

2. Ad paragraph (3), defendant is required to state according to what custom such damages are reckoned; whether or not defendant is detribalised; when, where and under what circumstances the alleged tender was made.

3. Ad paragraph (4), defendant is required to state the cash equivalent which is tendered by defendant.

The following further particulars were furnished in reply:-

1. At the house of the mother, Alexandra Township, some short while prior to the daughter going to live with Defendant. Defendant explained to the mother that he proposed to take her daughter as a second wife and this was done with the consent of mother, daughter and Defendant's own wife.

2. According to custom of defendant's own people. Defendant is not detribalised. Said offer was made personally and by correspondence.

3. Cash equivalent £11.0.0."

The hearing of the case was proceeded with and ultimately on the 16th April, 1934, the following judgment was entered by the presiding judicial officer.-

"Judgment for Plaintiff for £20 for seduction; and for "10/- per mensem towards maintenance of child until child "reaches age of sixteen years; with costs.

"It is ordered that the maintenance of 10/- be paid "in the first week of each month to the Clerk of the Court. "In addition 5/- each month until arrears of maintenance from "January, 1934, have been paid. First payment first week in "May, 1934."

On.....

On the 4th May, 1934, an appeal was noted against this judgment on behalf of the Defendant and on the 11th idem a cross-appeal was noted on behalf of the Plaintiff.

The grounds of appeal as specified in the notice are as follows.-

"1. The Commissioner should have decided the case under Native Custom Law instead of under the Common Law.

"2. The Commissioner should have accepted the tender made as adequate.

"3. The question of maintenance of the child was not specifically raised on the pleadings and should not have formed part of the Commissioner's award.

"4. The judgment is against the evidence and the weight of evidence."

The cross-appeal is in respect of the award to the Plaintiff of 10/- per month in respect of the maintenance of the child and it is brought on the ground that in view of the evidence led on behalf of the Plaintiff regarding the probable cost of the maintenance of the child, the award was inadequate.

As regards the first ground of appeal, the law on the subject is clear, viz. that while Natives in the Transvaal Province are like Europeans subject to the Roman Dutch system of law as modified by statute, Courts of Native Commissioner are by sub-section (1) of section eleven of the Native Administration Act No. 38 of 1927, given discretion subject to certain safe-guards "in all suits or proceedings between Natives involving questions of customs followed by Natives to decide such questions according to the Native law applying to such customs except in so far as it shall have been repealed or modified."

Seduction is an actionable wrong under both Roman Dutch law and Native custom and the question for decision then is whether the Assistant Native Commissioner rightly exercised his discretion in deciding the action, which was obviously brought under the common law and not according to Native law and custom.

This Court has no hesitation in answering this question in the affirmative. The parties in this case are obviously Natives of a superior type. The Plaintiff is a Native farmer on a considerable scale in the Rustenburg district. In addition he owns considerable property in the Alexandra township near Johannesburg. He and his wife were married not under Native law and custom but according to civil rites. He himself was educated at Lovedale and he is a preacher and elder of the Presbyterian Church. He has displayed the greatest care to ensure that his children will receive a good education according to European ideas and not only sent his daughter Motselisi to Lovedale but after she had completed her studies there sent her to Johannesburg for the express purpose of learning music. Above everything else, the letter which the Plaintiff addressed to the Defendant on the 24th October, 1933, in regard to the seduction of Motselisi, clearly indicates that he is an enlightened Native who has become detribalised and has adopted European sentiments and ideas.

The Defendant himself is a tailor by profession and apparently carries on business on a fairly large scale in the Alexandra township. He is a married man, his marriage was contracted according to Christian rites and he is a member of the Lutheran Church.

The considerations adduced above are even stronger than those which influenced this Court in Langman vs. Petrus Mohane (1930 2 N.A.C. (N. & T.) 101) to lay down that the common law should apply and the first ground of appeal must accordingly fail.

As regards the second ground of appeal, the tender made by the Defendant was based on the scale of damages under Native law and custom and from what has already been said concerning the mode of life and social status of the parties, it cannot in any sense be regarded as adequate.

The third ground of appeal is adequately disposed of by the Assistant Native Commissioner in his reasons for judgment. Full particulars as to how the amount of £200 claimed in the summons was made up were furnished to the Defendant before issue was joined. Moreover, the same precision of pleadings is not required under the rules for Native Commissioners' Courts as is demanded under the Magistrates' Courts Act and rules, and the exigencies of the position are adequately met so long as the parties know exactly what case they have to meet, which the Defendant undoubtedly did in the present instance.

The further ground of appeal is couched in general terms, viz. that the judgment is against the evidence and the weight of evidence. This contention must obviously fail having regard to the Defendant's admissions that he had intercourse with Motselisi, that he was the father of her child, that he was unable to dispute her statements that she was a virgin when he commenced having connection with her and that his tender of two cattle and a goat covered maintenance of the child.

The Defendant's appeal is accordingly dismissed with costs.

Turning now to the Plaintiff's cross-appeal, it is clear from the Native Commissioner's reasons for judgment that his considered estimate, based on experience over a considerable period of time, of the cost of maintaining a Native child in Johannesburg is £1 per mensem. Such being the case, he should have awarded the full assessment of £1 per month to the Plaintiff on the maintenance claim and not have halved it, as a seducer under the common law is liable for the maintenance on a reasonable scale of any child born of the seduction.

The cross-appeal is accordingly allowed with costs and the judgment and order of the Court below are amended by the substitution of the sum of £1 for the sum of 10/- specified therein.

CASE NO. 23.

BEN NQOLA, ISAAC NBOLA, GEORGE SONI AND JOSIAH M. HLONGWANE VS. SIMON XABA.

PRETORIA. 3rd September, 1934. Before Howard Rogers, Esq.,

Acting.....

Acting President, Messrs. R.W. Norden and F.H. Ferreira, Members of the Native Appeal Court (Transvaal and Natal Division).

Joint and several liability - Mutuum - Vinculum Juris.

An appeal from the Court of the Assistant Native Commissioner, Johannesburg.

WHEN A CONTRACT IS ONE OF "MUTUUM" AND THE BORROWERS HAVE NOT EXPRESSLY BOUND THEMSELVES "IN SOLIDUM", THEY ARE NOT LIABLE JOINTLY AND SEVERALLY.

The Respondent, as Plaintiff, instituted an action against the Appellants, as Defendants, in the Court of the Native Commissioner, Johannesburg, claiming from them the sum of £16, which it was alleged in the summons he had lent to them in February, 1933.

The case was tried by the Acting Assistant Native Commissioner who entered the following judgment in the matter:-

"Judgment for Plaintiff against the four Defendants, jointly and severally, for £16, and costs."

Against this judgment an appeal was lodged by the Appellants on the grounds that there was no "vinculum juris" between Plaintiff and Defendants entitling Plaintiff to judgment and that the judgment was against the evidence and the weight of evidence.

Before the matter came before this Court, one of the Appellants, Ben Ngola, withdrew his appeal.

At the hearing of the appeal, the Appellants were represented by Mr. Franks and the Respondent by Mr. Alexander.

Mr. Franks then applied for permission to withdraw the appeal in so far as the remaining three Appellants were concerned, stating that he had been insufficiently instructed in the matter.

The Court in granting the application dismissed the appeal with costs against the three Appellants, Isaac Mbola, George Soni and Josiah M. Hlongwane.

The Court then invited Mr. Alexander's attention to the fact that the Court below had granted judgment for the full amount against the Defendants jointly and severally despite the facts that the contract was one of "mutuum" and that there was nothing on the record to indicate that when the loan was made the joint borrowers had expressly bound themselves "in solidum". Mr. Alexander for the Respondent thereupon formally abandoned the judgment in so far as it purported to make the Defendants jointly and severally liable.

The Native Commissioner's judgment is accordingly altered by the deletion therefrom of the words "and severally".

CASE.....

CASE NO. 24.

ELIAS NKOSI VS. JAMES NKOSI.

PRETORIA. 4th September, 1934. Before Howard Rogers, Esq., Acting President, Messrs. R.T. Norden and F.H. Ferreira, Members of the Native Appeal Court (Transvaal and Natal Division).

Evidence - Facts - Probabilities.

An appeal from the Court of the Assistant Native Commissioner, Johannesburg.

A COURT IS QUITE ENTITLED TO DRAW INFERENCES FAVOURABLE TO ONE PARTY TO A SUIT FROM THE EVIDENCE OF THE OPPOSING PARTY.

This is an appeal from a judgment of the Assistant Native Commissioner, Johannesburg, in favour of the Respondent in an action in which the Respondent, as Plaintiff, sued the Appellant, as Defendant, for the return of a certain cow and calf or alternatively, payment of their value the sum of £12.

The ground of appeal as set out in the notice of appeal is as follows:-

"That the said judgment was against the weight of evidence inasmuch as it was based on probabilities and therefore bad in law."

At the hearing, the Appellant was represented by Mr. de Villiers and the Respondent by Mr. Advocate Gould.

Mr. de Villiers admitted in argument that there was a misuse of terms in the notice of appeal and that the real ground of appeal was that the judgment was against the evidence and against the weight of evidence. Mr. Gould intimated that he had no objection to the appeal proceeding on this basis and this was allowed by the Court.

There were no witnesses in the case apart from the parties themselves and the issue resolved itself entirely into a matter of credibility in that the Plaintiff on the one hand alleged that the Defendant had in his possession a cow and a calf belonging to him (the Plaintiff) whereas the Defendant denied "in toto" that such was the case.

Mr. de Villiers, for the Appellant, strongly urged that the Assistant Native Commissioner paid insufficient regard to the fact that the onus of proof was upon the Plaintiff; that there was other evidence available which the Plaintiff could and should have brought before the Court but which he deliberately withheld; that there was an entire absence of corroboration of the Plaintiff's story; that the Court below in effect dealt with the matter as if the onus of proof rested on the Defendant who was in the difficult position of having to establish a negative, and that it appeared from his reasons for judgment that the Assistant Native Commissioner in accepting the Plaintiff's version was largely influenced by minor discrepancies in Defendant's evidence in regard to incidents which were not relevant to the actual issue.

Now.....

Now the position undoubtedly is that both the Plaintiff and the Defendant in the case could have brought further evidence before the Court but neither chose, nor could the Court compel them, to do so. The Court had to decide the issue on the evidence brought before it and, under the rules for Native Commissioners' Courts, could have entered an absolution judgment only if satisfied that the evidence did not justify it in giving judgment for either party.

Though it appears from the record that the Plaintiff should have had other evidence available, he elected to rely upon his uncorroborated testimony and in doing so undoubtedly took the risk of losing his case or of having an absolution judgment entered.

The same applies to the Defendant. If his version were true, there should have been no lack of evidence available to corroborate him, e.g. on the question of whether the cattle claimed by the Plaintiff were ever at Defendant's kraal, whether they were left at the kraal after the death of the father of the parties, etc.

Neither side, however, troubled to bring corroborative evidence before the Court and the presiding judicial officer accordingly had to make up his mind which of the parties was telling the truth. As clearly emerges from his reasons for judgment, after going very carefully into the evidence, he came to the conclusion that the Plaintiff's (Respondent's) testimony must be accepted in preference to that of the Defendant (Appellant) not only because his demeanour in the witness box, in contrast to that of the Defendant, was frank and his evidence given in an unhesitating manner but because the various incidents in his story appeared to bear the stamp of probability and truth.

A Court is quite entitled to draw inferences favourable to one party to a suit from the evidence of the opposing party as was distinctly stated by the Supreme Court in the case "Siko vs. Zonsa" (1908 T.S.C. 1013).

A Court of appeal will never lightly set aside a decision of an inferior court on a question of fact as was clearly laid down in the following dictum of the late Chief Justice de Villiers in "Van Reenen vs. Manuel (9 J.,249):-

"I am not prepared to lay down as a general principle that under no circumstances should the Court reverse the decision of a magistrate upon a pure question of fact. The preponderance of evidence may be so great and there may be such cogent circumstances showing that the credibility was all on one side, as to justify the Court in reversing the magistrate's judgment upon a direct issue of fact, but this should not be done if the Court of Appeal entertains any doubt on the matter."

A perusal of the record in the present case discloses several discrepancies and contradictions in the Defendant's evidence not merely on matters of minor importance. Moreover, it is quite clear from his reasons for judgment that, apart from these discrepancies and contradictions, the Assistant Native Commissioner was not satisfied with the manner in which he gave his evidence and his demeanour in the witness box and definitely came to the conclusion that he was not a truthful witness.

After.....

After carefully considering the evidence on record and according full weight to Mr. de Villiers' able argument, this Court is not prepared to say that the Assistant Native Commissioner was wrong in his conclusion.

The appeal must accordingly fail and is dismissed with costs.

CASE NO. 25.

MALUSE CHOKOE VS. MONERI ASSISTED BY HIS MOTHER AND GUARDIAN, MOKWENA MASHITISHO.

PRETORIA. 4th September, 1934. Before Howard Rogers, Esq., Acting President, Messrs. R.W. Norden and F.H. Ferreira, Members of the Native Appeal Court (Transvaal and Natal Division).

Interpleader - Execution - Burden of proof of ownership.

An appeal from the Court of the Additional Native Commissioner, Zoutpansberg.

THE FACT THAT PROPERTY FORMING THE SUBJECT OF AN INTERPLEADER CLAIM WAS IN THE POSSESSION OF NEITHER THE JUDGMENT DEBTOR NOR THE CLAIMANT BUT OF A THIRD PARTY AT THE TIME OF ATTACHMENT DOES NOT HAVE THE EFFECT OF SHIFTING THE ONUS OF PROOF FROM THE CLAIMANT TO THE JUDGMENT CREDITOR.

This is an appeal from the judgment of the Court of the Native Commissioner, Zoutpansberg, in an interpleader action instituted by the Respondent as claimant against the Appellant claiming certain sixteen head of cattle which had been attached by the Messenger of the Court under a writ of execution sued out by the Appellant against one Petrus Phukubye.

The essential facts of the case are briefly as follows.-

The Appellant, as Plaintiff, obtained a judgment on the 13th April last against Petrus Phukubye for certain sixty-three head of cattle which he had "sisaed" or "fishaed" with Petrus' late father, Samuel Phukubye.

He sued out a warrant of execution in pursuance of the judgment and under and by virtue of this writ the Messenger of the Court on the 23rd idem attached sixteen head of cattle on the farm of a certain Mr. Jim Wilkin in the Pietersburg district. At the time of attachment Mr. Wilkin was absent from the farm and the cattle which were out grazing in the veld were brought into the kraal. A piccanin and a bigger boy were in charge of the stock and the Messenger then asked the piccanin to point out the cattle belonging to the judgment debtor but he refused to do so. The judgment creditor then pointed out to the Messenger sixteen head, as being his property under the judgment and these were then and there duly attached by the Messenger. Incidentally it may be remarked that these particular cattle bore what was admitted to be the Kibi location brand and that the judgment debtor, Peturs Phukubye, resides in that location.

On.....

On the 14th June last on interpleader summons was issued by the Respondent, as claimant, in which ownership of the attached cattle was claimed on behalf of Moneri and an order was sought declaring them not to be liable to execution.

When the matter came on for hearing on the 26th July, there was a preliminary argument upon the question of "onus" it being contended on behalf of the claimant that as the cattle were attached while in possession of a third party the onus lay on the judgment creditor. After hearing argument and taking the Messenger's evidence as to the attachment the Court held that the onus was on the judgment creditor " as he is really in the position of a person vindicating his ownership." Incidentally it may be remarked that up to the time that the Additional Native Commissioner gave his ruling, there was no evidence on record as to the identity of the two boys in whose possession the cattle were when attached and neither party endeavoured to show that these boys were his agents.

After the Court had given its ruling on the question of the onus, the hearing of the evidence of the judgment creditor and his witnesses was proceeded with, and on the judgment creditor closing his case (subject to the right to call rebutting evidence in the event of new matter being brought up) the claimant's attorney asked for judgment in his favour on the ground that the judgment creditor had not discharged the onus resting upon him.

The Additional Native Commissioner then entered the following judgment in the matter.-

"As the judgment creditor has failed to discharge the onus placed upon him, the cattle in question are declared not executable. I wish to make it clear, however, that this judgment does not purport to decide the question of the ownership of the cattle and the judgment creditor still has the right to bring a vindicatory action. The judgment merely indicates that he has not proved ownership and that the cattle in question must be returned to the person in whose possession they were attached. Judgment creditor to pay costs."

A notice of appeal against this judgment was lodged in the following terms:-

"The judgment creditor appeals against the whole of the judgment of the Additional Native Commissioner on the grounds that the same is bad in law, against the evidence and against the weight of evidence.

"The Additional Native Commissioner erred in ruling that the burden of proof lay on the judgment creditor, but if such ruling was correct, the Additional Native Commissioner erred in holding that the judgment creditor had not prima facie discharged such burden of proof.

"Further the Additional Native Commissioner was wrongly and adversely influenced in his judgment at the conclusion of the hearing by the cross-examination of the judgment creditor on statements he was alleged to have made in the previous proceedings between himself versus Petrus Phukubye, which statements the judgment creditor denied having made."

At the hearing of the appeal, the Appellant was

represented...

represented by Mr. Advocate Dowling and the Respondent by Mr. Meteleerkamp.

Mr. Dowling's contentions, stated very briefly, were:-

(a) that the Court below erred in ruling that the onus of proof rested upon the judgment creditor;

(b) that assuming that the ruling as to the onus was correct, the Court erred in entering a judgment in favour of the claimant at the closing of the judgment creditor's case, in that he had put forward at the least sufficient prima facie evidence to establish a case for the claimant to meet; that that was all that was required of him, whereas the Native Commissioner had dealt with the matter as if it were necessary for him not merely to establish a "prima facie" case but adduce full and absolute proof of ownership; and that there was sufficient evidence on the record upon which a reasonable man might at the closing of Plaintiff's case have entered judgment in his favour and that accordingly the Court erred in giving judgment against him without calling upon the claimant to lead his evidence;

(c) that, according to his reasons for judgment, the Additional Native Commissioner if not influenced by the cross-examination as alleged in the grounds of appeal, wrongfully and irregularly imported his knowledge of the previous proceedings in arriving at the conclusion "that the bare word of the judgment creditor was not sufficient proof of ownership."

Mr. Meteleerkamp in his reply urged (a) that the Additional Native Commissioner's ruling on the question of onus was correct; (b) that under the circumstances the onus was upon the claimant not to establish that the property attached did not belong to the claimant but to prove to the satisfaction of the Court that the sixteen head attached were actually sixteen of the specific cattle awarded to him under the original judgment; and (c) that under the circumstances even if the Additional Native Commissioner had had no knowledge of the previous proceedings, his judgment should have been no different.

The first consideration is whether the Court below was correct in its ruling that in this case the "onus" was upon the judgment creditor.

Now it has been laid down in a large number of Supreme Court decisions, e.g. Beattie vs. Fennell (5 S.C.37); Bain vs. Botha (14 C.T.R. p.364); Vosloo vs. Lyburgh (14 C.T.R. 1001); Grassie & Shrew vs. Lewis (1910 T.P.D. 533); Botha vs. Verity (1913 S.C. 515), that it lies upon the claimant in an interpleader suit to prove his title to the goods. And this indeed would seem to be in accordance with the ordinary rule of law that he who asserts must prove and that the burden of proof in the first instance rests upon the party who would fail in the action if no evidence were given on either side.

In certain cases, however, there is a departure from the ordinary rule, viz. when there is a definite presumption of law in favour of the claimant, e.g. the presumption of ownership

flowing....

flowing from possession. If the claimant himself is in possession of the goods claimed by him, the law presumes him to be the owner thereof unless and until the contrary is proved and in such a case the onus of proof is definitely shifted from the claimant to the judgment creditor: vide Gobo vs. Davies (1915 E.D.L. 136). It is important to point out, however, that when the onus is so shifted, it does not throw upon the judgment creditor the burden of proving that the property attached was in point of fact the property of the judgment debtor. He need merely prove that ownership does not vest in the claimant. This was clearly laid down by Tindall, J. in Mulumbe vs. Jussob (1927 T.P.D. 1006) in the following terms.-

"It appears from the case of Grassis and Shrew vs. Lewis (1910 T.P.D. 533) that a Claimant must prove title himself. There Bristowe, J. in giving judgment, after referring to the case of Beattie vs. Fennell (5 S.C. 37) said:

> 'It is no doubt true that a Claimant in interpleader must prove title himself and that he cannot merely rely on the respondent's want of title, still the title required to be proved is not necessarily the dominium for in Jennings vs. Mather (I.K.B. 1) a lien was held to be sufficient.'

"It is true that the claimant's possession raises a presumption of ownership in the claimant but if the execution creditor then succeeds in proving that the ownership as a matter of fact is not in the claimant and that she has no title, it seems to me that that is sufficient. It does not seem to be necessary for the execution creditor to go further than that; all he is called upon to do is to destroy the proof of ownership in the claimant."

It is a necessary inference from this judgment then that the presumption as to possession inures only in favour of a claimant who is actually in possession of the goods attached as all that the judgment creditor can in any case be called upon to do is to prove that the claimant is not the owner and the fact that a third party is in possession of the goods would raise the presumption that such third party is the owner thereof, a presumption which would operate against the claimant and upon which the judgment creditor would be entitled to rely.

The fact therefore that the property forming the subject of an interpleader claim was, as in the present case, in the possession of neither the judgment debtor nor the claimant but of a third party at the time of attachment does not therefore have the effect of shifting the onus of proof from the claimant to the judgment creditor.

The Additional Native Commissioner accordingly erred in his ruling that in this case the "onus" of proof rested upon the judgment creditor and not upon the claimant and this ruling must be reversed. It thus becomes unnecessary to consider the further ground of appeal.

The appeal is allowed with costs; the ruling of the Court below on the question of onus of proof is reversed; its judgment is set aside and the case is remitted to the Additional Native Commissioner to hear the evidence of the claimant and his witnesses, to afford the judgment creditor an opportunity of adducing any rebutting evidence; and to decide the issue in the light

of the evidence as a whole and with due regard to the ruling of this Court on the question of onus of proof.

CASE NO. 26.

MNYAMENI MSWELI VS. MLONDOLOZI MSWELI.

PIETERMARITZBURG. 9th October 1934. Before Howard Rogers, Esq., Acting President, Messrs. G.P. Wallace and W.G. Stafford, Members of the Native Appeal Court (Transvaal and Natal Division).

Claim against deceased estate - Proof.

An appeal from the Court of the Native Commissioner, Camperdown.

WHERE A CLAIM IS IN THE NATURE OF ONE AGAINST A DECEASED ESTATE, IT MUST BE VERY STRICTLY PROVED, AND THE PROOF MUST BE TO THE ENTIRE SATISFACTION OF THE TRIAL COURT.

The Appellant, as Plaintiff, instituted action against the Respondent, as Defendant, in the Court of the Native Commissioner, Camperdown, claiming six head of cattle or their value £30.

The Plaintiff alleged in his summons that his late father Ntshingwayo, to whom he claimed to be the heir, had advanced six head of cattle for lobolo purposes to the late Makubalo, to whom the Defendant is the heir, and Plaintiff accordingly demanded from Defendant payment of an equivalent number of cattle or their value.

The Defendant denied liability and contended that the six head of cattle in question formed portion of the lobolo of a woman Ntombile, to which lobolo the late Makubalo was entitled in that he was the heir to his deceased father Nkomiyapi and Ntombile was the daughter of an ukungena union entered into between Makubalo's mother, Nkomiyapi's wife, Potshozi, and the late Ntshingwayo for the express purpose of raising seed for the benefit of the house of the late Nkomiyapi.

The Native Commissioner gave judgment for the Defendant with costs and this judgment has been brought on appeal to this Court as being against the weight of evidence and contrary to law.

It should be remarked "in limine" that Plaintiff's claim in this action was essentially in the nature of a claim against a deceased estate and was supported only by oral evidence. It was accordingly necessary, as was laid down in "Savory vs. Gibbs ((1910) 20 C.T.R. 600), for him to prove it very strictly and to the entire satisfaction of the Court.

It was common cause that the late Makubalo did in fact utilise six head of cattle from the lobolo of the woman Ntombile in connection with his marriage to his second wife and the essential question upon which this action hinges is whether he or Ntshingwayo was entitled to the lobolo of Ntombile. The

answer.....

answer to this question in turn depends upon whether the late Makubalo's father, Mkomiyapi, had actually married Potshozi according to Native custom and Ntshingwayo had merely ngenaed her, as alleged by the Defendant, or whether the relationship between Potshozi and Mkomiyapi was illicit and was followed by a due and proper customary union between the former and Ntshingwayo, as alleged by the Plaintiff.

The issue thus resolves itself entirely into a question of fact and the Court below, after considering the conflict of evidence between the Plaintiff's witnesses on the one hand and those of the Defendant on the other, found:-

(1) That Mkomiyapi and Potshozi were properly married according to Native custom; and

(2) That the union between Potshozi and Ntshingwayo was one of ukungena.

A court of appeal will never lightly set aside a decision of an inferior court on a question of fact. This was clearly laid down in the following dictum of the late Chief Justice de Villiers in "Van Reenen vs. Manuel (9 J. 249):-

"I am not prepared to lay down as a general principle that under no circumstances should the court reverse the decision of a magistrate upon a pure question of fact. The preponderance of evidence may be so great and there may be such urgent circumstances showing that the credibility was on one side, as to justify the court in reversing the magistrate's judgment upon a direct issue of fact, but this should not be done if the court of appeal entertains any doubt on the matter."

In the present case the Native Commissioner has clearly set out in his reasons for judgment the considerations which influenced him in arriving at his finding as to the facts and, after carefully considering those reasons and the record, this Court is of the opinion that his conclusions are in accordance with the probabilities of the case.

Moreover, there is an important and undisputed fact not touched upon by the Native Commissioner in his reasons for judgment, which strongly points in the same direction, viz. that whereas the late Ntshingwayo, Potshozi, the late Makubalo, the Plaintiff and the Defendant were formerly all living in the same kraal (referred to by the Plaintiff as Makubalo's kraal) on the farm Doornhoek, about eight years ago the Plaintiff left this kraal to live in a location and was subsequently followed by Ntshingwayo. The Plaintiff himself says in this connection, "I remember when I decided to separate from Makubalo's kraal and father decided to come with me."

Now it is extremely improbable if Ntshingwayo and not Makubalo was the kraal head, as alleged by the Plaintiff, that upon a separation becoming necessary the kraal head, Ntshingwayo, would have moved with his son and not the kraal inmate, Makubalo.

This removal of Ntshingwayo and the Plaintiff strongly indicates that in point of fact the actual head of the kraal was Makubalo, the one who remained in occupation and possession thereof.

The Native Commissioner's judgment is accordingly upheld and the appeal is dismissed with costs.

CASE .....

CASE NO. 27

SEKET AYO HLOPE VS. DILIKA MEYIWA.

DURBAN. 13th October, 1934. Before Howard Rogers, Esq., Acting President, Messrs. G.P. Wallace and W.G. Stafford, Members of the Native Appeal Court (Transvaal and Natal Division).

Eviction - Damages - Costs of legal proceedings.

An appeal from the Court of the Native Commissioner, Camperdown.

A TENANT WHO IS EVICTED BY REASON OF HIS LANDLORD'S WANT OF TITLE AT THE DATE OF THE INCEPTION OF THE LEASE MAY INCLUDE IN HIS CLAIM FOR DAMAGES AGAINST HIS LANDLORD THE LAW COSTS INCURRED BY HIM IN THE EVICTION PROCEEDINGS AGAINST HIM.

This is an appeal from the judgment of the Native Commissioner, Camperdown, in a case in which the Respondent, as Plaintiff, sued the Appellant, as Defendant, for the sum of £50 as damages by reason of the Plaintiff having been ejected, with his family and belongings, from a certain piece of land which he alleged the Defendant, representing himself to be the owner thereof, had leased to him.

The Defendant pleaded that he was not liable to the Plaintiff in damages and the Native Commissioner after hearing the evidence gave judgment on the 7th June, 1934, for the Plaintiff for £25 and costs.

Against this judgment an appeal was noted on the 10th July, 1934, on the ground that it was against the weight of evidence and law in the case.

When the matter came before this Court Mr. Shepstone on behalf of the Appellant made application, in terms of section six of the rules, for condonation of the late noting of the appeal. This application was not opposed by the Respondent and was granted by the Court having regard to the somewhat unusual circumstances set forth in Mr. Shepstone's affidavit.

The Court then proceeded to hear the appeal.

The essential issue in this case is one of fact, viz. whether the Defendant did or did not lease to the Plaintiff the land from which the latter was subsequently ejected by the owner, Mr. A.F. Frara.

The Native Commissioner's findings as to the facts are recorded as follows:-

"1. Defendant did represent to Plaintiff that he was the owner of a piece of land at Umlaas in the Camperdown District and as such holding the right to let the land.

"2. Defendant did enter into an agreement to let the land to Plaintiff at an annual rental of £4 per annum per hut.

"3. In consideration of such an agreement entered into Plaintiff purchased the buildings of the tenant Aaron Majola who was about to leave together with certain fruit trees and a cattle kraal.

"4. Plaintiff in terms of the agreement moved into the buildings vacated by Aaron Majola together with his family and belongings and openly occupied the land.

"5. Without notice to Plaintiff of any defect in his right to let the land defendant abandoned his efforts to buy the land from one A. Frara, and allowed the said A. Frara to institute ejectment proceedings against the Plaintiff and to obtain judgment for ejectment and arrears of rent.

"6. That in consequence of Frara's action Plaintiff's donkeys were attached and sold and Plaintiff's family rendered homeless.

"7. That in handing the property back to A. Frara defendant suppressed the fact that Plaintiff was living on the property."

The considerations which actuated the Native Commissioner in arriving at these conclusions are fully set forth in his reasons for judgment and this Court after carefully considering the evidence on record sees no reason to differ from his findings.

Mr. Shepstone in his argument on behalf of the Defendant took the point that the amount of damages awarded to the Plaintiff was excessive in that the Native Commissioner included in his award the costs of the eviction proceedings instituted by Frara against the Defendant. He contended that these costs were too remote to be included in the damages awarded to the Respondent. In this contention he relied upon the following passage from Pothier (section 91):-

"A tenant has only detention, and not proper possession, of the property let; hence a third person who claims the property cannot proceed against the tenant, but only against the true possessor, i.e. the landlord, or the person receiving the rent, and if summons is issued against the tenant, he ought to be discharged on pointing out the person who receives the rent, and he need not defend the action. Hence the action on the guarantee does not lie against the landlord by the tenant, if the tenant is sued by a third person, for since the tenant cannot be sued, the landlord need not undertake the tenant's defence."

This Court is not prepared to accept Pothier's pronouncement quoted above as a full and correct statement of the Roman-Dutch law upon the point at issue, restricting as it purports to do an owner's right to vindicate his property against a third person who may be in unlawful occupation thereof. Under our law an owner is undoubtedly entitled to claim the possession of his land from anyone who cannot set up a better title to the same, to warn him off the property and to eject him (vide Wilson & Hall vs. Wessels, I Cape Times 107, and Donovan vs. Du Plooy, 2 S.A.R. 134).

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It is, moreover, definitely laid down by Voet that a tenant who is evicted by reason of his landlord's want of title at the date of the inception of the lease may include in his claim for damages against his landlord the law costs incurred by him in the eviction proceedings against him (Voet, 21.2.25).

Further, in the present case it appears from the record that the Respondent did not know of the ejectment proceedings against him until judgment had been given and an ejectment order granted. He thereupon immediately notified the Appellant. The Appellant moreover pleaded a denial of the lease and could not at this stage be heard to say that had he been notified of the proceedings he would have intervened on behalf of the Respondent.

The costs of the eviction proceedings against the Respondent were therefore in the opinion of this Court rightly included by the Native Commissioner in the amount of damages awarded to him against the Appellant.

The judgment of the Court below is accordingly upheld and the appeal is dismissed with costs.

CASE NO. 28.

ISAAC ZAMA VS. GWEBU GARDINER.

DURBAN. 15th October, 1934. Before Howard Rogers, Esq., Acting President, Messrs. G.P. Wallace and W.G. Stafford, Members of the Native Appeal Court (Transvaal and Natal Division).

Res judicata - Magistrate's Court action - Jurisdiction.

An appeal from the Court of the Native Commissioner, Umzinto.

A MAGISTRATE'S COURT HAS NO JURISDICTION IN ANY CASE BETWEEN NATIVES, WHETHER EXEMPTED OR NOT, IN AN AREA WHERE A NATIVE COMMISSIONER'S COURT HAS BEEN ESTABLISHED.

The Appellant, as Plaintiff, sued the Respondent as Defendant, in the Court of the Native Commissioner, Umzinto, for the sum of £100 as damages for defamation of character, his claim being set forth as follows in the summons:-

(1) £50 as damages for defamation sustained, in that on or about Saturday, 11th March, 1933, the Defendant falsely and maliciously stated to one Mabasa, a native, of Umzinto, Natal, in Mabasa's house in Umzinto, and in the presence of Mabasa's wife Nyanisile Mbasa Mabasa,: "Ngisho yena u Zama, angi funi umahlale lapa ngoba uya pinga nomukako", which was understood by the said Mabasa and Nyanisile Mabasa, and which means, "I mean Zama, I do not want him to stay at your place because he is committing adultery with your wife", by which statement Defendant referred and was understood to refer to the Plaintiff, Isaac Zama who had resided in the house of the said Mabasa for some time, and was the only person of the name of

Zama.....

Zama who had resided there at that time.

(2) £50 as damages for defamation sustained, in that on or about Sunday, 12th March, 1933, the Defendant falsely and maliciously stated in the presence of Dabula Cele and Velasho Mpungose, Native Policeman, and Jomba Dhlomo, a native, all of Umzinto aforesaid, and of other persons unknown, at or near the said Dabula Cele's house at Umzinto: "U Mabasa u lola umkonto wake u kulumaza ngawo indodana ka Mpiteni ngoba ipinga nomka Mabasa", which was understood by the said persons, and which means "Mabasa is sharpening his assegai to injure the son of Mpateni, because he is committing adultery with Mabasa's wife", by which statement Defendant referred and was understood to refer to the Plaintiff, Isaac Zama, who is the son of Mpiteni.

At the hearing a preliminary objection was taken by the Defendant to the summons in the following terms:-

"Defendant objects to the summons herein on the ground of res judicata inasmuch as:-

"(a) On 24th March, 1933, Plaintiff issued a summons (No. 60/33) against the Defendant in the Magistrate's Court for the District of Umzinto for damages, in which case judgment was entered in favour of the defendant on the 9th January, 1934.

"(b) The subject matter was the same then as now contained in the present summons.

"(c) The prior action was founded on the same cause of action, evidence being led on both claims contained in the present summons."

After hearing argument, the Assistant Native Commissioner upheld the objection with costs.

This ruling has been brought on appeal to this Court on the following grounds:-

"1. The Case No. 60/1933 in the Court of the Magistrate for the District of Umzinto was outside the jurisdiction of the said Magistrate, and the present case is therefore not "res judicata".

"2. The subject matter of the said case No. 60 of 1933 differs from that of the present case in that the claim made in the former case did not include the second claim of the summons in the present case, which is therefore not "res judicata."

"3. In upholding the objection of "res judicata" the Assistant Native Commissioner committed gross irregularities in taking cognizance of matters foreign to the record of the present case, and attaching thereto, the record in the aforesaid case No. 60 of 1933 as stated in paragraph 7 of his "Reasons for Judgment."

It.....

It is not stated in the record of the proceedings but was admitted in argument that a Native Commissioner's Court had been established for the Umzinto District prior to 1933, under the provisions of section ten of the Native Administration Act No. 38 of 1927, by Proclamation No. 298 of 1928 dated the 14th November, 1928.

Sub-section (4) of section seventeen of the Native Administration Act provides that as from the date of the constitution in any area of a court of Native Commissioner a magistrate's court shall cease to have jurisdiction in that area in respect of any civil suit between Native and Native only.

The parties to the present action are Natives, the Defendant being a Native who has been exempted from the operation of Native Law.

The provisions of sub-section (4) of section seventeen of the Native Administration Act were considered in this Court in the case of Florence Mdhlalose vs. Benjamin Mabaso (1931 (2) P.-H. R.60) and it was then laid down that exempted as well as unexempted Natives fall within the provisions of the sub-section. The Assistant Native Commissioner states in his reasons for judgment that there is a conflict of decision upon this point between the Native Appeal Court and the Appellate Division of the Supreme Court and that he is bound by the decision of the Appellate Division. Now it was laid down by this Court in July last in the case of Philemon P.Z. Lutuli vs. Maria Nyokana that it, like all other subordinate courts, is bound by the decisions of the Appellate Division of the Supreme Court and the Assistant Native Commissioner would undoubtedly be correct in following the pronouncement of the Appellate Division were there any such decision as he refers to. But in point of fact there is no such decision and the Assistant Native Commissioner in stating that there was, apparently had in view the case of Kumalo vs. Ncwana (1930 A.D. 362). The whole matter at issue in that case was the interpretation of Natal Act No. 41 of 1908 and no other point was considered. The question of jurisdiction was never raised either in the Court below or on appeal and the provisions of sub-section (4) of section seventeen of Act No. 38 of 1927 were not referred to. Certainly the case in question cannot be cited as authority for saying that the Appellate Division of the Supreme Court has ruled that exempted Natives do not fall within the provisions of sub-section (4) of section seventeen.

The only authoritative decision on the point is that of this Court in the case of Florence Mdhlalose vs. Benjamin Mabaso previously referred to. This definitely laid down that a magistrate's court has no jurisdiction in any case between Natives, whether exempted or not, in an area where a Native Commissioner's Court has been established.

Such being the case, the matter being one where the jurisdiction of a Magistrate's Court had been expressly excluded by statute and not one in which jurisdiction could be conferred by consent, the magistrate when the original action was brought before him should, "suo motu" have refused jurisdiction (vide Krupal vs. Brooklands Dairies, Ltd., 1921 T.P.D. 541).

Instead of doing this, however, the Magistrate proceeded to try the case and entered judgment for defendant. This

judgment was accordingly null and void for lack of jurisdiction and therefore cannot be relied upon to establish an objection of "res judicata" in any subsequent proceedings between the same parties arising out of the same cause of action.

The Assistant Native Commissioner accordingly erred in upholding the objection of "res judicata" and it is unnecessary to consider the further ground of appeal.

Mr. Shepstone for the Respondent strongly urged that this Court, which has been established for the purpose of hearing appeals from Native Commissioners' Courts, has no jurisdiction to question or pronounce upon the judgment of a Magistrate's Court. While it is true that this Court has no jurisdiction to set aside the judgment of a Magistrate's Court, it certainly is within its functions and province to consider and pronounce upon such a judgment when advanced as an essential factor in the pleadings of a case in a Native Commissioner's Court, and that case is brought on appeal to this Court.

The appeal is accordingly allowed with costs and the case is remitted to the Native Commissioner for trial on the merits.

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